

FILED

JUL 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 307492

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

GMAC MORTGAGE,

Respondent,

v.

CITY OF SPOKANE,

Appellant.

**JEANNETTE J. SWAN
HEIRS OF JEANNETTE J. SWAN, FRANK
LINE AND JANE DOE LINE, and the marital
community thereof, and ROBERT S.
DELANEY PLLC, TRUSTEE,**

Defendants.

Brief of Appellant

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I. INTRODUCTION

This appeal involves the lien priority arising in connection with two deeds of trust; one in favor of Appellant, City of Spokane ("City"), and the other in favor of Respondent, GMAC Mortgage LLC ("GMAC"). Both encumber a residence at 4427 N. Washington Street in the City of Spokane ("Property"). In 1998, City made its loan to the then owner of the Property, Jeannette J. Swan ("Ms. Swan"), and recorded its Deed of Trust ("City's Deed of Trust"). In 2008, GMAC made its loan to the then owner of the Property, Ms. Swan's son, Frank Line ("Mr. Line"), and recorded its Deed of Trust ("GMAC's Deed of Trust").

The factual events that should resolve this case and City's claims are not disputed. City's loan was made, and City's Deed of Trust was recorded, first in time. GMAC had actual or constructive notice of City's lien when it made its loan and recorded GMAC'S Deed of Trust. GMAC does not suggest it had reason to, or did believe, City's Deed of Trust lien was invalid when it made its loan and recorded GMAC's Deed of Trust or that GMAC's Deed of Trust would have first lien priority.

Ms. Swan passed away in 2000. In 2001, Mr. Line, as Personal Representative of Ms. Swan's estate, transferred the Property to himself

by Personal Representative's Deed. Mr. Line has been the record owner of the Property since that transfer.

Payments were not made on City's loan after Ms. Swan's death, and City did not comply with some written provisions in its loan documents. Among other things, City's Note deferred any payment requirements for an initial period and included provisions for potential continuation of the deferral status. Reviews of the borrower's eligibility to continue with the loan in deferral status were not conducted, actions to transfer the loan from Ms. Swan to Mr. Line were not taken, and City never took the loan out of deferral status (which removal would have triggered the need to begin making monthly payments).

Mr. Line verbally communicated with the City a number of times between 2001 and 2011. Discussions occurred regarding Mr. Line's stated intent to refinance the Property, plans to either make payments on or pay off City's loan, and/or Mr. Line's potential assumption of City's loan. No writing from Mr. Line memorialized those discussions.

In 2011, City learned Mr. Line had moved from the Property and commenced non-judicial foreclosure proceedings. GMAC contacted City through a representative from First American Title Insurance Company and claimed City's foreclosure was barred by a statute of limitations. At

City's request, Mr. Line executed an instrument acknowledging the validity of City's debt and waiving application of the six year statute of limitations. GMAC engaged legal counsel and instituted litigation.

GMAC contends City's Deed of Trust lien was rendered invalid and unenforceable because: Ms. Swan passed away in 2001; Mr. Line did not assume personal liability on City's loan in 2001 when he transferred the Property to himself by Personal Representative's Deed; no payments were made on City's loan after 2001; written provisions in City's loan documents governing the handling of City's loan were not followed; and more than six years passed without City's complying with loan procedures, or receiving payment on its loan. GMAC further contends that since City's Deed of Trust became wholly enforceable, GMAC did not need to demonstrate that it has standing to assert a statute of limitations defense. Alternatively, GMAC contends it has standing to assert the defense.

City contends that City's Deed of Trust has been and remains a valid and enforceable security interest in the Property with priority over GMAC's Deed of Trust lien because: City's Deed of Trust was first in time and GMAC had notice of City's Deed of Trust when GMAC made its loan in 2008; Mr. Line, as Personal Representative of Ms. Swan's estate

and later as owner of the Property, had the right to and did waive any lack of compliance with City's loan documents and any statute of limitations defense; potential expiration of the statute of limitations under City's Note created at most a voidable obligation rather than rendering City's lien void; and GMAC lacks standing to challenge the manner in which City and Ms. Swan or Mr. Line dealt with the loan or to assert a statute of limitations defense in connection with City's loan.

City moved for summary judgment in the trial court. Both City and GMAC agreed, and continue to agree, there are no issues of disputed material fact. The trial court ruled that disputed issues of material fact remain and denied City's motion. City requests that, based on the undisputed material facts presented, this Court reverse the trial court's denial of its motion for summary judgment, direct the trial court to grant summary judgment in favor of City, and direct the trial court to engage in further proceedings consistent with that ruling.

II. ASSIGNMENTS OF ERROR

City makes the following assignments of error:

1. The trial court erred in determining that there were disputed issues of material fact.

2. The trial court erred by not granting City's Motion for Summary Judgment.

Issues related to assignments of error:

1. The standard of review.
2. Whether this case should be decided as a matter of law given the absence of disputed issues of material fact.
3. Whether City's Deed of Trust has priority over GMAC's Deed of Trust.
4. Whether requirements in City's loan documents could be and were waived.
5. Whether a statute of limitations defense can be waived.
6. Whether Mr. Line could and did waive any statute of limitations defense.
7. Whether GMAC has standing to assert a statute of limitations defense or override Mr. Line's actions.

