

NO. 295851

**COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON**

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
SAVINGS BANK; JUNCO FROST LAVINIA, INC.; UNIFUND CCR
PARTNERS; AND BANKERS TRUST OF CALIFORNIA;

Respondents.

**BRIEF OF THE RESPONDENTS MARCO T. BARBANTI,
ROYAL POTTAGE ENTERPRISES AND JUNCO FROST LAVINIA, INC.**

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RESPONSE TO ASSIGNMENT OF ERROR

RELATED ISSUES

1. Is the vendee under a real estate contract the fee owner of the property even if he does not have fee title to the real property?
2. Does RCW 4.84.330 mandate the award of attorney fees to the successful defendants, as prevailing parties, in an action based on a deed of trust which provides for attorney fees to the beneficiary who seeks to foreclose and extinguish the successful defendants' ownership in real property?

STATEMENT OF THE CASE

This case involves three parties who successfully defended their ownership rights to a valuable piece of commercial property located in Spokane Washington and a beneficiary on a deed of trust. CP 137-140. On April 16, 2009 Appellant Bank of New York (BNY) filed a lawsuit seeking several remedies. CP 4-10. First, BNY sought a money judgment against Brian and Lisa Hooper (Hooper or Hoopers) for default in payments under a promissory note. CP 5-6. Second, BNY sought to collect that money judgment from property by foreclosing and extinguishing the ownership interests of all defendants including Respondents Marco Barbanti

(Mr. Barbanti), Junco Frost Lavinia (Junco Frost), and Royal Pottage Enterprises (Royal Pottage) (collectively, Respondents). CP 6.

Respondents filed answers to the complaint to defend their ownership interest in the real property. CP 20-27, Royal Pottage also requested that the court quiet the title as to the Deed of Trust. CP 27.

One year and six months later, on October 29, 2010, the trial court granted the Respondents' motion to dismiss, and Royal Pottage's motion to reconvey the deed of trust. CP 137-140. The court found that the promissory note was stale and could not be used as a basis to foreclose and extinguish the Respondents' respective ownership in the subject property. CP 139.

Because of their successful efforts in defending the lawsuit, the court determined that Respondents Mr. Barbanti, Royal Pottage and Junco Frost were prevailing parties. CP 153, 156. The court awarded Respondents their reasonable attorney fees and court costs finding that the action against them was based on the deed of trust which the court determined was a contract which contained a unilateral attorney fee clause. CP 152-157.

SUMMARY OF THE ARGUMENT

The Appellant does not contest the ultimate result of the lawsuit, to wit, dismissal. BNY, however, raises two issues in this appeal. First, the Appellant contends that the trial court should not have concluded that Royal Pottage was the fee owner of the property. Contrary to this assertion, Royal Pottage is considered the fee owner for many purposes under the law, including standing to avoid liens on the property. Even if Royal Pottage is not a fee owner for all purposes, it is the owner of record and any perceivable error would be harmless as any correction would render the same result.

Second, the Appellant contends that the trial court should not have awarded attorney fees to the Respondents based on RCW 4.84.330. RCW 4.84.330 mandates the award of attorney fees to a prevailing party where the action is based on a contract which contains a unilateral attorney fee clause. In this case the contract which formed the basis for the action against the Respondents was the Deed of Trust. It is undisputed that the Deed of Trust provides attorney fees for a successful beneficiary. RCW 4.84.330 defines the prevailing party as “ the party in whose favor final judgment is rendered.” This definition is intentionally broad to prevent one party

to the litigation from having an unfair financial advantage over the other parties to the litigation based on a unilateral attorney fee clause.

In this matter, BNY made a failed attempt to foreclose and extinguish the Respondent's ownership interests in the subject property. RCW 4.84.330 mandates that the trial court award the Respondents their attorney fees when they prevailed in the action based on a deed of trust which provides for attorney fees to BNY. Appellant's arguments to the contrary fail because the decisional law cited in its brief does not address the issue of foreclosure of a deed of trust.

The assignment of error related to reconsideration is redundant and Respondents will not discuss this independently.

ARGUMENT

Appellant claims no error in fact and only assigns error to the conclusions of law. The matter was decided upon Respondents' Motion to Dismiss, and the trial court considered material outside the complaint. Therefore this Court should treat this matter as the trial court's granting of a motion for summary judgment. CR 12(b). The factual allegations in the complaint are taken as true, and factual

issues, if any, raised in the record before this Court are read in a light most favorable to the Appellant. The Appellant assigns no error to the factual inquiry of the trial court. Therefore, the trial court's decision and the error claimed by the Appellant are questions of law and are reviewed *de novo*. This Court makes the same inquiry as the trial court with no weight given to its decision.

I. THE TERM “FEE OWNER” IS AN APPROPRIATE LEGAL TERM USED TO DESCRIBE ROYAL POTTAGE IN THE TRIAL COURT’S ORDER QUIETING TITLE AS TO THE UNENFORCEABLE DEED OF TRUST.

BNY's first assignment of error deals only with the wording of the Superior Court's Order Quietening Title as to BNY's unenforceable deed of trust, not the effect of the order. The use of the term “fee owner” does not create legal error or change the result of the litigation.

Washington's history in the area of interpreting the rights of the parties to a real estate contract has a confusing history.¹ BNY's Complaint in this case is evidence of the confusion. On page 2 of

¹ See Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud*, 7 Univ. Puget Sound Law Rev. 233 (1984).

the Complaint BNY alleges that Mr. Barbanti's interest in the subject property is "fee title". CP 5. Therefore according to the Complaint, Mr. Barbanti's interest is that of "fee title", and by operation of the quitclaim deed, Royal Pottage would hold "fee title" as well. The variety of terms used in describing the real estate contract vendee's interest in Washington is the result of using terms that originated in property law to describe the rights of parties that arise in contract law. *Tomlinson v. Clarke*, 118 Wn.2d 498, 505, 825 P.2d 706 (1992). As further indication of the confusion created by combining property law concepts with contract law concept, the *Tomlinson* Court, in dicta, said that it saw no reason to distinguish between those cases in which legal title is conveyed to secure the payment of a debt and those cases in which legal title is retained to secure payment of a debt. *Tomlinson*, 118 Wn.2d at 509-10. The *Tomlinson* court was concerned with substance over form. In this matter BNY is concerned with form over substance.

The Superior Court's use of the term "fee owner" in describing the nature of Royal Pottage's interest is consistent with the facts in this case. It matters not that Royal Pottage gained its interest through a real estate contract. BNY's use of the term "fee

title” describes the vendee’s interest in the subject property. CP 5. Additionally, it is not error for a court to accept the allegations in the Plaintiff’s Complaint as true for purposes of ruling on a Motion to Dismiss. *Berg v. Gorton*, 88 Wn.2d 756, 567 P.2D 187 (1977), at 759.

The undisputed factual and procedural history of this case demonstrates that BNY filed a complaint to judicially foreclose and extinguish the rights of the Respondents due to an alleged failure by Hoopers to make payments called for in a promissory note.

CP 4-10. Upon motion by the Respondents, BNY’s complaint was dismissed with prejudice by the Superior Court because the note was stale. CP 137-140. The Superior Court ruled that a stale promissory note cannot be used as the basis for foreclosure of the deed of trust.

