

64121-2

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No. 64121-2

**THE COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON**

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**SCOTT AND KIM SHUMWAY, *Appellant (s),***

v.

**CHASE HOME FINANCE, LLC, *Respondent.***

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**STRICT REPLY BRIEF OF APPELLANT(S) (RAP 10.1(b))**

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*(None)*

The Appellants, Scott and Kim Shumway, submit the following strict reply brief pursuant to RAP 10(b) in opposition to the brief of the respondent.

#### A. ARGUMENT

#### **THE TRIAL COURT'S ORDER ON RECONSIDERATION IS VOID OF ANY LANGUAGE REGARDING PROCEDURAL MATTERS.**

The Respondent, Chase Home Finance, LLC has attempted to argue that the Superior Court order denying reconsideration was based upon procedural defects in the Shumway's motion for reconsideration.

Specifically, Chase states that:

As the Shumways failed to timely serve their motion for reconsideration the Superior Court correctly denied their motion for reconsideration.

*Respondent's Brief, p. 7.* The Shumway's motion for reconsideration was filed and served on June 19, 2009 (ten days after the entry of the order denying reconsideration), and there is nothing in the record to indicate that the Superior Court acknowledged any procedural defects in the Shumways motion. In fact, the order denying reconsideration merely states that the motion is denied, and is void of any specific grounds for such a denial, therefore it is wholly improper for Chase Home Finance, LLC to interpose a basis for the ruling that does not appear in the record. *CP 70.* There was nothing procedurally defective with the Shumway's motion.

Chase Home Finance, LLC further attempts to suggest that the Shumways failed to file a calendar note, and therefore, this was a basis for denial of the Shumways motion for reconsideration.

The Shumways failed to comply with this rule as no calendar note setting the motion for reconsideration for hearing was filed. As the motion was not properly noted the trial court correctly denied it.

*Respondent's Brief, p. 8.* As stated above, the order denying reconsideration, dated August 12, 2009, does not contain any reference to the specific grounds for denial of the motion, therefore, the only inference that can be drawn from the denial, are those grounds enumerated in the court's original order, denying the Shumway's motion to vacate. *CP 64, 70.* Consequently, Chase Home Finance, LLC's argument that the failure to file a note for motion would serve as a ground for denial of the motion, is not supported by the record.

Furthermore, the rules quoted by Chase Home Finance, LLC do not apply. SCLCR 59(e)(3)(B) applies only if oral argument is requested, and in this case, no oral argument was requested, nor was oral argument given on the motion for reconsideration. Moreover, the court has the discretion to set a matter on its own calendar and waive both the need for a note for motion (or order to show cause) and the requirement of hearing confirmation. Notwithstanding that fact, there is simply no evidence in the record that the Superior Court reviewed any matter of a procedural

nature related to the Shumway's motion for reconsideration, nor is there any evidence in the record that such matters formed the basis of the Court's ruling. Rather the Court's ruling would appear to be a well intentioned effort on the part of the Superior Court to arrive at an equitable solution to Chase's problem, without first having considered that such unorthodox relief would have bizarre and unintended results to the Shumways.

**THE NATURE OF THE RELIEF GRANTED TO CHASE DEMANDS THAT THE SHUMWAYS WERE NECESSARY PARTIES WHO SHOULD HAVE PARTICIPATED.**

Chase Home Finance, LLC relies upon the case of Stephens v. Kesselburg, 19 Wn.2d 427, 143 P.2d 289 (1943) for the proposition that the fee title owner is not a necessary party to a quiet title dispute between lienholders, because the only issue at hand would be who has superior title between the lienholders. This argument may have had some merit, if the Superior Court had merely allocated priority between the first and second position lienholder, however, in this case, the Superior Court granted unusual and extraordinary relief, by creating a new third position lien, in order to equitably satisfy Chase Home Finance, LLC.

The Court took this action, ostensibly to solve the problem of the relative size of Chase's loan in comparison to the loan that it paid off. While a novel solution, it is not a normal application of equitable

subrogation, and would result in harm to parties who were not afforded an opportunity to participate in the case.

The fee title owner is called a “grantor” for deeds of trust, because the relationship necessarily implies that the fee owner must consent to the imposition of a new lien on their property. It is the Shumway’s position that they would have been necessary parties, even if the relief sought by Chase Home Finance, LLC was merely to be placed in superior lien position to West Coast. If no new liens were created, then in theory, the equitable argument would suggest that the Shumways acquiesced to the existence of two liens, and therefore, switching the lien positions would not be prejudicial to them. In this case, an entirely different result took place. The court created a new (third position) lien, rather than treat the balance of Chase Home Finance LLC’s loan as unsecured, which is the common practice, in both Bankruptcy Courts, and Superior Courts. In fact, the Appellants have not found a reported case where a second position lien was equitably split in a first and third position lien, and it is doubtful that if such a reported case exists, that the trial court would have accorded such relief without, at least, constructive notice to the homeowner. Absent such notice, bizarre and inequitable results would take place, such as what took place in this case.