III. STATEMENT OF THE CASE

City and GMAC do not dispute the material facts to which the law should be applied in this case. Those material facts include the following:

1. City's Note and Deed of Trust were executed by Ms. Swan on or about July 13, 1998 and City's Deed of Trust was recorded with the Spokane County Auditor July 17, 1998 under recording 4245363. (CP 86-94).

2. On October 12, 2000, Ms. Swan passed away. (CP 96).

3. On November 20, 2001, Mr. Line, as Personal Representative of Ms. Swan's estate, executed a Personal Representative's Deed conveying the Property to himself. (CP 27).

4. City's Note was executed as part of City's program to provide redevelopment funds, generally to unsophisticated homeowners with limited resources. Payments on City's Note had been deferred for an initial period expiring September 1, 2003 at which time the borrower's eligibility under the program could be reevaluated and payments could continue to be deferred. Reviews of the borrower's eligibility to continue with the loan in deferral status were not conducted, actions to transfer the loan from Ms. Swan to Mr. Line were not taken, and City never took the loan out of deferral status (which would have triggered the need to begin making monthly payments). (CP 79-83, para. 2-15; and CP 86-88).

5. Between November 2001 and 2010, Mr. Line and/or someone on his behalf contacted City several times indicating Mr. Line

was attempting to refinance the Property and pay City's loan off, was attempting to obtain additional financing under the City's program, and/or potentially wanted to assume the loan. (CP 80-84, paras. 6-16).

6. By January 2011, City learned Mr. Line had moved from the Property and the house was vacant. At that point, City referred the matter to Attorney Robert Delaney who customarily works in conjunction with the City's Community Development Department. (CP 84, para. 17).

7. On April 1, 2011, Mr. Delaney initiated non-judicial deed of trust foreclosure proceedings under City's Deed of Trust. (CP 132, para. 4).

8. On July 12, 2011, 30 days prior to the scheduled Trustee's Sale, Mr. Delaney was contacted by First American Title Company by phone and in writing asserting, on behalf of GMAC, that City's foreclosure proceeding was barred by a statute of limitations. (CP 133, para. 7).

9. Mr. Delaney contacted Mr. Line regarding the statute of limitations assertion. At Mr. Delaney's request, on or about July 18, 2011, Mr. Line signed and returned an "Acknowledgement and Reinstatement of Promissory Note." In that document, Mr. Line stated that the Property had been transferred to him in 2001, that he was not aware of any payments

having been made on the promissory note, and that he “hereby absolutely, unqualifiedly, and unconditionally” acknowledged the debt and waived the applicable six-year statute of limitations in order to permit City to judicially or non-judicially foreclose City’s Deed of Trust. (CP 133, para. 8; and CP 136).

10. On or about October 6, 2011, GMAC filed its Summons and Complaint in this matter. (CP 1 and 3).

11. GMAC acknowledges that Mr. Line is the record owner of the Property. (CP 4, para. 3; and CP 139:15-16).

12. GMAC has not contended it lacked actual or constructive notice of City’s Deed of Trust when it made its loan and recorded its Deed of Trust.

13. GMAC has not contended it was ever a party to City’s Note or Deed of Trust, a successor in interest under either City’s Note or Deed of Trust, an intended beneficiary under either of them, or a record owner of the Property.

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IV. LEGAL ARGUMENT

1. Standard for review.

This Court reviews de novo a trial court's order denying summary judgment, engaging in the same inquiry as the trial. *Triplett v. DSHS*, 166 Wn. App 423, 427, 268 P.3d 1027 (2012); *Masunaga v. Gapasin*, 52 Wn. App 61, 68, 757 P.2d 550 (1988). "When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. ... Summary judgment is proper if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. ... Statutory interpretation is also a question of law reviewed novo." *Triplett*, 166 Wn. App at 427; CR 56(c).

2. No issues of material fact remain.

The Parties agree that there are no disputed issues of material fact. (See e.g. CP 262:30). City and GMAC each contends, however, that applicable case law and statutory provisions, when applied to the undisputed facts, justify a ruling in its favor. Since there are no disputed issues of material fact, and all issues to be resolved depend upon

application of the facts to statutory provisions and case law, this case should be resolved as a matter of law. *Triplett*, 166 Wn. App at 427.

3. City's Deed of Trust has lien priority over GMAC's Deed of Trust.

City's Note and Deed of Trust were executed, and City's Deed of Trust was recorded, years before GMAC's loan was made and GMAC's Deed of Trust was recorded. The law in Washington is well-established that a Deed of Trust creates a lien against the property it describes and provides public notice thereof once recorded. With competing lien claims, the lien first in time is generally the lien first in right unless something alters the lien priority, such as a lienholder's voluntary subordination of its lien. See e.g. *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App 238, 246, 46 P.3d 812 (2002); *Aberdeen Fed. Sav. & Loan Assoc. v. Empire Manufactured Homes, Inc.*, 36 Wn. App 81, 672 P.2d 409 (1983); RCW 65.08.070. Unlike the parties in *BNC Mortgage*, GMAC does not dispute which lien was first in time, and agrees City's Deed of Trust was executed and recorded first. (CP 263: 9-11). GMAC has made no assertion that GMAC had any right to expect other than second lien priority when it made its loan or that City voluntarily subordinated its lien. GMAC

recorded its Deed of Trust in second lien position, and City asserts nothing has occurred that should change its lien priority.