CP 139. Royal Pottage, as record owner of the property, requested that title to the subject property be quieted as to the unenforceable deed of trust. CP 142-145. RCW 7.28.300 states:

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitation, and upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

RCW 7.28.330.

BNY questions whether Royal Pottage should be labeled the “fee owner” because its interest in the subject property arises from Mr. Barbanti who is a contract purchaser. Yet BNY’s Complaint states that Mr. Barbanti has a “fee title” interest. CP 5.

The use of these terms raises certain questions. Does “fee title” mean the same as “fee owner”? Do either of these terms mean the same as “record owner”? The real question should be: Do any of these distinctions matter in this case such that this Court needs to wade into the murky waters surrounding the definition of the respective interests of each party to a real estate contract in Washington? The short answer to these questions is that whatever distinctions may exist between these terms do not matter in the adjudication of the assignment of error in this case because it is not error to refer to Royal Pottage as “fee owner”. Under Washington law a real estate contract vendee has a real property interest and is the owner of the property. For many purposes under the law, the vendee is considered the “fee owner”.

The first consideration of this Court should be whether Royal Pottage is a proper party to quiet title to the unenforceable deed of

trust. RCW 7.28.300 expressly states that the “record owner” of the property may seek to have title quieted as to an unenforceable deed of trust. The undisputed evidence demonstrates that Royal Pottage was the record owner of the subject property. CP 181. Royal Pottage acquired its interest in the subject property by the recording of a quit claim deed from Mr. Barbanti. CP 181. Mr. Barbanti’s interest in the property arose from his status as purchaser under a real estate contract which had been recorded. CP 80-94. BNY admits these facts. See *Brief of Appellant*, p. 8. Thus, Royal Pottage satisfies the statutory requirement for requesting that title be quieted as to BNY’s unenforceable deed of trust. The semantic difference between a “fee owner” and a “record owner” is irrelevant because the Washington State Supreme Court has held that a real estate contract vendee may contest a suit to quiet title. *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946).²

2. The Supreme Court in *Tomlinson v. Clarke*, 118 Wn.2d 498, 507, 825 P.2d 706 (1992) discussed the holding in *Turpen* and at least nine other decisions it had rendered which according to the Court demonstrated that “... we have held the vendee to have certain rights totally inconsistent with the concept that a vendee has no title or interest, legal or equitable.” *Tomlinson supra* at p. 507. Since it is established law that a contract vendee (or its assignee) may contest a suit to quiet title it is axiomatic that the vendee also has the right to request that title be quieted.

In the section of its Brief entitled “Issues Pertaining to Assignments of Error” BNY explains that its basis for questioning the Superior Court’s use of the term “fee owner” to describe Royal Pottage arises from the fact that the contract wherein Mr. Barbanti is vendee has not been fully paid. *Brief of Appellant*, p. 1. BNY’s argument is unavailing for two reasons. First, the law in Washington clearly recognizes a real estate contract vendee’s interest in the subject property as being a real property interest and the real estate contract vendor’s interest as being personal property. Second, BNY offers no statutory or decisional authority to support its assertion that labeling a real estate contract vendee as “fee owner” is an error of law.

A. A VENDEE’S INTEREST IS A REAL ESTATE CONTRACT IS REAL PROPERTY.

In 1925 the Washington State Supreme Court held that an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee...” *Ashford v. Reese*, 132 Wash. 649, 650, 233 P. 29 (1925). The holding in *Ashford* was criticized from its inception. *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 781, 567 P.2d 631 (1977). For 52 years the holding in

Ashford was whittled away by the Supreme Court until in 1977

Ashford was finally overruled by the Court in *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977). The Supreme Court stated in *Butler*:

Despite our failure to specifically overrule *Ashford*, we have distinguished it in so many ways that its sweeping language has become virtually meaningless.

Cascade Security Bank v. Butler, 88 Wn.2d 777, 781, 567 P.2d 631 (1977).

During the 52 years of the *Ashford* ruling's existence the Washington Supreme Court carved away at the holding and consistently recognized the many attributes of the real estate contract vendee's interest in the subject property. The *Butler* Court noted:

Additionally, we have held the vendee to have certain rights totally inconsistent with the concept that a vendee has no title or interest, legal or equitable. For example, we have held that: a vendee may contest a suit to quiet title, *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946); under the traditional land sale contract, the vendee has the right to possession of the land, the right to control the land, and the right to grow and harvest crops thereon, *State ex rel. Oatey Orchard Co. v. Superior Court*, supra; a vendee has the right to sue for trespass, *Lawson v. Helmich*, 20 Wn.2d 167, 146 P.2d 537, 151 A.L.R. 930 (1944); a vendee has the right to sue to enjoin construction of a fence, *Kateiva v. Snyder*, 143 Wash. 172, 254 P. 857 (1927); a vendee's interest constitutes a mortgageable interest, *Kendrick v. Davis*, 75 Wn.2d 456, 452

P.2d 222 (1969); a vendee is a necessary and proper party for purposes of a condemnation proceeding, *Pierce County v. King*, 47 Wn.2d 328, 287 P.2d 316 (1955); a vendor's interest for inheritance tax purposes is personal property, *In re Estate of Eilermann*, 179 Wash. 15, 35 P.2d 763 (1934); a vendor's interest for purposes of succession and administration is personal property, *In re Estate of Fields*, 141 Wash. 526, 252 P. 534 (1927); a vendee may claim a homestead in real property, *Desmond v. Shotwell* 142 Wash. 187, 252 P. 692 (1927); a vendee is a real property owner for attachment purposes, *State ex rel. Oatey Orchard Co. v. Superior Court*, supra at 11-12.”

Cascade Security Bank v. Butler, 88 Wn.2d 777, 782, 567 P.2d 631 (1977).

The *Butler* Court then went on to overrule *Ashford* and held specifically that a real estate contract vendee's interest is “real estate” within the meaning of the judgment lien statute in Washington. *Butler*, 88 Wn.2d at 782. Shortly after deciding the *Ashford* case the Washington Supreme Court acknowledged the very limited “title” that a real estate contract vendor possessed:

It must follow that the interest in the property remaining in the grantors after the execution of the contract to the Richardsons was an incumbered title; that it was a legal title subject to be defeated absolutely by a performance of the contract on the part of the grantees, and subject to be reinstated in full on a breach of the contract. The real beneficial interest remaining in the grantors was the right to receive the payments as they fell due on the contract.”

Culmback v. Stevens, 158 Wash. 675, 680-1, 291 Pac. 705 (1930).

With the exception of *Ashford* which was criticized, undercut, and later overruled, Washington law's recognition of the real property ownership rights of a real estate contract vendee is overwhelming.³ In light of Washington law's recognition of the fullness of the rights of the real estate contract vendee and in light of the fact that BNY labels Mr. Barbanti's interest in the subject property as "fee title", it is impossible to make a credible argument that the Superior Court erred in this case when it labeled Royal Pottage "fee owner" in its Findings and Conclusions.⁴ As the grantee under Mr. Barbanti's Quit Claim Deed Royal Pottage was vested with all the rights previously outlined which can be generally summarized as the rights of ownership of real property. The real

3. In *Chelan County v. Wilson*, 49 Wn. App. 628, 632, 744 P.2d 1106 (1987) the Washington State Court of Appeals, Division III recognized that a real estate contract vendee had a substantial valid and subsisting interest in the property even if the interests were not recorded.

