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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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No. 58927-0

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BEAL BANK, SSB,  
a Texas state savings bank,

Appellant,

v.

STEVEN SARICH and KAY SARICH,  
husband and wife,  
and  
JOE CASHMAN and JANE DOE CASHMAN,  
husband and wife,

Respondents.

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BRIEF OF RESPONDENTS CASHMAN

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## STATEMENT OF THE ISSUES

1. Did a nonjudicial foreclosure sale conducted by a senior lienor during the pendency of a junior lienor's claim for judicial foreclosure extinguish the underlying claims of the junior lienor by operation of *Washington Mutual v. United States*, 115 Wn.2d 52, 793 P.2d 969, 800 P.2d 1124 (1990) and RCW 61.24.100?

2. If a junior lienor misrepresented to its borrowers that it would satisfy the claim of a senior lienor in order to preserve its security interest and if this misrepresentation deterred the borrowers from acting on their own behalf to stop a trustee's sale conducted by the senior lienor, should equity reduce the claim of the junior lienor by the value of the security interest lost as a result of the trustee's sale?

3. Does a borrower have a statutory right to attorney's fees against the assignee of a lender who reserved a right to fees in a written loan agreement incorporated by reference into the terms of the assigned note?

### STATEMENT OF THE CASE

Joe Cashman signed a note (CP 104-106) in favor of U.S. Bank. At the bottom of its first page, the note indicates that it was “issued under a Term Loan Agreement.” The *Term Loan Agreement* (CP 113 at ¶1.5) obligates the borrower, upon default, to pay attorney’s fees.

Beal Bank alleged in its initial complaint that it had become the holder of the note and that it was owed a total of \$189,244.70.<sup>1</sup> It also alleged that the note was secured by a deed of trust on a Seattle condominium. (CP 3-48) The bank demanded that the deed of trust be judicially foreclosed. (CP 10)

Joe Cashman responded to this complaint by requesting, among other things, that the Superior Court “establish a reasonable upset price for the subject property before any foreclosure sale takes place.” (CP 52) Although Joe Cashman never owned any interest in the condominium, it was owned by his co-borrower Steve Sarich and his wife Kay Sarich. (CP 6)

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<sup>1</sup>The bank joined a claim on a second note signed only by the other defendants. This second note has no bearing on any issue concerning Joe Cashman in this appeal. Joe Cashman nevertheless reserves his right to claim that any partial payments or offsets first be credited to the note bearing his signature.

After each of the initial pleadings had been filed, a trustee issued a *Notice of Sale* with respect to a senior deed of trust held by Washington Mutual Bank. (CP 145-151, 163-164) Beal Bank notified defendants by letter that it would attend the trustee's sale to "pay off" the deed of trust (CP 153) and "take out the lien of Washington Mutual Savings Bank." (CP 164) By paying the trustee \$51,157.34 by August 25, 2005 (CP 149) or \$74,907.67 by November 21, 2005, any interested party could have stopped the trustee's sale. (CP 164) After November 21, 2005, there remained ten days during which the sale could have been stopped by making a payment of \$1,543,984.09. (CP 149)

Beal Bank's announcement that it would "pay off" Washington Mutual Bank deterred Joe Cashman from taking any action of his own to stop the trustee's sale. (CP 164) By its silence, Beal Bank admits that it made no payment to the trustee, and it also admits that it gave defendants no notice of its change in plans.