GMAC contends, however, that because City did not follow some written procedures in its loan documents and payments were not made on City's Note for more than six years, the applicable statute of limitations expired. As a result, GMAC contends City's Deed of Trust was extinguished and GMAC's Deed of Trust now has first lien priority as a matter of law. (CP 263: 12 – 264: 12).

As discussed below, Washington law is clear that City's Deed of Trust lien was never void or invalidated. Rather, City's failure to comply with procedures stated in its written loan documents, absence of payments under City's Note for more than six years, and potential expiration of the applicable statute of limitations, rendered the lien under City's Deed of Trust at most voidable upon objection from a party with standing.

As further discussed below, since the potential statute of limitations defense made City's Deed of Trust lien potentially voidable, the objecting party's right to assert the claim is critical. GMAC has no standing to assert the statute of limitations defense it has raised. The only person involved in this case with the ability to assert a statute of limitations defense, Mr. Line, affirmatively chose to waive it. As a result,

City's potentially voidable lien was never invalidated and retains first priority lien status, ahead of GMAC's Deed of Trust lien.

4. Mr. Line could and did waive any lack of compliance with stated provisions in City's Note.

GMAC contends that, while parties to a contract can waive defenses, Mr. Line was never a party to City's loan agreement, never assumed personal obligations on City's Note, and did not provide anything in writing to confirm this debt until 2011. GMAC claims that, as a result, Mr. Line had no authority to waive any defect or reaffirm City's lien. (CP 265:14-31).

City contends, as discussed below, Mr. Line had authority as Personal Representative of Ms. Swan's Estate, and later as record owner of the Property, to waive defenses to enforcement of City's lien by his conduct, and later by written document.

When City made its loan in 1998, it dealt with its borrower, Ms. Swan. (CP 79-80, para. 2). Ms. Swan passed away in November 2000, and her son, Mr. Line, was appointed Personal Representative. (CP 80, para. 5). In that capacity, he transferred ownership of the Property to himself by Personal Representative's Deed. (CP 27). Through his attorney, he communicated with City, treating City's loan as a valid and

continuing obligation. (CP 80-81, para. 6 and 7). Thereafter, until 2011, Mr. Line communicated periodically with City, with City and Mr. Line both treating City's loan as a valid and continuing obligation. (CP 81-84, para. 8-16).

While serving as Personal Representative, Mr. Line was acting on behalf of the representative of Ms. Swan's estate. See gen. In re Estate of Kordon, 157 Wn.2d 206, 137 P.3d 16 (2006). At that time, Mr. Line could act for the estate, which he did through actions such as conveying the Property to himself by Personal Representative's Deed.

Thereafter, Mr. Line was the record owner of the Property. Even though there is no evidence he assumed personal liability for payment of City's Note, he had taken ownership of the Property subject to City's Deed of Trust lien under RCW 11.12.070. Mr. Line was also given statutory permission to assert a statute of limitations defense to foreclosure of City's Deed of Trust lien under RCW 7.28.300. (See pp. 23-24).

Parties involved in contractual dealings are always at liberty to waive or modify contractual requirements, either expressly or by their conduct. *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161, 166 (2003). Through Mr. Line's conduct between 2001 and 2011, as well as his express agreement in 2011, Mr. Line treated City's

loan as a continuing and valid obligation, acknowledged the debt, and waived any applicable statute of limitations.

The inconsistency in GMAC's positions regarding the right to take action in this case must also be noted. GMAC claims Mr. Line lacked authority to waive defenses to enforcement of City's liens because he was not a party to the original contract. If true, then GMAC's status as junior lienholder gave it no authority to assert anything with respect to City's loan. GMAC never was a party to City's contract; never had authority to speak or assert claims on behalf of Ms. Swan, Ms. Swan's estate, or Mr. Line; never was an intended beneficiary under City's contract; and never owned the Property. GMAC has no authority to collaterally challenge the validity of contractual dealings and obligations between City on the one hand, and Ms. Swan, Ms. Swan's estate, and Mr. Line on the other.

5. A defense based on application of a statute of limitations can be waived.

GMAC contended below that, upon expiration of the applicable statute of limitations on a note secured by a mortgage, early common law cases held the mortgage's lien automatically became invalid as a matter of law. According to GMAC, it was therefore irrelevant City had recorded

City's Deed of Trust first in time and irrelevant that GMAC had notice of City's prior Deed of Trust because "City failed to take action to keep its Deed of Trust from being extinguished." (CP 264:8-10). Similarly, GMAC contended below that, at common law, a mortgage lien was extinguished as a matter of law when the statute of limitations had run on enforcement on the underlying debt instrument. (CP 8:8 – 9:21). Further, GMAC claimed more recent cases, including this Court's decision in *CHD, Inc. v. Boyles*, 138 Wn. App 131, 157 P.3d 415 (2007), *rev. denied* 162 Wn.2d 1022, 178 P.3d 1033 (holding that a potential statute of limitations defense to foreclosure of a deed of trust is waived if not asserted by a proper party and renders the obligation potentially voidable, not void) were incorrectly decided. GMAC's position is incorrect; a deed of trust securing a note on which the statute of limitations has run is and always has been voidable and not void.

