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No. 67375-1-I
COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

ROGER GARDNER,

Appellant, and

LYLE SINCLAIR,

Plaintiff

v.

COLUMBIA STATE BANK, f/k/a FIRST HERITAGE BANK, and

SEL, INC.,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

The 2011 Legislature found that “[t]he rate of home foreclosures continues to rise to unprecedented levels, . . . a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments,” and “[p]rolonged foreclosures contribute to the decline in the state’s housing market, loss of property values, and other loss of revenue to the state” Laws of 2011, Ch. 58, § 1(a), (b). This case challenges the practice of serial nonjudicial foreclosure against collateral to satisfy the same personal loan. Serial nonjudicial foreclosure prolongs the agony of foreclosure for homeowners, clouds titles, and undermines the *quid pro quo* by which lenders obtain a quick nonjudicial process free of judicial supervision and borrower right of redemption, in exchange for giving up their right to a deficiency.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred by denying Plaintiff Roger Gardner’s first Motion for Restraining Order / Preliminary Injunctive Relief. (Order entered October 27, 2010, CP 980).
2. The trial court erred by denying Plaintiff Roger Gardner’s second Motion for Restraining Order / Preliminary Injunctive Relief. (Order entered March 31, 2011, CP 12).

3. The trial court erred by denying Plaintiff Roger Gardner's Motion for Summary Judgment (Order entered March 22, 2011, CP 5), and by granting Defendant Bank & SEL, Inc.'s Motion for Summary Judgment (Oral Ruling, VRP 34-38; Judgment entered June 10, 2011, CP 20).

4. The trial court erred by denying Plaintiff Roger Gardner's Motion for Reconsideration (Order entered April 12, 2011, CP 9).

5. The trial court erred by denying amendment to add a Consumer Protection Act claim for fraudulent boundary line adjustment (VRP 38/10-24 (5/25/2011)).

6. The trial court erred by entering Judgment on the merits and for attorneys' fees in favor of Defendant Bank & SEL, Inc., and against Plaintiff Roger Gardner. CP 20-21.

B. Issues Pertaining to Assignments of Error

1. Did the trial court erroneously permit the Bank to conduct serial nonjudicial foreclosure on different collateral securing the same personal loan, in violation of RCW 61.24.100?

2. Did the trial court err by permitting a nonjudicial foreclosure against Lot 10, which was principally used for a horse farm (agricultural purposes), in violation of RCW 61.24.030(2)?

3. Did the trial court err by dismissing the Declaratory Judgment/ Quiet Title and Consumer Protection Act claims on summary judgment

based on waiver and election of remedies, and compound this error by denying the Motion to Amend to add a CPA claim for fraudulent boundary line adjustment, based on this same reasoning?

4. Should the award of attorneys fees to the Bank and SEL, Inc. be reversed or modified?

5. Should Mr. Gardner be awarded attorneys' fees on appeal?

III. STATEMENT OF THE CASE

A. Overview

This is an action to enjoin a nonjudicial foreclosure, for a declaratory judgment as to the illegality of that foreclosure, to quiet title, and for damages under the Washington Consumer Protection Act. CP 1115-1124.¹ Two principal objections are raised to the nonjudicial foreclosure: first, that serial foreclosure separated by many months on different collateral held to secure a personal home construction loan is prohibited by RCW 61.24.100, the anti-deficiency section of the Nonjudicial Foreclosure Act; and second, that there were at least disputed issues of material fact as to the principal use of Lot 10 for agricultural purposes, requiring a trial on the issue of the legality under RCW 61.24.030(2) of use of nonjudicial foreclosure against that Lot. The

¹ The Verified Complaint also contains a claim for trespass, but this appeal raises no issue regarding dismissal of that claim.

Consumer Protection Act claims were raised prior to the April 1, 2011 trustee's sale by the Verified² Complaint of October 19, 2010, CP 1122-23, and therefore they are not waived. The newly-arisen Consumer Protection Act violation for fraudulent boundary line adjustment does not affect the validity of the April 1, 2011 trustee's sale, and therefore it should have been allowed as an amendment. This combined claim, along with the claims for declaratory judgment and quiet title, should have been sent to trial based on disputed material facts.