4. The Respondents suggest that if anyone is misusing a term it is the Appellant when it uses the term "fee title" to describe Mr. Barbanti's interest in the subject property. CP xxxxx. Given the fact that the real estate contract vendor retains title as security for the performance of the contract obligations it seems that the Superior Court's use of term "fee owner" is more accurate because the case law proves that all the attributes of ownership inhere in the contract vendee. If BNY's use of the term "fee title" is in error it is, as discussed earlier a harmless error.

estate contract vendor retains title solely for security for the performance of the contract. *Tomlinson v. Clarke*, 118 Wn.2d 498, 503, 825 P.2d 706 (1992). The real estate contract vendor's rights have been held to be personal property, *In re Estate of Eilermann*, 179 Wash. 15, 35 P.2d 763 (1934), and the real estate contract vendor's title is "subject to be defeated absolutely" by performance of the real estate contract. *Culmbach v. Stevens*, 158 Wash. 675, 680-1, 291 Pac. 705 (1930).

B. BNY OFFERS NO AUTHORITY TO SHOW THAT THE TRIAL COURT COMMITTED ERROR BY CALLING ROYAL POTTAGE A FEE OWNER.

The entire discussion on the ownership status of Royal Pottage takes place on pages 7-10 of the Appellant's Brief. The *Brief of Appellant* on p. 8 states:

"A purchaser under a real estate contract has substantial right in the property, but his ownership does not amount to a fee ownership. *Bays v. Haven*, 55 Wn. App. 324, 777 P.2d 562 (1989). *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977).

Brief of Appellant, p. 8.

The Appellant's Brief also references *Tomlinson v. Clarke*, 118 Wn.2d 498, 507, 825 P.2d 706 (1992). None of these cases

supports BNY's assertion regarding the use of the label "fee owner" to describe Royal Pottage. Upon closer examination, these cases actually support the language used in the trial court's order.

The *Butler* decision has already been extensively cited by the Respondent in this Brief. In *Butler* the Supreme Court held that a real estate contract vendee's interest is "real estate" within the meaning of the judgment lien statute. *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 782, 567 P.2d 631 (1977). Given the holding in *Butler* and the discussion therein of the evolution of the law regarding a real estate contract vendee's interest, the Respondents are unable discern the basis for BNY's reliance on this decision to support its argument. Contrary to the previously quoted passage from the Appellant's Brief, the Respondents have been unable to find any reference in *Butler* to the term "fee owner" or any reference prohibiting the use of this term to describe a real estate contract vendee. The language in *Butler* which resembles part of the passage from the Appellant's Brief does not conclude as the Appellant's assert:

We have identified the vendee's interest as 'substantial rights', as a 'valid and subsisting interest in property', as a

‘claim or lien’ on the land and as rights ‘annexed to and are exercisable with reference to the land.’...

Cascade Security Bank v. Butler, 88 Wn.2d 777, 781, 567 P.2d 631 (1977) (Citations omitted). The *Butler* decision does not support BNY’s argument.

With regard to the Appellant’s citation of *Bays v. Haven*, 55 Wn. App. 324, 777 P.2d 562 (1989), the Respondents suggest that this case is dispositive of the issue in favor of affirming the trial court. The plaintiff in *Bays* sued for recognition of an implied easement across lands owned by the defendant. *Bays*, supra at 326-7. One of the elements that must be proved to establish an easement by implication is unity of title. *Bays*, supra at 327. The Court framed the issue in the case as follows:

The primary issue on appeal is whether ownership of the fee of the dominant estate and ownership of the servient estate by virtue of a contract of purchase satisfy the requirement of unity of title, one of the requisites of an easement by implication.

Bays, 55 Wn. App. at 325.

The Court in *Bays* held that ownership of the servient estate by a real estate contract vendee satisfied the unity of title requirement. *Bays* supra at 328. In order to reach its decision the Court in *Bays* had to

acknowledge that ownership of the fee of the dominant estate was equal to ownership of the servient estate by virtue of being a real estate contract vendee. If there was any doubt that a real estate contract vendee could be called a “fee owner” *Bays* removes that doubt and demonstrates that the Superior Court committed no error when it used that term to describe Royal Pottage.

The *Bays* decision undercuts the entire argument made by the Appellant on this issue. In reaching its decision the *Bays* Court reviewed the long history of cases in Washington that recognized the real property ownership rights of a real estate contract vendee. *Bays* supra at p. 328. The Court concluded:

Under Washington case law a purchaser under an executory real estate contract has substantial rights and is clearly the beneficial owner of the real property.

Bays, 55 Wn. App. at 328. (Emphasis added).

The *Bays* Court made a distinction which may have eluded BNY:

Gerald Haven had substantial rights in the land, pursuant to the real estate contract, even though his interest did not amount to a fee title.

Bays, 55 Wn. App. at 327. (Emphasis added).

In other words “fee title” is different from “fee ownership”. If

there has been an error in this case the error is BNY's reference to Mr. Barbanti's interest as being "fee title" (CP 5) in light of Mr. Barbanti's status as real estate contract vendee. The Superior Court made no error when referring to Royal Pottage as "fee owner" because the real estate contract vendee, or its assignee, have all the rights enumerated in the Washington decisions which the *Bays* Court says makes the real estate contract vendee the "beneficial owner" of the property. The real estate contract vendor retains "fee title" to secure performance of the contract i.e. payments. The vendor's right to receive real estate contract payments is personal property. *Freeborn v. Seattle Trust*, 94 Wn.2d 336, 340, 617 P.2d 424 (1980). The vendor's title can be defeated absolutely by performance of the contract. *Culmback v. Stevens*, 158 Wash. 675, 680-1, 291 Pac. 705 (1930).

The last case cited by BNY in support of its argument on this assignment of error is *Tomlinson v. Clarke*, 118 Wn.2d 498, 825 P.2d 706 (1992). *Tomlinson* builds on the foundation laid by the Washington Supreme Court in *Butler* and the long line of cases that recognize the real property ownership rights of a real estate contract

vendee. *Tomlinson* cites with approval a decision from the United States Bankruptcy Court for the Eastern District of Washington in the case *In re McDaniel*, 89 Bankr. 861 (Bankr. E.D. Wash. 1988) where the Court stated:

Washington law considers the purchaser's interest under the real estate contract as a property interest and the seller's interest under that contract as a lien-type security device. *McDaniel*, 89 Bankr. at 869.

Tomlinson v. Clarke, 118 Wn.2d 498, 509, 825 P.2d 706 (1992).

The Washington Supreme Court then opines in dicta that there is no reason to distinguish between those cases in which legal title is conveyed to secure the payment of a debt and those cases in which legal title is retained to secure the payment of a debt. *Tomlinson* supra at pp. 509-10. *Tomlinson*, like *Bays* offers no support for the Appellant.

There is no law to support the argument made by BNY on this assignment of error. All relevant decisions demonstrate that the superior court committed no error when it used the term "fee owner" to describe Royal Pottage in its Findings and Conclusions. The decision of the Superior Court should not be disturbed by this Court.