At early common law, Washington's Supreme Court recognized expiration of the statute of limitations is a defense to foreclosure of a mortgage lien that a party in interest can assert or waive, and that a failure to assert the defense by a party in interest will constitute a waiver. *George v. Butler*, 26 Wash. 456, 67 P. 263 (1901). The court also held that a successor property owner who was not personally obligated on a note

secured by a mortgage encumbering their property had separate standing to assert a statute of limitations defense in order to block foreclosure of the mortgage. This was true even though the statute of limitations defense could not be asserted by the obligor on the note. *Id.* at 461-63.

At 460-62, *George v. Butler* also contrasted two prior cases that had dealt with potential waiver of the statute of limitations defense in a foreclosure setting, *Fund of Gen. Assembly of Presbyterian Church v. First Presbyterian Church*, 19 Wash. 455, 459-60, 53 P. 671 (1898) and *Damon v. Leque*, 17 Wash. 573, 50 P. 485 (1897).

The court noted that in *First Presbyterian*, the obligor on a mortgage had failed to timely assert the statute of limitations defense and a foreclosure had been completed. The Supreme Court held that the defendant had “defaulted” on that defense and the mortgage foreclosure was upheld as valid. The court quoted *First Presbyterian* with approval recognizing “[A] pleading of the statute of limitations is a privilege which is accorded by the law to the defendant ... and it can avail itself of that privilege or answer upon the merits, or default ...” at 462.

The court then compared the result in *First Presbyterian* with what could be viewed as a contrary result obtained in *Damon v. Leque*, where the statute of limitations defense had been timely asserted by a party with

standing. The court reconciled the results in those two cases as follows: “[W]hen a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred, and the mortgage cannot be revived by the acts of the mortgagor as against a subsequent grantee without his consent.” *Id* at 462. (Emphasis supplied).

Thus, early common law cases established that a potential statute of limitations defense to foreclosure of a mortgage does not render the mortgage lien void, merely voidable; a property owner with no liability on the mortgage note had separate standing to assert the defense, and the defense would be waived if not timely asserted by a proper party.

The early common law rule is consistent with more recent decisions, such as *CHD, Inc. v. Boyles*, 138 Wn. App 131, 138-39, 157 P.3d 415 (2007) in which this Court recognized that the defense of the statute of limitations applicable to a note securing a deed of trust is waived if not timely asserted by a proper party, and that a foreclosure of such a deed of trust is and remains valid.

Again, GMAC’s position that potential expiration of a statute of limitations on a note secured by a mortgage or deed of trust invalid as a matter of law, whether under early common law, or based on more recent cases, is simply incorrect. The potential defense is subject to waiver by a

proper party and, as discussed below, Mr. Line was a proper party and did just that.

6. Mr. Line validly waived any statute of limitations defense.

As noted above in Section 4, Mr. Line was Personal Representative of Ms. Swan's estate in 2001 and entitled to act on its behalf. After that, he was the Property's record owner.

As noted above in Section 5, early common law cases such as *George v. Butler, supra*, established that the record owner of property, even if not personally obligated on a note securing a mortgage, has separate standing to assert a statute of limitations defense to foreclosure of a mortgage. The principle that the statute of limitations defense can be waived if not asserted by a proper party has been confirmed in more recent cases such as *CHD, Inc. v. Boyles, supra*. Finally as discussed in Section 7.b.(i) below, RCW 7.28.300 grants a statutory right to the record owner of property to assert a statute of limitations defense to foreclosure of a deed of trust.

As discussed above in Section 4, between 2001 and 2011, Mr. Line communicated a number of times with City and throughout the period Mr. Line and City treated City's loan as a valid and continuing obligation. (CP

80-84, para. 6-16). In July 2011, Mr. Line resolved any uncertainty when he executed and delivered to City a document entitled “Acknowledgement and Reinstatement of Promissory Note.” (CP 136). In that document, Mr. Line, acknowledged he was record owner of the Property, and “absolutely, unqualifiedly, and unconditionally acknowledged [t]he debt and waived [t]he applicable 6-year statute of limitations to pursue a claim on the Note by the Holder and/or to judicially or non-judicially foreclose the Deed of Trust.” (CP 136, para. 5).

The action and intention of Mr. Line in this regard could not be more clear. He waived defenses to enforcement of the Note, waived the applicable statute of limitations defense and specifically stated the Note was reinstated.

As discussed below, no case law and no statute has ever given a junior deed of trust beneficiary standing to assert a statute of limitations defense against foreclosure of a senior deed of trust. Nor has any decision or statute suggested a junior deed of trust beneficiary has any right to override the affirmative decision of the record owner of property to waive a statute of limitations defense. GMAC’s efforts in this regard are unsupported by law and inconsistent with principles governing standing.

7. GMAC has no standing to assert breach of contract or statute of limitations defenses.

As an alternative to GMAC's assertion that City's Deed of Trust was void, making it irrelevant whether GMAC has standing to interpose a statute of limitations defense in this matter, GMAC also claims that it does have standing. As noted below, no case law, statutory provision or equitable consideration supports GMAC's claim.

a. Court Decisions.