B. Statement of Facts

This case challenges the legality of the nonjudicial foreclosure of Lot 10 of Sky River Estates, Snohomish County Auditor's file 200610115247 – commonly known as 15713 - 365th Ave SE, Sultan, WA 98294 (hereinafter "Lot 10"). CP 1115-16. The property was the subject of a trustee's sale on April 1, 2011, at which First Heritage Bank, predecessor to current Respondent Columbia State Bank (hereinafter "the Bank"), was the successful bidder. CP 161 ¶2; CP 26.

1. Loan History – Personal Home Construction Loan

Roger Gardner acquired Lot 10 in January, 2007. CP 1117 ¶ 3.1. Lot 10 was 21.9 acres of vacant land, zoned A-1 Agricultural. CP 1035; CP 369 ¶31.

²The Verifications appear in the record at CP 1111-12.

All parties agree that on February 27, 2007, the Bank made a \$750,000 loan to Mr. Gardner for the purpose of construction of his own personal single-family residence. CP 364-65 ¶¶9-10 (2/27/2007 loan purpose was construction of a residence which was Gardner's primary residence); CP 1117 ¶3.2 (2/27/2007 loan was for "personal purposes"); CP 1028 ¶2; CP 1029 ¶3. The personal nature of this loan was confirmed expressly in testimony by Bank Vice-President Kathy Bartha:

Mr. Gardner's relationship with First Heritage Bank began with a construction loan for his personal residence at 15713 365th Avenue, Sultan, WA (sometimes referred to as "Lot 10" or "the Residence") The Residence is on Lot 10.

CP 1028-29 ¶2.

The 2007 Construction Loan was secured by a Construction Deed of Trust, dated February 27, 2007, and recorded March 1, 2007 (the "February 2007 D/T"). CP 1050-59 (ex. 2 to Bartha declaration).

As stated by Ms. Bartha, in November, 2007, the parties agreed to a loan modification, adding approximately \$100,000 to the Construction Loan, to address cost overruns and personal credit card debt. CP 1029 ¶3; *accord*, CP 1142-46 (exhibits to Verified Complaint); CP 1117-18 ¶¶3.4-3.5 (Verified Complaint – loan modification still for personal purposes).

The February 2007 Construction Loan was payable in one single payment of all principal and interest, due on February 27, 2008. CP 1128.

According to Ms. Bartha, the house was completed and the Gardner family moved in during November, 2007. CP 1085. The February 2007 Construction Loan was then refinanced on April 22, 2008,³ when the Bank loaned Mr. Gardner \$869,688.17, payable in eleven interest-only payments, plus one balloon payment for the full amount, due April 20, 2009. CP 1149; 1065; 1029 ¶3. As stated by Ms. Bartha:

[T]his Promissory Note reflected the additional loan that Mr. Gardner requested in November 2007, and *effectively refinanced* the February 27, 2007 loan into a new Note in the then principal amount of \$869,688.17. *This loan was secured by Lot 10 and 12.*

CP 1029 ¶3 (emphasis added). The Bank's own internal processing assigned the same loan number to both the February 2007 and April 2008 Promissory Notes. *Compare*, CP 1128 (February 2007 Note – loan number 3171700011), *with* CP 1149 (April 2008 Note – loan number 3171700011).

The dual security for the April 2008 loan asserted by Ms. Bartha is memorialized in two documents. First, the April 2008 Promissory Note recites that it is secured by the February 2007 D/T, CP 1149, which covers Lot 10. CP 1050-59. The February 2007 D/T also covers future advances.

³ Ms. Bartha mistakenly states the date of this loan as “April 9, 2008” in her Declaration, but examination of the actual Exhibit 4 attached to her declaration confirms that it was April 22, 2008. *Compare*, CP 1029 ¶3, *with*, CP 1064-65.