II. THE SUPERIOR COURT'S AWARD OF ATTORNEY'S FEES AND COSTS IS MANDATED BY THE PROVISIONS OF RCW 4.84.330.

Appellant BNY assigns error to the Superior Court's award of attorney's fees and costs to Respondents Royal Pottage, Junco Frost and Mr. Barbanti. The Appellant's analysis is flawed in several ways. First, the undisputed facts support the application of RCW 4.84.330. There is no requirement for a person to be a party to a contract to invoke RCW 4.84.330. Second, BNY overlooks the remedial nature of the statute. Third, BNY's argument does not consider the nature of a deed of trust foreclosure in the judicial setting. Finally, the cases cited by BNY are not germane to the issue presented.

A. RESPONDENTS HAVE MET THE STATUTORY REQUIREMENTS SET OUT BY RCW 4.84.330.

The undisputed facts indicate that BNY was seeking to foreclosure and extinguish the Respondents' ownership interests in valuable real property based on a deed of trust that contains a provision entitling the beneficiary, BNY, to recover its attorney fees and costs. *Brief of Appellant*, pp. 11-12. Respondents were successful in defeating the efforts of BNY to take their property.

The Superior Court concluded as a matter of law, that these undisputed facts triggered the application of RCW 4.84.330:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, **the prevailing party, whether he is the party specified in the contract or lease or not**, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section 'prevailing party' means the party in who's favor final judgment is rendered.

RCW 4.84.330. (Emphasis added).

The express language of the statute requires a finding that the Respondents established the following elements:

1. The underlying action against the Respondents must be based on a contract entered into after September 21, 1977;
2. The contract must contain a provision allowing the recovery of attorney's fees and costs to one party to the contract who seeks to enforce its provisions; and

3. The respondents must be the prevailing parties in the underlying action. See *Herzog Aluminum v. General American Window Corporation*, 39 Wn. App. 188, 692 P.2d 867 (1984).

The Court did not err in its application of the law. The undisputed facts in the record demonstrate that the deed of trust forming the basis for the lawsuit against the Respondents was entered into after September 21, 1977. CP 14-17. See also *Brief of Appellant*, p.2. The deed of trust, CP 15 (paragraph 4.), contains a provisions allowing BNY to recover attorney's fees and costs in any action to enforce the provision of it. See *Brief of Appellant*, pp. 11-12. Royal Pottage, Junco Frost, and Mr. Barbanti are each a prevailing party in this litigation. RCW 4.84.330 defines "prevailing party" as "...the party in whose favor final judgment is rendered." The Superior Court entered a final judgment dismissing the BNY complaint which attempted to foreclose and extinguish the ownership rights of the Respondents. The order dismissing the matter with prejudice is a final determination of the parties' rights, or a final judgment. CR 54(a).

Nothing in the Appellant's Brief disputes the existence of the

three factual elements which govern the applicability of RCW 4.84.330. As can be seen in BNY's assignment of error, BNY is making a thinly veiled attempt to require a fourth element - privity of contract.

Although a contract may provide that only one party may recover attorney fees and costs incurred in enforcing the contract, RCW 4.84.330 provides that, if the other party to the contract is the prevailing party in the litigation, it shall be entitled to its attorney fees under the contract.

Brief of Appellant, page 2 (emphasis added).

This requirement is simply not in the statute. The reason for this is because the public policy considerations go far beyond the parties to the contract.

B. THE REMEDIAL NATURE OF RCW 4.84.330 IS A PUBLIC POLICY CONSIDERATION.

A person who brings litigation pursuant to a contract uses public resources. The provisions of RCW 4.84.330 discourage the use of resources, both public and private, to effectuate tenuous results. This is done by requiring the payment of attorney fees to unsuccessful litigants on contract claims where they would otherwise not bear any risk paying court costs and attorney fees. This is why the statute is specifically drafted in a way which does not limit its

application to the parties on the contract, rather it applies to “an action on a contract or lease”. RCW 4.84.330.

In addition, the Respondents herein were directly affected by the litigation. Any attorney fee award in favor of BNY would be chargeable to the value of the property and would reduce any potential recovery for any junior lien holder. Indeed, BNY sought to completely eliminate the Respondents’ rights by foreclosing and extinguishing the Respondents’ respective ownership interest in the property, using litigation based on a deed of trust with an attorney fee provision only in its favor.

RCW 4.84.330 was enacted as a remedial statute for the purpose of allowing a unilateral attorney fee and cost provision in a contract to be applied to the parties in litigation. *Herzog Aluminum v. General American Window Corporation*, 39 Wn. App. 188, 196-7, 692 P.2d 867 (1984). The Washington State Supreme Court further explains:

By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its

bilateral intent by defining a prevailing party as one that receives a final judgment. This language must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevail or whether there is a final judgment. Cf. *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 335, 494 P.2d 479 (1972) (holding that uninsured motorist statute expresses overriding public policy, ‘so that the intendments of the statute are read into and become a part of the contract of insurance’).

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489-90, 200 P.3d 683 (2009). BNY’s argument in this case implicitly requires this Court to amend RCW 4.84.330 to require a new element for its application and to limit its application to parties to the contract. This application would undermine the policy of the statute.

The *Herzog* opinion demonstrates the remedial nature of RCW 4.84.330. *Herzog* recognized that an action pursued under a contract which is void would still give rise to an award of attorney fees pursuant to RCW 4.84.330 provided there is a unilateral attorney fee clause in the void contract. By definition, a void contract is one which never existed. Therefore, there are no parties to a void contract. Under BNY’s theory of RCW 4.84.330, this result would be impossible, because no one would be a party to the contract. In this matter, there is a valid deed of trust which affects

the rights of all parties in title to the property. This contract was the basis of the BNY action against the Respondents, and BNY claimed a right to collect attorney fees from the Respondents pursuant to that valid contract. If RCW 4.84.330 allows litigants in a lawsuit based on a void contract to collect their attorney fees, would it not offer the same, or better protection to litigants in a lawsuit based on a valid contract? Of course it would.

**C. APPELLANT’S THEORY OF RCW 4.84.330
ALLOWS IT TO COLLECT FEES AND COSTS
UNILATERALLY FROM THE RESPONDENTS.**

The Appellant is proffering a theory that would allow it to indirectly collect its attorney fees awarded against Hooper from the Respondents by using the deed of trust. The Appellant’s contentions are contained in the following excerpts from its Brief where it states:

However, the bank did not seek nor could it have obtained a monetary judgment or an award of attorney fees against Barbanti, Royal Pottage or Junco Frost. The bank only sought to foreclose the interests of those parties whose interest attached to the property subsequent to the execution of the bank’s deed of trust [CP 1-19]

Brief of Appellant, p. 12 (emphasis added).

These two sentences not only summarize BNY’s entire argument regarding the award of attorney’s fees and costs but they

also are the undoing of BNY's entire argument. The flaw in the argument is seen in the fact that BNY was attempting to recover fees and costs from one party and then use that debt to "foreclose the interests" of the Respondents by use of another contract - the deed of trust. BNY attempts to limit the reach of RCW 4.84.330's remedial effect only to the parties named on the contract or lease when, in fact, its litigation affected all parties who had an interest in the property. When the deed of trust is used to take away the Respondents' property, the Respondents must be able to protect that property. When the Respondents prevail, they should not be harmed by the actions of the Appellant. The Legislature enacted RCW 4.84.330 to avoid this unjust result.