Principles of standing are intended to prevent one party from asserting another's legal rights. *West v. Thurston County*, 144 Wn. App 573, 578, 183 P.3d 346 (2008). In order to establish standing sufficient to permit a party to enforce private rights or challenge private rights, the challenging party must demonstrate that it has some real interest in the cause of action and that the interest is present and substantial, as opposed to an expectancy or future contingent interest. To do so, the challenging party must generally demonstrate that it was either a party to the contract at issue or an intended beneficiary under that contract. *Kim v. Moffett*, 156 Wn. App 689, 701, 234 P.3d 279 (2010); *Warner v. Design and Build Homes, Inc.*, 128 Wn. App 34, 43, 114 P.3d 664 (2005). In order to demonstrate that it was an intended beneficiary, GMAC would have to

show that the original contracting parties, City and Ms. Swan, intended to confer benefits on GMAC and create interest in its favor at the time they formed their contract. See *Kim v. Moffett*, 156 Wn. App at 701; *Ramos v. Arnold*, 141 Wn. App 11, 21, 169 P.3d 482 (2007). In addition to the above provisions, as noted above, common law cases establish that an owner of property has separate standing to assert a statute of limitations defense in opposition to an attempt to foreclose a mortgage, even when the successor property owner has no personal liability on the mortgage debt. See *George v. Butler*, 26 Wash. at 68.

GMAC satisfies none of the requirements in order to establish standing to challenge the manner in which the contract between City on the one hand, and Ms. Swan, her estate, and Mr. Line, on the other hand, were administered or handled. Similarly, GMAC satisfies none of the requirements to establish standing to assert a statute of limitations defense in opposition to foreclosure of GMAC's mortgage. GMAC was never a party or successor in interest under City's loan agreement, note or deed of trust; and was never an assignee or successor under any of those instruments or agreements. GMAC's loan did not come into existence until years after City's loan was made and City's Deed of Trust was recorded. There is no suggestion that City, Ms. Swan, or Mr. Line

intended at any time, directly or indirectly, to benefit or confer enforcement rights on GMAC under City's loan. Finally, GMAC has never been the record owner of the Property.

A conclusion that GMAC lacks standing to assert the statute of limitations defense in this case is also bolstered by decisions such as *Guaranty Surety Co. v. Coad*, 114 Wash. 156, 195 P. 22 (1921). In that case, the Supreme Court observed

For the sake of public policy, debtors are permitted by statutes of limitation, after the lapse of a certain time, to plead the statute as a bar to the collection of the ancient debt. But no one else can invoke it but the debtor; and, if the debtor desires to prefer a creditor, he has, under the unbroken decisions of this state, the right to do so; and he may prefer a creditor whose debt might be barred by the statute of limitations, if pleaded, and does so in good faith.

Id at 161.

b. Statutory Provisions.

GMAC argued below that statutory provisions provide GMAC with standing to assert a statute of limitations defense that block foreclosure of City's Deed of Trust. In this regard, GMAC relied on RCW 7.28.300; Washington's Uniform Declaratory Judgment Act ("UDJA"), RCW Chapter 7.24; and Washington's Quiet Title Statute, RCW 7.28.010. In evaluating these claims, as noted above, this Court interprets statutes as

a matter of law. *Triplett*, 166 Wn. App at 427. In so doing, “a court’s fundamental objective is to ascertain and carry out the legislature’s intent.” *Triplett*, 166 Wn. App at 427. (Citation omitted). If a “statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Triplett*, 166 Wn. App at 427. (Citation omitted).

(i) RCW 7.28.300.

RCW 7.28.300 provides “The record owner of real estate may maintain an action to quiet title against the lien of 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 limitations ...” (Emphasis supplied).

GMAC contended below that RCW 7.28.300 was consistent with early common law cases and is remedial. GMAC then contended the statute should therefore be construed to permit “any interested person” to have the right to bring a quiet title claim, even though the statute only states that the right is extended to the property’s record owner. (CP 144:20 – 145:5). GMAC claimed there is no logical reason that the legislature would have wanted to protect only the property owner from the

“harsh inequities” of a foreclosure that would otherwise be time-barred, and not give the same protection to lienholders. (CP 150:5-19).

GMAC unsuccessfully asserted virtually the same argument in another case involving statutory rights granted to mortgagees, *Summerhill Village Homeowners Association v. Roughly*, 166 Wn. App. 625, 270 P.3d 639 (2012). In that case, GMAC Mortgage unsuccessfully argued that it should be allowed to redeem property that had been foreclosed for non-payment of condominium assessments by a condominium owners’ association. Even though GMAC did not qualify as a potential redemptioner under a plain reading of the language used in the statute, GMAC contended applying the statute as written was unfair and led to absurd results. The Court of Appeals applied customary rules of statutory construction in concluding that statutes are to be interpreted as a matter of law with the statute’s language to be given its plain meaning. Since the language of the statute at issue was unambiguous and nothing showed the statute was intended to mean anything other than what it stated, the statute was enforced, and its scope was limited, as it was written.

The same analysis and result should apply to 7.28.300. The statute extends a right to the record owner of property to assert a defense for foreclosure of a mortgage or deed of trust based upon running of the

statute of limitations. The statute does not purport to extend that right to any other party, such as a junior lienholder like GMAC. Nor does the statute make assertion of the defense mandatory. It states that the property's record owner may assert the claim, not that the record owner must do so.

Further, if GMAC's position were correct, it would have been unnecessary in cases interpreting RCW 7.28.300 to analyze whether a party challenging foreclosure of a deed of trust based on expiration of a statute of limitations held the status of a "record owner" of the property. That status was clearly presented as having significance under the statute, however, in cases such as *Bank of New York v. Hooper*, 164 Wn. App. 295, 263 P.3d 1263 (2011) *rev. denied* 173 Wn.2d 1021; *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109 (2010); and *Walcker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 904 P.2d 1176 (1995).