CP 1051. Second, contemporaneous with the April 2008, refinance, Mr. Gardner gave a second Deed of Trust covering Lot 12 (the April 2008 D/T). CP 1152-53.

2. Loan History – Other Loans

On April 9, 2008, the Bank made an SBA-backed business loan of \$1,068,000 to Mr. Gardner and his partner, Lyle Sinclair, with a 25-year term, secured by a Deed of Trust on Lot 11. CP 1029 ¶3; CP 1084.

Finally, on August 25, 2008, the Bank opened a line of credit in the amount of \$102,435.96, secured by Lots 10, 11 and 12, and a property in Snohomish. CP 1029 ¶3; CP 365 ¶16; CP 1071.

3. Rising Sun Arabians’s Agricultural Business

Because this case involves a nonjudicial foreclosure, and the applicable statute (RCW 61.24.030(2)) prohibits nonjudicial foreclosure of land used primarily for agricultural purposes, the record evidence of agricultural use of Lot 10 is highly relevant.

Lot 10, being nearly 22 acres, was much bigger than the footprint of Mr. Gardner’s personal residence. The “vast majority” of Lot 10 was dedicated to raising and caring for livestock, the business of Rising Sun Arabians, LLC, a “partnership” in LLC form between Mr. Gardner and Lyle Sinclair. CP 364 ¶¶7-8; CP 369 ¶31. The purpose of Rising Sun Arabians (www.risingsunarabiansllc.com) was to build and operate a

horse-breeding, training, and boarding facility consisting of a barn, stable and arena, plus plenty of pasture and riding area, on Sky Acres Lots 10, 11 and 12. CP 364-65 ¶¶7-10, 14; CP 368 ¶27.

The horse breeding and training facility was completed in January, 2008. CP 365 ¶17. Bank V-P Bartha concedes that by February, 2008, Rising Sun Arabians had a staff of trainers in residence. CP 1085.

The barn could house up to 57 horses, provide riding lessons, training, and various equestrian activities. CP 365 ¶17. From 2008 to 2010, the equine residents of the barn varied from 24-57 in number. CP 366 ¶9. In addition, show horses while breeding, and young horses, resided in the pasture in numbers up to 12. *Id.* Mr. Gardner and his partner personally owned twenty horses. CP 521-23. Rising Sun Arabians bred both the Gardner-Sinclair stock, and other stock brought to them for that purpose. CP 366-67 ¶¶20-21. The record shows that approximately fourteen horses were bred by Rising Sun Arabians during 2008-2010. CP 367 ¶24 & CP 519-20. In addition, and despite the interference suffered through foreclosure on Lots 11 and 12, Rising Sun Arabians had contracts in place for breeding during 2011 and 2012. CP 367 ¶24; CP 526-28 (Kimberly Neils for mare Sashay, for both 2011 and 2012); CP 529-31 (Kelly Borgan for mare Flying Matilde for 2011); CP 535-37 (Catherine Cartwright for mare De Monique for 2011). These

agreements were dated between July and October, 2010; had the Bank's foreclosure notices not been posted in May 2010, it is reasonable to conclude that additional breeding contracts would have been obtained. CP 368 ¶¶28-29.

Rising Sun Arabians engaged in all the usual pursuits one would expect of a horse farm: it retained veterinarians; purchased grain, feed and hay as well as shavings in large quantities; and it maintained professional certifications with the Arabian Horse Association and the US Equestrian Federation, which included dues as well as fees for testing and authentication of the horse pedigrees. CP 367-68 ¶¶25-28; CP 542-55 (Veterinary records); CP 554-63 (receipts for grain, feed and shavings).

Roger Gardner and his partner, Lyle Sinclair, applied for and were granted special tax classification for Lots 10, 11 and 12, as Farm and Agricultural Land. CP 366 ¶15. Snohomish County's approval was dated and recorded April 14, 2008. CP 421.

Mr. Gardner also protected his right to conduct the horse farm agricultural activity on Lot 10 when his development company, YoungGardner, LLC, filed the Declaration of Covenants for Sky River Estates in October, 2006. Although generally limiting use of the property to single-family residences, the Declaration states a clear exception

covering the horse farm. CP 385 §2.6 (Gardner decl.) & 1018 §2.6 (Lerner decl.).