BNY's view is an overly simplistic reading of the statute that does not take into account the procedures of a judicial foreclosure. The Legislature defined "prevailing party" as one who recovers a judgment " ...whether he is the party specified in the contract or lease or not..." This language in the statute demonstrates that the Legislature recognized that the inquiry under RCW 4.84.330 is not a simple mechanical determination of whose name is on the contract

and whose name is on the pleadings as the Appellant suggests in its Brief. In addition, when the legal effect of a deed of trust is considered along with the unique procedural and substantive nature of the judicial foreclosure remedy, the Appellant's cited authorities require that the Superior Court's decision to be affirmed.

The suit commenced by BNY was **not** limited to suing for monies due on a promissory note. A deed of trust may be foreclosed judicially like a mortgage. *RCW 61.24.020*. If judicial foreclosure is chosen the provisions of RCW Chapter 61.12 governing mortgages apply to the litigation. BNY elected to foreclose its deed of trust judicially.

The judicial process requires BNY to reduce the obligation evidenced by the promissory note to judgment against the Hoopers. See *Washington Practice*, Chapter 18, p. 339 *et seq* (Stoebuck, 1995). See also *RCW 61.12.060*. Once a judgment is obtained for the amount owed on the promissory note (including attorney's fees and costs) that judgment becomes the basis for the entry of an Order of Foreclosure and Sale and becomes the basis for determining the amount necessary to stop the foreclosure and redeem the property.

Gilmore Hays v. W. W. Miller, 1 Wash. Terr. 143, 146-7 (1861).

Redemption of the property is a means to free the land from the mortgage or deed of trust. In Washington the period of equitable redemption runs until the time of the foreclosure sale. Payment of the judgment effectuates the redemption and stops the foreclosure sale. *Washington Practice*, Vol. 18, Section 18.19 (Stoebuck, 1995), p. 361.

BNY sought judgment against Hoopers for the amount due on the promissory note plus attorney's fees and costs. This judgment would then be used to divest the Respondents of their property. The issue of whether BNY would have been able to obtain a *money* judgment against Royal Pottage, Junco Frost or Mr. Barbanti is moot. Appellant was seeking a judicial foreclosure of the deed of trust which would *foreclose and extinguish* the Respondents' interest in the property. If they desire to protect the value of their interest in the property and stop the foreclosure they must pay the Hooper judgment in **full** (including attorney's fees and costs taxed against Hooper), in addition to the costs and fees related to the judicial foreclosure of the deed of trust. The judicial foreclosure remedy

effectively allows BNY to collect any judgment for attorney's fees and costs owed by Hoopers from any junior interest holder in the subject property. In addition, BNY would also be entitled to attorney fees related to the foreclosure process as provided by the deed of trust because of the attorney fee clause contained therein. Therefore, when any or all of the junior interest holders are successful in defeating BNY's attempt to collect on a Hooper judgment, including principal, interest, late charges and pre and post judgment attorney's fees and costs, through judicial foreclosure, the reciprocity provisions of RCW 4.84.330 become applicable and the Respondents become quintessential "prevailing parties" as contemplated by the statute. The Superior Court committed no error in awarding attorney's fees and costs in this case.

BNY's assignment of error on this issue takes on a pseudo-validity if one is lulled into misunderstanding the nature of the relief sought by the Appellant's Complaint. If the Complaint in this case had been solely a complaint for monies due and solely for a personal judgment against the Hoopers without a foreclosure of the deed of trust then the cases offered by BNY on pages 14-17 of its Brief may

have some relevance. This Court need not adjudicate or consider the impact of any of those cases because they are all distinguishable by one significant fact: none of those cases involved a judicial foreclosure of a deed of trust. On page 11 of its Brief the Appellant states:

Said differently, the mutuality of remedy under the statute provides for an award of attorney fees to a prevailing party under a contractual provision if the party-opponent would have been entitled to attorney fees under that same provision had that opponent prevailed, even when the contract itself is found invalid. *Herzog*, 39 Wn. App. at 195-197.”

This passage from the Appellant’s Brief **admits** that the Respondent’s argument is correct. According to the Appellant’s Brief mutuality under RCW 4.84.330 provides for an award of attorney’s fees to a prevailing party if the party-opponent would have been entitled to attorney’s fees under the same contractual provision if that opponent had prevailed. Under either the promissory note or deed of trust BNY would have been allowed to include its attorney’s fees and costs in any judgment obtained against Hoopers in the case of the note and all other defendants in the case of the judicial foreclosure of the deed of trust. When the Hooper judgment

becomes the basis for judicially foreclosing the deed of trust, BNY becomes entitled to collect the entire amount of the judgment (including attorney's fees and costs) from any junior interest holder in the property who wants to stop the foreclosure in order to protect its interests. BNY's claim that the Respondents should only be allowed to recover their attorney's fees and costs if BNY was able to obtain a personal judgment against Respondents is a pseudo-distinction that is irrelevant in a judicial foreclosure. The mutuality of remedy concept under RCW 4.84.330, as expressed by the Appellant, is satisfied in this case.

The issue that eludes BNY and ultimately undoes their entire argument regarding the award of attorney's fees and costs is the meaning of the phrase "In any action on a contract..." in RCW 4.84.330. A judicial foreclosure which arises under a deed of trust is an action on a contract. The deed of trust in this case contains an attorney fees provision which in the context of a judicial foreclosure allows the foreclosing beneficiary to include all of its attorney's fees and costs in the judgment of foreclosure. As a result when a junior interest holder, facing the foreclosure and extinction of his interest in

the property wants to stop the foreclosure or redeem the property that junior interest holder must pay the underlying judgment, which will include attorney fees and costs.

The phrase “In any action on a contract...” has been interpreted broadly to allow a prevailing party to recover its attorney’s fees and costs even when no contract was found to exist. *Herzog Aluminum v. General American Window Corporation*, 39 Wn. App. 188, 692 P.2d 867 (1984). The *Herzog* Court devoted part of its opinion to discussing the history of RCW 4.84.330. The Court noted that the Washington statute was very similar to the California attorney fee statute found at Cal. Civ. Code § 1717. *Herzog supra* at p. 194. The *Herzog* Court concluded that our Legislature used the California provision as a paradigm for RCW 4.84.330. *Herzog supra* at p. 195.

While not binding on this Court, the Respondents submit that the decision by the California Court of Appeal in *Saucedo v. Mercury Savings and Loan*, 111 Cal. App. 309, 168 Cal. Rptr. 552 (1980) is helpful and instructive on the issue presented by BNY’s assignment of error. (A copy of the decision is attached hereto in

Appendix A).

In *Saucedo* the Plaintiffs purchased a piece of real property and took the property “subject to” an existing loan held by the Defendant Mercury Savings and Loan. *Saucedo supra* at p. 553. Mercury invoked the provisions of a “due-on-sale” clause and commenced foreclosure proceedings. *Saucedo supra* at p. 553. The Plaintiffs were successful in defeating Mercury’s foreclosure and the action was dismissed. The Plaintiffs’ request for an award of attorney’s fees and costs under Cal. Civ. Code 1717 was denied because:

...defendants contended that plaintiffs were not entitled to recover attorney fees because, not being parties to either the promissory note or deed of trust, plaintiffs could not have been held liable for attorney fees had Mercury prevailed in the action.