RCW 7.28.300's provisions, including the right, it extends to a property record owner and the permissive nature of that right would be entirely superfluous if expiration of the statute of limitations on a note rendered enforcement of a mortgage or deed of trust securing that note invalid as a matter of law or if any lienholder could assert the defense. GMAC's construction of RCW 7.28.300 is incorrect.

(ii) Washington's Uniform Declaratory Judgment Act
(“UDJA”).

GMAC also contended below that it has standing to assert the statute of limitations defense in this case based on the provisions of Washington's UDJA, RCW Chapter 7.24. GMAC's first assertion in that regard was that its standing was not relevant because it was not attempting to assert rights under a note obligation. Instead, it was purportedly attempting to enforce its interest in real property as a lienholder against “an outdated note obligation and an extinguished deed of trust.” (Emphasis supplied). (CP 266:24-27). As noted above, this line of argument was based on GMAC's incorrect assertion that potential expiration of the statute of limitations rendered City's Deed of Trust lien void and unenforceable. As discussed above, case law and statutory provisions make it clear that potential expiration of a statute of limitations renders a deed of trust lien at most voidable, not void.

In support of its alternative claim that it had standing, GMAC initially relied on *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002), claiming the case granted standing to seek substantive relief under Washington's UDJA to any party whose financial interests would be affected. GMAC argued that the

Supreme Court had granted fire districts with standing under the UDJA to challenge annexation of property by a city even though the districts' properties were not included within the annexation plan. (CP 143:17-29).

City responded that this portion of the Supreme Court's 2002 ruling had been reversed in the Supreme Court's revised decision in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). In that revised decision, the Supreme Court denied the fire districts any standing under the UDJA because their interest in the challenged statute was not direct.

GMAC responded by asserting that its reference to the earlier decision "was simply to illustrate that to establish standing under the UDJA, the plaintiff must have a sufficient interest, which can be a financial interest in the instrument underlying the dispute." (Emphasis supplied). (CP 267:6-14). It must be noted, that in ruling that the fire districts had no standing, the Supreme Court provided guidance on interpretation of standing under the UDJA stating "[t]his statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d at 802.

To the extent clarified by GMAC, City does not dispute its explanation of the standing requirement. To establish standing under the UDJA, GMAC would need to demonstrate that it has a financial interest in the instrument underlying the dispute, namely City's Note or City's Deed of Trust. The undisputed evidence demonstrates it never has had an interest in either.

Alternatively, GMAC contended that the case of *Casey v. Chapman*, 123 Wn. App 670, 98 P.3d 1246 (2004) would support GMAC's claim to standing. In that case, a party to a security agreement sought a declaration under the UDJA that foreclosure of its security interest, and the resulting purchase of the collateral foreclosed upon, was valid and that the purchaser had acquired all interests that had been pledged. Without discussing the issue at length, the Court of Appeals noted that a person interested under a written contract whose rights are affected by that contract can seek declaratory relief, as can parties whose financial interests are affected by the outcome of a declaratory judgment action. The Court of Appeals did not cite the Supreme Court's revised decision in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake* and did not purport to enlarge the standing provisions that would apply under the UDJA. Notably, *Chapman*, the party whose standing was challenged,

was an original party to the contract at issue. As a result, he had standing under traditional concepts established by case law.

Even if GMAC had a right to request declaratory relief under the UDJA, that would not mean GMAC had a right to obtain the substantive relief it requests. Pursuant to RCW 7.24.010, the UDJA grants a court the ability to declare rights, status and legal relations of parties “whether or not further relief is or could be claimed.” RCW 7.24.020 provides that certain parties interested in contracts can ask a court to have a court “determine any question of construction or validity” under the contract and “obtain a declaration of rights, status or other legal relations thereunder.” Nothing in the statute purports to grant a party with no standing in a contract at issue with the right to interject itself into the contractual dealings between third parties and assert substantive rights under that contract.

At most, GMAC should be entitled to a declaratory ruling stating that City’s Note was a potentially voidable obligation, that the only person involved in the case with standing, Mr. Line, expressly chose to affirm rather than attempt to avoid. GMAC should be granted no standing under the UDJA to question or challenge the continuing validity of City’s Note or City’s Deed of Trust or to override Mr. Line’s express action.

(iii) Quiet Title Statute.

GMAC argued below that it has a separate right to quiet title in the Property, free of City's lien under RCW Chapter 7.28.010 because quiet title litigation is equitable in nature and GMAC does not have an adequate remedy available at law. (CP 150:20 – 151:14). To pursue a quiet title claim, RCW 7.28.010 required GMAC to demonstrate that it had a valid subsisting interest in the Property and a right to possession. See *Washington Securities and Investment Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App 188, 130 P.2d 880 (2006) *rev. denied* 158 Wn.2d 1023, 149 P.3d 379. GMAC is merely a junior deed of trust beneficiary that has not foreclosed its lien. It has no right to possession of the Property. Pursuant to RCW 7.28.230, a mortgagee has no right to possession of a property until completion of a foreclosure and sale. See *Coleman v. Hoffman*, 115 Wn. App 853, 863-65, 64 P.2d 65 (2003). GMAC does not claim it has possession of the Property and has no standing under RCW 7.28.230.