4. Defaults and Foreclosures

Due to the general decline in the economy, Rising Sun Arabians and Mr. Gardner's other business enterprises began to suffer loss of customers and earnings, beginning in the third quarter of 2008. CP 370 ¶39. On May 19, 2009, SEL, Inc., the successor Trustee under the Gardner Deeds of Trust, executed a Notice of Trustee's Sale, which includes (among other properties) Lot 10 under the February 2007 D/T, and Lots 11 and 12 under the April 2008 D/T. CP 1119 ¶3.9; CP 1168-69. Mr. Gardner filed for individual Chapter 11 bankruptcy protection by petition dated August 13, 2009. Supp CP – [Lerner Decl., Ex. 1]. On March 17, 2010, the Bank obtained relief from the automatic stay regarding Lots 11 & 12, but not Lot 10. CP 222 ¶2 (Lerner Decl.); CP 229-30.

At that point, the Bank and SEL chose to proceed with the trustee's sale without Lot 10, rather than wait for the resolution of the bankruptcy. The trustee's sale for Lots 11 & 12 was held May 14, 2010, CP 1119 ¶3.10; 371 ¶45; CP 597 (Trustee's Deed for Lots 11 & 12 to the Bank), and the bankruptcy was dismissed barely more than one month later, on June 22, 2010. CP 1004.

Prior to this first trustee's sale, Mr. Gardner was working assiduously to sell property in order to pay down his indebtedness and obtain some kind of work-out of his overall obligation to the Bank. CP 370 ¶40. On April 9, 2010, Mr. Gardner obtained a signed Purchase and Sale Agreement with Guerdon Ellis and Tammy Knight (the "Ellis PSA"), in which they agreed to purchase Lot 12 for \$230,000. CP 370 ¶42; CP 576. Mr. Gardner intended to pay off the \$102,000 line of credit with the Bank, then one other creditor, and then apply the balance to other obligations owed to the Bank. CP 172; CP 371 ¶44. Mr. Gardner immediately notified the Bank, but it refused to postpone the trustee's sale or to work with him. CP 371 ¶43. Mr. Gardner moved in bankruptcy for permission to carry out this sale, but the Bank opposed this, *inter alia*, on the grounds that \$230,000 was allegedly an "undervalued" price. CP 185. Mr. Gardner was forced to rescind the Ellis PSA. CP 371 ¶46. The day after obtaining its Trustee's Deed, on May 15, 2010, the Bank turned around and flipped Lot 12 to Ellis for the exact price negotiated by Mr. Gardner - \$230,000. CP 371 ¶47; CP 591.

SEL continued the Trustee's sale of Lot 10 to November 5, 2010. CP 994; CP 1120 ¶3.14. The sale was stayed again when Mr. Gardner's partner, Lyle Sinclair, filed bankruptcy, but the stay was lifted February 9, 2010, and the sale of Lot 10 rescheduled for April 1, 2010. CP 169. After

several denials of injunctive relief (discussed below), the nonjudicial foreclosure sale of Lot 10 went forward on April 1, 2011. CP 167-68. The Bank was the only bidder, purchasing Lot 10 for a credit bid of \$900,000. CP 203. Just a few weeks before the sale, Lot 10 had been appraised at \$985,000 by the Bank's own chosen appraiser. CP 1040.⁴

5. Boundary Line Adjustment

One claim asserted below was for trespass, based on the fact that the barn straddles the property line between Lots 10 and 11. CP 1129 ¶¶3.15-3.16; CP 1121. While the Bank acquired title to Lot 11 by the Trustee's Deed issued May 14, 2010, it did not acquire a claim to title to Lot 10 until receiving the Trustee's Deed of April 1, 2011.⁵ Yet on December 10, 2010 – a full sixteen weeks before the trustee's sale of Lot 10 – the Bank filed an Affidavit of Boundary Line Adjustment with the