Saucedo supra at p. 554. The California Court of Appeals rejected Mercury’s argument (which was identical to the argument presented by BNY in this case) and stated in pertinent part:

Plaintiffs suggest that by emphasizing the attorney fee provision in the promissory note and the lack of personal liability of the ‘subject to’ purchasers in the *Pas v. Hill* decision, our attention was diverted from the real relationship between the non-assuming grantee and the trust deed holder. This relationship, resulting primarily from the deed of trust,

enables the trust deed holder as a practical matter to recover his attorney fees from the non-assuming grantee despite the fact that the non-assuming grantee is not personally liable for the performance of the obligations of the note and deed of trust.

Saucedo supra at p. 555. The California Court of Appeals

continued:

However as a practical matter, on foreclosure the beneficiary is entitled to recover its fees a condition to redemption and if the non-assuming grantee wishes to protect his equity in the property he will have to pay those fees. Since the grantee expended fees to enjoin the foreclosure, there is an indication that there was a sufficient equity in the property to be protected. Therefore, the Court's conclusion is unrealistic. Since the grantee is required to pay the fees of the beneficiary to protect his equity in the property, this should be a sufficient practical reason to apply CC § 1717 in an action by the Trustor [sic: grantee] to enjoin the beneficiary's foreclosure....This practical 'liability' of the non-assuming grantee is sufficient to call into play the remedial reciprocity established by Civil Code section 1717.

Saucedo supra at p. 555. The *Saucedo* Court overruled earlier precedent which had been inconsistent with its decision. *Saucedo supra* at pp. 555-6. BNY's argument regarding the application of the attorney fee statute in a judicial foreclosure fails for the same reason.

BNY uses liberal doses of the term "mutuality" as it discusses the applicability of RCW 4.84.330 in this case. The Appellant attempts to portray its assignment of error as justified in order to

maintain “mutuality” under the statute, i.e. BNY can’t obtain a judgment against the Respondents for attorney’s fees and costs therefore the Respondents should be prohibited from doing the same to BNY. The fallacy of this contention in a judicial foreclosure setting is apparent from the foregoing discussion.

Ironically it is BNY’s malformed construction of RCW 4.84.330 advocated before this Court which actually subverts mutuality under the statute in a judicial foreclosure. If BNY’s reasoning prevails then a foreclosing beneficiary could recover its attorney’s fees and costs in a foreclosure, even from a non-signatory junior interest holder, by virtue of those fees being included in the amount necessary to redeem the property from foreclosure. However under BNY’s view of the law if that same junior interest holder was able to defeat the foreclosure, the junior interest holder would not be able to recover its attorney’s fees and costs expended to protect the equity in the property. Apparently “mutuality” like beauty must be in the eye of the beholder.

D. THE CASES CITED BY BNY ARE DISTINGUISHABLE.

Lastly the cases cited by BNY on pages 14-17 of its Brief

which purport to buttress its argument are inapposite or readily distinguishable from the present case. On pp. 14-15 of its Brief BNY cites *Tacoma Northpark, L.L.C. v. NW, L.L.C.*, 123 Wn. App. 73, 96 P.3d 454 (2004) in support of its claim that RCW 4.84.330 requires a contractual relationship between the parties in order to apply.

Tacoma Northpark is distinguishable from and inapplicable to the present case. In *Tacoma Northpark*, NW entered into a purchase and sale agreement to sell some lots to O'Connor subject to a final plat being approved by the City. *Tacoma Northpark supra* at pp. 76-7. NW was unable to obtain final plat approval and offered to sell the property "as-is" to O'Connor but O'Connor refused the offer.

Tacoma Northpark supra at p.76. NW then sells the property to Tacoma Northpark. *Id* at p. 76. O'Connor sues both NW and Tacoma Northpark and loses at trial. *Tacoma Northpark supra* at p. 78. The Court of Appeals affirms the decision and refuses to award Tacoma Northpark attorney fees on appeal because Tacoma Northpark and O'Connor had no contractual relationship. *Tacoma Northpark supra* at p. 84. The *Tacoma Northpark* decision has no relevance to the present case. In *Tacoma Northpark* the Court chose its words

carefully when it found no “contractual relationship” between Tacoma Northpark and O’Connor. NW and O’Connor had a contract which failed due to one party’s inability to satisfy a condition precedent. NW and Tacoma Northpark had a subsequent contract which resulted in full performance. There was never any contractual relationship between O’Connor and Tacoma Northpark.

The facts in *Tacoma Northpark* are very different than those in the present case. BNY’s deed of trust is the contract under which the present action arises. As discussed previously the deed of trust is a unique contract because it can be foreclosed judicially which means the contract can be used to terminate the rights of third parties in the subject property even if those third parties never joined in the formation of the deed of trust. Most important the judicial foreclosure process and the language of the deed of trust allow the foreclosing beneficiary to recover his attorney fees and costs from any junior interest holder in order to stop the foreclosure and redeem the property.

BNY’s reliance on *Mutual Security v. Unite*, 68 Wn. App. 636, 847 P.2d 4 (1993) is both misplaced and disingenuous. In

Mutual Security, Unite signed a promissory note secured by a deed of trust on real property. *Mutual Security supra* at p. 637. Unite quit claimed the property to Guzman subject to the deed of trust. *Id.* The note holder sues **both** Unite and Guzman on the promissory note claiming that the note was in default. *Mutual Security supra* at pp. 637-8. The Court of Appeals held that Guzman had no personal liability on the note because Guzman had not signed the note. *Mutual Security supra* at p. 640. Conversely the Court held that Guzman could not recover attorney's fees from the note holder because Guzman had not signed the note. *Mutual Security supra* at pp. 642-3. Based on *Mutual Security* BNY concludes on p. 16 of its Brief:

Guzman was not entitled to attorney's fees because he was not a person 'liable on a contract' as required by the *Herzog* line of cases.

BNY's conclusion is irrelevant because it overlooks some critical factual distinctions present in *Mutual Security*. First the Court in *Mutual Security* makes a critical distinction in Footnote 5 on page 640 of its opinion by pointing out that the case is **only** a suit on a promissory note. Unlike the present case there was no foreclosure remedy at issue in *Mutual Security*. Second and most important the

Court in *Mutual Security* acknowledges that when the remedy of foreclosure is sought, the obligation (even though unsigned by the defendant) can be enforced through the mortgage. *Mutual Security supra* at p. 642.

The holding in *Mutual Security* is limited to cases where the note holder/beneficiary elects to pursue an action at law and obtain a judgment on the promissory note. In the present case BNY sought the equitable remedy of foreclosure of its deed of trust. The *Mutual Security* Court was very careful to recognize that invoking the equitable remedy of foreclosure altered the rights of the parties.