Finally, GMAC argued that it should not be required to meet the possession requirement under RCW 7.28.230 because it has no adequate remedy at law. (CP 151:1-8). Contrary to GMAC's assertion that it has no remedy at law, and that equity must intervene to give it greater rights

than those it obtained when it made its loan, GMAC retains the same legal rights under its Note and Deed of Trust as those for which it bargained when it made its loan. GMAC has articulated no bases for suggesting otherwise.

c. Equity.

GMAC also argued below that its lien should be promoted into first lien priority position based on equitable considerations. GMAC relied on cases such as *Smith v. Monson*, 157 Wn. App 443, 447, 236 P.3d 991 (2010), and *Kobza v. Tripp*, 105 Wn. App 443, 447, 236 P.3d 991 (2010) in support of this contention. (CP 268:1 – 269:6; and CP 149:12 – 150:2). In *Smith v. Monson*, the court recognized that standing to assert a claim in equity “resides in the party entitled to equitable relief ...” *Id.* at 447.

In *Smith v. Monson*, the plaintiff was held entitled to recover in equity in order to fulfill a promise previously made to the plaintiff and on which the plaintiff had justifiably relied. The plaintiff had conveyed real property to the defendants so that the defendants could obtain a loan to purchase a mobile home to place on the subject property. The evidence established that the defendants had promised to convey title to the

property back to the plaintiff once the loan obtained to purchase the home had been paid. The defendants failed to fulfill their promise and equity intervened to grant the plaintiff a security agreement so that the defendants' promise, upon which the plaintiff had reasonably relied, would be honored. In that case, the plaintiffs demonstrated their entitlement to equitable relief based on the manner in which they had been misled and unfairly treated.

GMAC has given no reason why equity should intervene to grant it a better position than that for which it originally bargained. GMAC obtained its Deed of Trust from Mr. Line in second lien position. It had notice of City's existing lien. It does contend it was misled in this regard. GMAC did not refinance another loan in order to justify it receiving equitable relief under doctrines such as equitable contribution recognized in cases such as *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007), nor does GMAC present evidence suggesting that it was an unsophisticated lender that was unable to assess the risks of its loan when it entered into its agreement with Mr. Line.

GMAC has articulated no reasons why equity "resides" in it. Its position is similar to that presented in *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App 238, 46 P.3d 812 (2002). As in that case, GMAC

presents no reasons why equitable considerations should favor it. The ultimate responsibility for making a loan in second lien position rests with GMAC, and only GMAC. GMAC should not now be permitted to force City to shoulder the responsibility for GMAC's decision when it made its loan. GMAC is in no worse off position today, as a second lienholder, than it was in 2008 when it made its loan.

Despite these undisputed facts, GMAC asserted below that Washington's courts and the legislature "have consistently held that giving priority and/or effect to an outdated mortgage or deed of trust is inherently inequitable ..." (CP 268:14-17). Contrary to GMAC's assertion, as noted above, Washington courts have enforced and upheld mortgage and deed of trust foreclosures in connection with notes that were arguably barred by the applicable statute of limitations had a party with standing asserted the defense. See e.g. CHD, Inc. v. Boyles, supra.

GMAC's apparent contention that City's lack of strict compliance with written requirements in its loan documents was somehow "inequitable" is also incorrect. "[A] breach of contract is neither immoral or wrongful, it is simply a broken promise." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 53 P.3d 1223 (2002). (Citation omitted).

Finally, GMAC suggested below that City's failure to have Mr. Line personally assume the obligations on City's Note was somehow improper and should serve to deny City a remedy. As noted above, Mr. Line's acceptance of title to the property from Ms. Swan's estate resulted in his taking title subject to City's Deed of Trust lien pursuant to RCW 11.12.070. It did not invalidate that lien. Washington case law recognizes that loan transactions in which no borrower has personal liability, often referred to as non-recourse loans, are accepted and appropriate loan transactions. See e.g. *Seattle-First Nat'l Bank v. Hart*, 19 Wn. App 71, 72-73, 573 P.2d 827, 828-29 (1978). The same is true with respect to loans in which an original obligor can no longer be pursued for collection of a debt, such as a borrower discharged from personal liability in bankruptcy. *Boeing Employees' Credit Union v. Burns*, 167 Wn. App 265, 272 P.3d 908 (2012).

V. CONCLUSION

For the reasons stated above, City requests that the trial court's denial of its summary judgment motion be reversed and that this matter be remanded to the trial court for further action consistent with that ruling.

RESPECTFULLY SUBMITTED this 25th day of July 2012.

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By:  _____

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APPENDIX

Washington Statutes**Title 7. Special proceedings and actions****Chapter 7.24. Uniform declaratory judgments act***Current through 2012 Second Special Session***§ 7.24.010. Authority of courts to render**

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Cite as RCW 7.24.010**History.** 1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.CASEMAKER © 2012 Lawriter, LLC. All Rights Reserved. [Privacy](#) [Settings](#) [Contact Us](#) 1-877-659-0801

Washington Statutes**Title 7. Special proceedings and actions****Chapter 7.24. Uniform declaratory judgments act**

Current through 2012 Second Special Session

§ 7.24.020. Rights and status under written instruments, statutes, ordinances

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Cite as **RCW 7.24.020**

History. 1935 c 113 § 2; RRS § 784-2.