⁴ Counsel for the Bank and Trustee SEL also testified by declaration that he is an officer of his client, trustee SEL, Inc., and in fact he signed documents on behalf of SEL, including the 4-1-2011 Trustee's Deed. CP 989 ¶1 (Lerner decl.); CP 167-68. Although the trustee under a Deed of Trust may not owe the Grantor/Borrower a strictly fiduciary duty, he/she does owe a duty to act in good faith and evenhandedly. RCW 61.24.010(3), (4); *see, Albice v. Premiere Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 934-35, 239 P.3d 1148 (Div. 2 2010). Under case law such as *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), and under the State Bar's Advisory Ethics Opinion #926 (1986), a partisan attorney acting as trustee under a deed of trust can easily run afoul of the rules against conflict of interest, RPC 1.7-1.8.

⁵ Mr. Gardner does not concede *validity* of title; he merely notes physical transfer of a deed.

Snohomish County Planning and Development Office, in which Graham S. Haight, Vice-President of First Heritage Bank, swore under notarized oath that the Bank was the owner of *both* Lot 11 and Lot 10. CP 108-12. This false swearing caused the County to approve a boundary line adjustment on February 4, 2011 – again, well before the trustee’s sale – to further the Bank’s effort to end the alleged trespass caused by an encroachment of the horse barn on Lot 11 into Lot 10. CP 111.

The Bank’s excuse for this fraudulent act is that it did not *record* the boundary line adjustment until after the trustee’s sale. CP 66. Nonetheless, the false sworn representation of Lot 10 ownership was filed with Snohomish County on December 10, 2010, and was notarized on December 8, 2010, well before a deed was received from the trustee. CP 108, 111-12.

C. Procedural Facts

This action was commenced by a Verified Complaint for Declaratory Judgment, TRO, Permanent Injunction, Trespass, Quiet Title, and Violation of the Consumer Protection Act, filed October 19, 2010. CP 1111-1182. Plaintiffs filed a Motion for TRO on that same date based on the facts in the Verified Complaint, CP 1105, which was denied by Judge Castleberry on October 27, 2010. CP 980-81; VRP 14-16 (10-27-2010).

The Bank and SEL moved for Summary Judgment on December 13, 2010. CP 964-69. Plaintiffs opposed this Motion and filed their own Cross-Motion for Partial Summary Judgment on January 3, 2011. CP 646, 681. In connection with this Motion, Plaintiffs first filed the Declaration of Roger Gardner containing substantial additional documentation of the agricultural use of Lot 10. CP 684-963. However, this set of motions was never ruled on because of Lyle Sinclair's intervening bankruptcy filing. CP 207-08.

Plaintiffs re-filed their Motion for Partial Summary Judgment on February 22, 2011, again supported by the Gardner declaration. CP 340-605. On March 10, 2011, First Heritage Bank and SEL filed their Opposition to this Motion. Supp. CP -. The Motion was denied by order dated March 22, 2011, signed by Judge Joseph P. Wilson. CP 5-7; 273-75. Plaintiffs filed a Motion for Reconsideration, which was denied on April 12, 2011. CP 207-18; CP 9-10.

The Trustee's sale was set for April 1, 2011, so Plaintiffs filed a second Motion for TRO on March 24, 2011, pursuant to RCW 61.24.130. CP 243-72. This Motion was denied on March 31, 2011, in a stern order that found this was reapplication on unchanged facts, and that rulings in summary judgment estopped certain arguments. CP 220-21. The order reserved sanctions to trial. CP 221.

After the sale was completed, the Bank and SEL filed a Motion for Summary Judgment on April 15, 2011. CP 141-60. Mr. Gardner responded on May 19, 2011, pointing out that the previous injunction and summary judgment rulings were merely interlocutory and did not determine ultimate issues of fact, and that completion of the Trustee's sale does not waive the properly-asserted challenges to its validity. CP 131-137. In addition, on the same date Mr. Gardner moved to amend the complaint to add to a Consumer Protection Act claim based on the fraudulent boundary line adjustment. CP 88-112. The trial court agreed with the Bank's position that amendment would be futile, and that no disputed questions of material fact remained for trial, so it denied the amendment and granted summary judgment. VRP 34-38.