Chase’s reliance upon Bank of America, N.A. v. Prestance Corp. 160 Wn.2d 560, 160 P.3d 17 (2007) is misapplied, as the application of

equitable subrogation took place correctly in that case. In this case, if the Superior Court would have applied equitable subrogation in the normal fashion, as in the Bank of America case, then Chase's second position lien would have been placed in first position, superior to West Coast. When West Coast performed its foreclosure, any surplus funds realized from that sale would have belonged to the Shumways. Furthermore, Chase's lien would not have been impacted by a junior lienholder foreclosing, and therefore, it would have the option of foreclosing, without any negative impact on the Shumways, because deficiencies are specifically disallowed under Washington State law. Sadly, in this case, because the court misapplied the doctrine of equitable subrogation, not only are the Shumways not entitled to any surplus from the non-judicial foreclosure by the second position lienholder, but Chase can foreclose its first position lien (i.e. take relief against the property), while at the same time obtain a deficiency judgment on the newly created third position lien (i.e. take relief against the Shumways).

This would completely fly in the face of Washington State's anti-deficiency statute, and would form a dangerous loophole that would allow lienholders the opportunity to both foreclose, and seek a deficiency judgment, by splitting their lien and according themselves remedies that are specifically denied under Washington State law. *Id.*

**AFFIRMING THE COURT'S RULING WOULD CREATE A  
DEFACTO EXCEPTION TO THE ANTI-DEFICIENCY STATUTE.**

RCW 61.24.100(1) provides that

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

RCW 61.24.100(1). Essentially in creating the anti-deficiency statute, the legislature has deemed that following a non-judicial foreclosure of a residential deed of trust, the homeowner need not be punished more than losing their home. The Superior Court's misapplication of the doctrine of equitable subrogation has led to a defacto loophole to RCW 61.24.100(1), wherein now, any creditor, that finds itself in need of the application of the equitable doctrine, can automatically gain two remedies (non-judicial foreclosure and a deficiency judgment), by asking the court to bifurcate its lien into two parts. Instead of having a second position lien switched to first position, the creditor will have a new first position lien, with which it can exercise the foreclosure option, and a third position lien, (that is unaffected by the foreclosure or RCW 61.24.100) that it can seek a deficiency on. The anti-deficiency statute has longstanding public policy grounds, and to affirm the Superior Court's relief in this case would create immediate and negative implications. Homeowners would now face the prospect of losing their

home to a foreclosing bank, and owing that bank on the balance of the loan, when the homeowner originally only agreed to one lien. In fact, if the ruling in this case is allowed to stand, where equitable subrogation was previously an unpleasant administrative matter for creditors, now each and every instance where equitable subrogation becomes necessary, the lienholder has suddenly (unfairly) won an additional remedy (deficiency judgment) that was never contemplated by the legislature.

**CHASE HAS NOT PROVIDED ANY EVIDENCE THAT IT IS IN COMPLIANCE WITH RCW 25.15.340.**

Despite the impressive list of wholly owned corporations, subsidiaries, and loan originators, the respondent, Chase Home Finance, LLC has not presented any evidence that it was a registered corporation in Washington, so that it can comply with RCW 25.15.340. In fact, the respondent does not even suggest that any of the entities listed is a registered corporation in Washington State. The Superior Court erred in ignoring this issue, and in fact, the statute does not contemplate discretion on the part of a trial court with respect to this issue. Once the fact that Chase Home Finance, LLC's unregistered status was brought to the attention of the court, the Superior Court should have vacated any and all orders/relief accorded to the unregistered corporation.

## B. CONCLUSION

Affirming the Superior Court's ruling in this case would serve as 1) an exception to RCW 25.15.340, and allow unregistered foreign business entities to seek relief in Washington State Courts without paying the appropriate fees, and 2) more disturbingly, serve as a loophole to the Washington State anti-deficiency statute contained in RCW 61.24.100(1). The Superior Court erred in denying the Shumway's motion to vacate and subsequent motion for reconsideration, and the Shumways respectfully request that this court vacate the order granting summary judgment and remand this matter back to the Superior Court for a trial on the merits of the appropriate application of equitable subrogation.

Dated this 15<sup>th</sup> day of April, 2010

Respectfully Submitted by:

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