Washington Statutes
Title 7. Special proceedings and actions
Chapter 7.28. Ejectment, quieting title

Current through 2012 Second Special Session

§ 7.28.010. Who may maintain actions – Service on nonresident defendant

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his or her unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his or her grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court.

Cite as RCW 7.28.010

History. Amended by 2011 c 336, §170, eff. 7/22/2011.

1911 c 83 § 1; 1890 c 72 § 1; Code 1881 § 536; 1879 p 134 § 1; 1877 p 112 § 540; 1869 p 128 § 488; 1854 p 205 § 398; RRS § 785. Formerly RCW 7.28.010, 7.28.020, 7.28.030, and 7.28.040.

Note:

Process, publication, etc.: Chapter 4.28 RCW.

Publication of legal notices: Chapter 65.16 RCW.

Washington Statutes
Title 7. Special proceedings and actions
Chapter 7.28. Ejectment, quieting title

Current through 2012 Second Special Session

§ 7.28.230. Mortgagee cannot maintain action for possession – Possession to collect mortgaged, pledged, or assigned rents and profits – Perfection of security interest

(1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: PROVIDED, That nothing in this section shall be construed as any limitation upon the right of the owner of real property to mortgage, pledge or assign the rents and profits thereof, nor as prohibiting the mortgagee, pledgee or assignee of such rents and profits, or any trustee under a mortgage or trust deed either contemporaneously or upon the happening of a future event of default, from entering into possession of any real property, other than farm lands or the homestead of the mortgagor or his or her successor in interest, for the purpose of collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof for application in accordance with the terms of such mortgage, trust deed, or assignment.

(2) Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of RCW 65.08.070 as now or hereafter amended shall be applicable to such rents and profits, and such rents and profits are excluded from *Article 62A.9 RCW.

(3) The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee. Any lien created by such assignment, mortgage, or pledge shall, when recorded, be deemed specific, perfected, and choate even if recorded prior to July 23, 1989.

Cite as RCW 7.28.230

History. Amended by 2011 c 336, §179, eff. 7/22/2011.

1991 c 188 § 1; 1989 c 73 § 1; 1969 ex.s. c 122 § 1; Code 1881 § 546; 1877 p 114 § 550; 1869 p 130 § 498; RRS § 804.

Note:

***Reviser's note:** Article 62A.9 RCW was repealed in its entirety by 2000 c 250 § 9A-901, effective July 1, 2001. For later enactment, see Article 62A.9A RCW.

Washington Statutes
Title 7. Special proceedings and actions
Chapter 7.28. Ejectment, quieting title

Current through 2012 Second Special Session

§ 7.28.300. Quieting title against outlawed mortgage or deed of trust

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 limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

Cite as RCW 7.28.300

History. 1998 c 295 § 17; 1937 c 124 § 1; RRS § 785-1.

Note:

Limitation of actions, generally: Chapter 4.16 RCW.

Real estate mortgages, foreclosure: Chapter 61.12 RCW.

RCW 11.12.070

Devise or bequeathal of property subject to encumbrance.

When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

A charge or encumbrance upon any real or personal estate for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate, previously executed. The devises and legacies therein contained shall pass and take effect, subject to such charge or encumbrance.

[1965 c 145 § 11.12.070. Prior: 1955 c 205 § 2; 1917 c 156 § 31; RRS § 1401; prior: Code 1881 § 1324; 1860 p 170 § 26.]

RCW 65.08.070
Real property conveyances to be recorded.

***** CHANGE IN 2012 *** (SEE 6095.SL) *****

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

[1927 c 278 § 2; RRS § 10596-2. Prior: 1897 c 5 § 1; Code 1881 § 2314; 1877 p 312 § 4; 1873 p 465 § 4; 1863 p 430 § 4; 1860 p 299 § 4; 1858 p 28 § 1; 1854 p 403 § 4.]

Notes:

RCW 65.08.070 applicable to rents and profits of real property: RCW 7.28.230.

FILED

JUL 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
No. 284352
By _____

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

GMAC MORTGAGE,

Respondent,

v.

CITY OF SPOKANE,

Appellant.

**JEANNETTE J. SWAN
HEIRS OF JEANNETTE J. SWAN, FRANK
LINE AND JANE DOE LINE, and the marital
community thereof, and ROBERT S.
DELANEY PLLC, TRUSTEE,**

Defendants.

Certificate of Service

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Layman Law Firm, PLLP
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Spokane, WA 99202-1335
(509) 455-8883 Telephone
(509) 624-2902 Facsimile

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury according to the laws of the State of Washington that the following statements are true and correct:

On the 26 day of July 2012, I caused to be served a true and correct copy of the ~~foregoing document~~ Brief of Appellant in this matter by the method indicated below, and addressed to the following:

<input type="checkbox"/>	U.S. Mail, postage prepaid	MR. PETER WITHERSPOON ATTORNEY AT LAW 601 WEST MAIN AVENUE SUITE 714 SPOKANE, WA 99201-0636
<input checked="" type="checkbox"/>	Hand Delivery	
<input type="checkbox"/>	Overnight Mail	
<input type="checkbox"/>	Facsimile (509/624-6441)	
<input type="checkbox"/>	Electronically <u>pwitherspoon@workwith.com</u>	

DATED this 26 day of July 2012.


LISA Y. OESTREICH-BERG