Washington Mutual Bank purchased the Sarich condominium at its own trustee's sale for \$1,648,630.06. (CP 155) It sold the property sixty-two days later for a profit of \$401,369.94. (CP 157) After this second sale, Beal Bank amended its complaint to drop its demand for judicial foreclosure. (CP 67-74) In his amended answer to this

amended complaint, Joe Cashman asserted an equitable estoppel defense. He based this defense upon Beal Bank's misrepresentation that it would make a payment to stop the trustee's sale. (CP 178-183)

The parties filed cross motions for summary judgment. The Superior Court dismissed each of Beal Bank's claims (CP 415-418) and awarded each of the defendants their attorney's fees, including \$4,812.50 payable to Joe Cashman. (CP 456-457)

## ARGUMENT

### I. CASHMAN IS DISCHARGED FROM HIS DEBT TO THE SAME EXTENT AS THE SARICHES

The Sariches cited *Washington Mutual v. United States*, 115 Wn.2d 52, 793 P.2d 969, 800 P.2d 1124 (1990), for the proposition that a nonjudicial foreclosure sale by a senior lienor will extinguish—by operation of RCW 61.24.100—not only the security interest of a junior lienor but its underlying claim. To the extent this proposition is true, the debt of Joe Cashman is likewise extinguished. RCW 61.24.100(1) discharges “*any borrower, grantor, or guarantor after a trustee’s sale.*” (Emphasis added.) The use of the word *borrower* in addition to the word *grantor* reveals a clear intention of the Legislature to include within the scope of the discharge debtors who do not themselves own the property which is pledged to secure the debt.

### II. THE BANK’S CLAIM SHOULD BE OFFSET BY THE VALUE OF THE SECURITY INTEREST LOST AS A CONSEQUENCE OF ITS MISREPRESENTATION

The Superior Court cited *Washington Mutual* as the basis for its decision. That is undeniably true, and that is also why Beal Bank spared little effort in its opening brief to distinguish the holding of that case. But Joe Cashman

provided the Superior Court with a different and even more compelling rationale for its decision. “Where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition.” *Ertman v. City of Olympia*, 95 Wn.2d 105, 107-108, 621 P.2d 724 (1980).

In his final pleading, Joe Cashman raised equitable estoppel as an affirmative defense. (CP 178-183) Not only did he and the other defendants file evidence to support that defense, evidence consisting of public records and written communications from Beal Bank; but he also presented written argument to the Superior Court explaining why this evidence compelled dismissal of the bank’s claims. (CP 166-171)

The Washington Supreme Court has recently taken the opportunity to restate the elements of equitable estoppel:

Three elements must be established in order to support an equitable estoppel claim. It must be shown that (1) the conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party, (2) the party asserting estoppel took action in reasonable reliance upon that conduct, act, or statement, and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conducts, act, or statement.

*Sorenson v. Pyeatt*, No. 77229-1, slip op. at 16 (Wash., Nov. 9, 2006).

The evidence filed by defendants sufficiently proves five material facts: (1) Beal Bank informed defendants by letter that it would stop the trustee's sale by "paying off" Washington Mutual Bank;<sup>2</sup> (2) defendants ceased their own efforts to stop the sale in reasonable reliance upon these letters; (3) Beal Bank allowed the trustee's sale to take place without making the promised payment; (4) Beal Bank gave defendants no notice of its change in plans; and (5) Washington Mutual purchased the Sarich condominium at its own trustee's sale and sold it sixty-two days later for a profit of \$401,369.94—an amount greater than Beal Bank's claim against Joe Cashman.

Beal Bank chose not to controvert these facts, resorting instead to a bare legal argument.

The bank held a valuable security interest, a power of sale over a view condominium on the crown of Queen Anne Hill, one of Seattle's most affluent neighborhoods. The assessed value of this property put the bank on notice

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<sup>2</sup>The letters were written by Beal Bank's attorney of record in the Superior Court. An attorney has authority to bind a client the same as any other agent by making a statement within the scope of his or her agency. *City of Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 216, 505 P.2d 168 (1973). The statements made by Beal Bank's attorney clearly pertained to matters within the scope of her authority.

of the adequacy of its security interest, despite its status as a junior lienor.<sup>3</sup> (CP 141) Joe Cashman was aware of these facts. That is why he requested the establishment of an upset price. (CP 52)

When Washington Mutual commenced its nonjudicial foreclosure proceeding, its trustee provided notice of the size of the payment required to stop the pending sale. *See* RCW 61.24.040 (requirements of notice of sale). This payment was small in proportion to the surplus value of the property available for the benefit of Beal Bank. Defendants, wanting to avoid deficiency judgments, had incentives of their own to preserve this surplus value. They would likely have paid the trustee by their own devices if Beal Bank had not informed them that it would pay the trustee with its own funds.