The final case, *Yuan v. Chow*, 96 Wn. App. 909, 982 P.2d 647 (1999), is irrelevant on its facts because the remedy sought in that case was not a foreclosure of a deed of trust. BNY's summary of the facts in *Yuan* on pp. 16-17 of its Brief is correct however the conclusion BNY draws from *Yuan* misses the mark:

In the instant case none of the defendants to whom the trial court awarded attorney fees signed the note or deed of trust or assumed the obligations and could not be liable on the contract.

Brief of Appellant, p. 17.

For reasons previously discussed BNY's conclusion doesn't

end the inquiry in this matter. A signature may be a prerequisite to finding liability in an action at law for a judgment on a promissory note. However when the judgment becomes the basis for the equitable remedy of foreclosure the foreclosing beneficiary can compel any redeeming junior interest holder to pay the entire judgment as a condition of redemption even though that person had no personal liability under the judgment. The beneficiary recovers its attorney's fees and costs even from a non-assuming grantee and despite the fact that the non-assuming grantee is not personally responsible for performance on the note or the deed of trust. The nature of the contract commonly known as a "deed of trust" dictates this result. Therefore personal liability is an inappropriate basis for distinguishing between the rights of Hooper and the non-assuming grantees Royal Pottage and Mr. Barbanti or the junior interest holder Junco Frost. *Saucedo v. Mercury Savings and Loan*, 111 Cal. App. 309, 168 Cal. Rptr. 552, 555 (1980).

None of the cases cited by BNY are relevant because none deal with the unique procedure and result of a judicial foreclosure. BNY's attempt to create a distinction under RCW 4.84.330 based on

personal liability fails in the context of a judicial foreclosure of a deed of trust even though such a distinction may exist in other areas of the law. In the judicial foreclosure setting the distinction argued by Bank of New actually results in defeating the public policy goal of mutuality of remedy under RCW 4.84.330. The distinction sought by BNY is not allowed by the express language of RCW 4.84.330 and is unsupported by the decisions in Washington in other areas of the law. The trial court's award of attorney fees and costs should be affirmed.

III. RESPONDENTS ARE ENTITLED TO FEES ON APPEAL.

Based on the analysis in the foregoing section of this brief, the Respondents are also entitled to attorney fees on appeal pursuant to RCW 4.84.330. Respondents request fees herein in compliance with RAP 18.1.

CONCLUSION

The trial court committed no error in its decision with respect to either issue on appeal. This Court should affirm the trial court's order quieting title on the deed of trust. This Court should affirm the award of attorney fees pursuant to RCW 4.84.330 and award the

Respondents their reasonable attorney fees on appeal.

Respectfully Submitted, on
April 14, 2011



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Royal Pottage and Junco Frost

APPENDIX A

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Saucedo v. Mercury Sav. & Loan Assn., 168 Cal.Rptr. 552, 111 Cal.App.3d 309

168 Cal.Rptr. 552

111 Cal.App.3d 309

Gilbert SAUCEDO et al., Plaintiffs and Appellants,

v.

MERCURY SAVINGS AND LOAN ASSOCIATION et al., Defendants and Respondents.

Civ. 21432.

California Court of Appeal, Fourth District, Second Division

Oct. 22, 1980.

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Fred Crane, Riverside, and John Meyer, Los Angeles, for plaintiffs and appellants.

Tyre & Kamins, Randall H. Kennon and Peter M. Sloan, Los Angeles, for defendants and respondents.

KAUFMAN, Associate Justice.

In this appeal we are asked to reconsider our decision in *Pas v. Hill* (1978) 87 Cal.App.3d 521, 151 Cal.Rptr. 98, insofar as it held that a "subject-to" purchaser (or non-assuming grantee) of property encumbered by a deed of trust is not entitled to recover attorney fees under Civil Code section 1717 in a successful suit to enjoin the trust deed holder from enforcing a due-on-sale clause in the promissory note secured by the deed of trust. Upon reexamination and reconsideration of the problem we conclude that on this point *Pas v. Hill* was incorrectly decided and we overrule that decision to the extent it is inconsistent herewith. Plaintiffs Gilbert and Angelina Saucedo will be

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referred to as plaintiffs; their predecessors in interest, James M. and Christine H. McKernie, the original borrowers, will be referred to as the McKernies; Mercury Savings and Loan Association will be referred to as Mercury, and Mercury and the trustee collectively will be referred to as defendants.

In September 1973 Mercury loaned \$25,800 to the McKernies for the purchase of a residence located at 9635 Drake Place, Riverside. The McKernies executed a promissory note and a deed of trust on the property in favor of

Mercury. The note contained a unilateral attorney fees provision reading: "If the holder of this note institutes legal action to enforce this note and prevails in such action, I shall pay his attorney fees in connection with such action in (sic) amount that is fixed by the court as reasonable." The note also contained a due-on-sale clause providing that the entire unpaid balance of the note would immediately become due and payable in the event the McKernies sold or otherwise transferred or conveyed the property unless Mercury consented in writing to the transfer.

The deed of trust provided inter alia that to protect the security of the deed of trust, the McKernies agreed "3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including ... attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear." (Emphasis added.)

On about July 2, 1976, plaintiffs purchased the Drake Place property from the McKernies, paying \$16,500 in cash and taking the property "subject to" the existing loan represented by the note and deed of trust held by Mercury. On July 3, 1976, plaintiffs informed Mercury that they had purchased the property, and negotiations ensued for the assumption by plaintiffs of the loan. Mercury demanded a transfer fee of \$125 and an increase in the interest rate from seven and one-half percent to nine percent. Plaintiffs refused to agree to these changes, whereupon on December 7, 1976, ^[1] Mercury elected to enforce the due-on-sale clause and, pursuant to Civil Code section 2924b, caused to be filed a notice of default and election to sell under the deed of trust.

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To prevent defendants from proceeding to foreclose, plaintiffs commenced this action for declaratory relief, injunction and exemplary damages. In the prayer of their answer defendants requested inter alia the recovery of reasonable attorney fees.

After issuance of a preliminary injunction restraining foreclosure sale, defendants filed a motion for summary judgment asking the court to rule as a matter of law that Mercury had the right automatically to enforce the due-on-sale clause because of the sale and transfer of the property from the McKernies to plaintiffs. As part of the motion for summary judgment an award of attorney fees in the amount of \$1,750 was requested on the basis of the attorney fee provisions in the promissory note and deed of trust. Apparently, defendants' motion for summary judgment was denied.

Subsequently, following the decision by the California Supreme Court in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 148 Cal.Rptr. 379, holding, in essence, that commercial lenders may exercise a due-on-sale clause only if they can demonstrate that the sale or transfer results in an impairment of their security, plaintiffs filed a motion for summary judgment on their cause of action for declaratory relief, requesting an award of attorney fees. In view of the *Wellenkamp* decision defendants did not resist the motion for summary judgment. They did, however, oppose plaintiffs' request for attorney fees. The court granted the motion for summary judgment in favor of plaintiffs on their action for declaratory relief and, pursuant to an oral motion of plaintiffs at the time of hearing, dismissed plaintiffs' causes of action for injunction and punitive damages. The order recited that the question of attorney fees remained to be resolved.