Knowing that Beal Bank had good reason to preserve its own security interest, defendants acted reasonably: They stood aside, allowed the bank to stop the trustee's sale through its own efforts, and waited to settle their accounts with the bank after its forthcoming judicial foreclosure sale. This course of action would have preserved the surplus value of the condominium for the mutual benefit of each party in this case.

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<sup>3</sup>The condominium was assessed by King County in 2004 as having a value of \$2,487,000. (CP 140)

However, Beal Bank did not pay the trustee as it promised it would do. By the time defendants first became aware of the bank's change in plans, Washington Mutual had already purchased the property at its own trustee's sale. The measure of defendants' injury is the profit earned by Washington Mutual—an amount in excess of \$400,000.

Beal Bank asserts a right to exercise its own "business judgment," including its decision not to pay the trustee. This assertion, although true as an isolated legal principle, completely misses the point. If Beal Bank had kept its silence, it would indeed have had no duty to pay the trustee. What Beal Bank had no right to do was *communicate* an intention to make the payment, then act contrary to that intention without first giving adequate notice of its change in plans. By failing to act consistently with its stated written intention, Beal Bank induced defendants not to act on their own behalf and for their own benefit.

Equity declares done what should have been done. If Beal Bank had not made its misrepresentation, the parties would have retained a security interest worth \$401,369.94. This security interest could have been liquidated at a judicial foreclosure sale and paid over to Beal Bank, or it could have been credited to the defendants by the establishment of a fair upset price. *See* RCW 61.12.060. The Cashman debt,

either way, would have been satisfied without the entry of a deficiency judgment against him.

### **III. CASHMAN HAS A STATUTORY RIGHT TO ATTORNEY'S FEES DUE TO THE LANGUAGE OF A WRITTEN LOAN AGREEMENT**

Beal Bank argued in its opening brief (at 30) that the note signed by Joe Cashman “does not have an attorney fee provision” and that he therefore “had no statutory right or contractual right to claim fees or costs.”

Although it is literally true that the note contained no attorney's fee provision, the bank nevertheless bases its conclusion on a half truth insofar as the note is not the only contract document signed by Joe Cashman. He also signed a *Term Loan Agreement* (CP 113-118), and that agreement is incorporated by reference into the note. (CP 104)

The attorney's fee provision is labeled as Paragraph 1.5 of the *Term Loan Agreement*. (CP 113) Although this provision is worded to give the right only to the initial lender and its assignees, RCW 4.84.330 nevertheless entitles Joe Cashman, as a prevailing party, also to that right. The Superior Court had access to this same evidence and same statute (CP 517-521) and obviously made the correct decision.

Joe Cashman charged the bank no more and no less

than what his own attorney charged him. The bank is therefore the beneficiary of a "discounted rate" (CP 514) the reasonableness of which becomes apparent by comparing the fees awarded to the various defendants.

The same contractual provision and same statute entitle Joe Cashman to his attorney's fees on appeal. Joe Cashman does now hereby respectfully request that he be awarded those fees.

#### **CONCLUSION**

The evidence and legal authorities set forth above demonstrate that the correct decision was made by the Superior Court. The Court of Appeals should therefore affirm the Superior Court and award Joe Cashman his attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 12th day of  
January 2007.



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## APPENDIX

### 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 whose favor final judgment is rendered.

### RCW 61.12.060

In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with

interest and costs, at any time before sale, shall satisfy the judgment. The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.

The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted.



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DATED this 12th day of January 2007.



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