At about the same time plaintiffs filed a memorandum of costs and disbursements in the amount of \$5,891.55 of which \$5,675 consisted of a claim for attorney fees. Defendants responded with a notice of motion to tax costs. The only item attacked was the claim for attorney fees. Relying largely upon the decision in *Pas v. Hill*, supra, 87 Cal.App.3d 521, 532-537, 151 Cal.Rptr. 98, defendants contended that plaintiffs were not entitled to recover attorney fees because, not being parties to either the promissory note or deed of trust, plaintiffs could not have been held liable for attorney fees had Mercury prevailed in the action. The trial court, also no doubt relying on *Pas v. Hill*, granted the motion to tax,

disallowing plaintiffs' claim for attorney fees. It is from this order that plaintiffs appeal.

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In *Pas v. Hill*, supra, 87 Cal.App.3d at pp. 533-535, 151 Cal.Rptr. 98, we concluded on similar facts that the "subject to" purchasers were not entitled to recover attorney fees because, not being parties to the note or deed of trust, they were not personally liable to perform the obligations created by those instruments and could not have been held liable for attorney fees had the beneficiary and trustee of the deed of trust prevailed in the action. In discussing the decision in *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 107 Cal.Rptr. 512, we repeated our disagreement with the reasoning of the court in that decision, originally expressed in our opinion in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978), 78 Cal.App.3d 477, 485-486, 144 Cal.Rptr. 474. We opined that the result in *Babcock* was correct and that it might properly have been reached on a theory of equitable estoppel-e. g., "the plaintiffs having alleged and attempted to prove the defendant wife was a party to the notes as a joint venturer and that she was liable under the notes' attorney fee provisions and having caused defendant wife to defend against such liability, were estopped to deny defendant was a party to the contract for the remedial purposes of Civil Code section 1717." (87 Cal.App.3d at pp. 535-536, 151 Cal.Rptr. 98.)

Plaintiffs here first urge that they should have recovered attorney fees under the equitable estoppel theory suggested in *Pas v. Hill*. They correctly assert that in the case at bench, unlike the situation in *Pas v. Hill*, Mercury and the trustee did early in the case take the position that plaintiffs were liable for attorney fees under the promissory note and deed of trust. Thus, they urge that Mercury and the trustee should be estopped from denying plaintiffs' reciprocal right to recover attorney fees under Civil Code section 1717. ^[2] While plaintiffs' right to recover attorney fees might conceivably be established on that basis, ^[3] our reanalysis of the problem leads us to the conclusion that our denial of the recovery of attorney fees in *Pas v. Hill* was in error, and we think it preferable to deal with the problem head-on, rather than obliquely by adopting another theory.

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Plaintiffs suggest that by emphasizing the attorney fee provision in the promissory note and the lack of personal liability of the "subject to" purchasers in the *Pas v. Hill* decision, our attention was diverted from the real relationship between a non-assuming grantee and the trust deed holder. This relationship, resulting primarily from the deed of trust, enables the trust deed holder as a practical matter to recover his attorney fees from the non-assuming grantee despite the fact the non-assuming grantee is not personally liable for the performance of the obligations of the note and deed of trust.

Several noted real property authorities have also criticized as unrealistic the result reached on the attorney fee question in *Pas v. Hill*. In 1 Miller & Starr, *Current Law of California Real Estate* (1979 Supp.), section 3:109, pages 93-94, footnote 16, it is observed: "The case of *Pas v. Hill*, supra, involved an action by a non-assuming grantee to enjoin the foreclosure of a purchase money deed of trust. The injunction was granted. The Court reasoned that since the non-assuming grantee was not a party to the contract he could not be held personally liable for the payment of the fees; therefore, he cannot recover fees from the beneficiary under CC § 1717. As a matter of legal theory, this is correct. However, as a practical matter, on foreclosure the beneficiary is entitled to recover its fees as a condition to redemption and if the non-assuming grantee wishes to protect his equity in the property he will have to pay those fees. Since the grantee expended fees to enjoin the foreclosure, there is an indication that there was a sufficient equity in the property to be protected. Therefore, the Court's conclusion is unrealistic. Since the grantee is required to pay the fees of the beneficiary to protect his equity in the property, this should be a sufficient practical reason to apply CC § 1717 in an action by the Trustor (sic: grantee) to enjoin the beneficiary's foreclosure." Professor Hetland has pointed out that

inasmuch as there is no personal liability on a purchase money deed of trust in any event, personal liability would appear to be an inappropriate basis for distinguishing between the original trustor and his

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non-assuming grantee. (Real Property Secured Transactions (Conference for Continuing Education, 1979) p. 122.)

On rethinking the matter we agree with plaintiffs and the authorities noted. 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 the non-assuming grantee has a 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.

While the non-assuming grantee would not have been personally liable for payment of attorney fees under the note and deed of trust, the trustee and/or beneficiary would have been entitled to attorney fees under the provisions of the deed of trust had they prevailed, and these fees would have become part of the debt secured by the deed of trust. To prevent foreclosure of his interest, the non-assuming grantee would have had to pay off the secured debt, including the attorney fees, by refinancing or otherwise. (See Civ.Code, §§ 2905, 2924c, subd. (a).) ^[4] This practical "liability" of the non-assuming grantee is sufficient to call into play the remedial reciprocity established by Civil Code section 1717. With due apologies to the trial court and others who relied on our decision of the attorney fee question in *Pas v. Hill*, supra, 87 Cal.App.3d 521, 151 Cal.Rptr. 98, we overrule that decision insofar as it is inconsistent herewith.

The order appealed from is reversed with directions to the trial court to allow the cost bill claim for attorney fees in a reasonable amount on account of the services of plaintiffs' attorneys in prosecuting the causes of action for declaratory relief and injunction in that court. Plaintiffs shall recover the additional sum of \$850 on account of their attorney fees on appeal. In the interests of justice the parties shall bear their own respective costs on appeal.

TAMURA, Acting P. J., and McDANIEL, J., concur.

NOTES:

[1]A notice of default and election to sell under the deed of trust was filed earlier on November 18, 1976, but it was defective and was therefore rescinded.

[2]Civil Code section 1717 reads in part: "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements."

[3]In *Babcock v. Omansky*, supra, 31 Cal.App.3d 625, 107 Cal.Rptr. 512, had the plaintiffs prevailed in the action against the defendant wife, she would have been liable for attorney fees provided for by the contract as a joint venturer. Thus the court was entirely correct in holding that under Civil Code section 1717 she had the reciprocal right to recover attorney fees when she prevailed. (*Reynolds Metal Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129, 158 Cal.Rptr. 1.) Here, as a legal proposition, Mercury and the trustee could not have recovered a personal judgment against plaintiffs for attorney fees because plaintiffs, as "subject to" purchasers, were not personally liable for performance of the

obligations created by the note and deed of trust. (Cornelison v. Kornbluth (1975) 15 Cal.3d 590, 596-597, 125 Cal.Rptr. 557; Pas v. Hill, supra, 87 Cal.App.3d at p. 533, 151 Cal.Rptr. 98.) Nevertheless, inasmuch as Mercury and the trustee could have recovered their attorney fees from plaintiffs as a practical matter had plaintiffs not prevailed in the action (see discussion, infra), perhaps it might be said that for practical purposes plaintiffs here were in the same position as the defendant wife in the Babcock case.

[4]In the event the foreclosure sale were actually held, the attorney fees of the trustee and/or beneficiary would be recovered out of the proceeds of sale.