On June 10, 2011, Judgment was entered against Roger Gardner, including over \$47,000 in attorneys' fees, based on the attorney fee provisions of the Promissory Notes and Deeds of Trust. CP 20. On the same date, the Bank's Motion to Substitute Columbia State Bank for First Heritage Bank was granted, so Columbia Bank is now the party-Respondent and Judgment Creditor. CP 24-25. In September, 2010, First Heritage Bank had been found by Federal regulators to be "significantly undercapitalized," and in February 2011 it was required to find a buyer or raise more capital within 30 days. CP 114.

Mr. Gardner filed his Notice of Appeal on July 8, 2011. CP 1-19.

IV. ARGUMENT

A. Standard of Review

This case raises error principally based on denial of preliminary injunctive relief, grant and denial of summary judgment, and associated statutory construction.

“The standard of review for grant or denial of a preliminary injunction is abuse of discretion.” *Bowcut v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (Div. 3 1999) (citing, *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998)).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); accord, e.g., *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (Div. 1 2002). Interpretation of a statute under which an injunction has been granted or denied is a question of law, reviewed *de novo*. *Bowcut, supra*, 95 Wn. App. at 316.

Summary judgment is reviewed *de novo*. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30P.3d 446 (2001). The trial court can grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Albice v. Premier Mortgage, supra, 157 Wn. App. at 922.

B. The Trial Court Erred by Permitting Serial Nonjudicial Foreclosure on the Same Personal Loan

1. RCW 61.24.100 Prohibits Serial Nonjudicial Foreclosure of Collateral Securing a Personal Loan

The Bank improperly took two bites at the apple when it nonjudicially foreclosed twice on the same personal loan, in violation of RCW 61.24.100. That statute, the anti-deficiency section of the Nonjudicial Foreclosure Act, ch. 61.24, RCW (the “Act”), provides in relevant part:

(1) *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.

* * *

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust *securing a commercial loan* executed after June 11, 1998:

* * *

(b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed

RCW 61.24.100 (emphasis added). By first nonjudicially foreclosing on the April 2008 D/T for Lot 12, which secured the personal home construction loan, and then later nonjudicially foreclosing on the February 2007 D/T for Lot 10, which also secured the personal home construction loan, the Bank violated this statute.⁶

“Since the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, ‘lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor.’” *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (Div. 3 2007), quoting, *Amresco Ind. Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (Div. 2 2005); accord, *Albice v. Premier Mortgage, supra*, 157 Wn. App. at 920.

The enactment of RCW ch. 61.24, . . . contemplated a “quid pro quo between lenders and borrowers.” *Donovick v. Seattle-First Nat’l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). Debtors, among other things, relinquished a right to redemption and to a judicially imposed upset price. Creditors, in exchange for inexpensive and efficient non-judicial foreclosure procedures, sacrificed [the right to a deficiency], a

⁶ It was the second nonjudicial foreclosure (April 1, 2011) that violated the statute.

substantial benefit that remains available in a judicial foreclosure

Consequently, the beneficiary of a trust deed is faced with an election of remedies upon default. The beneficiary may

“(1) where the trust deed secures a note, sue on the note; (2) foreclose under existing mortgage foreclosure proceedings; or (3) foreclose pursuant to [RCW 61.24].”

Thompson v. Smith, 58 Wn. App. 361, 365-66, 793 P.2d 449 (Div. 1 1990) (quoting, Gose, *The Trust Deed Act in Washington*, 41 Wash. L.Rev. 94, 97 (1966)).

Applying these bedrock principles to the facts of this case, it quickly becomes apparent that Mr. Gardner demonstrated likelihood of success on the merits, and therefore it was error to fail to grant a preliminary injunction against the second Trustee’s sale held April 1, 2011. The Bank’s own witness, Bank V-P Bartha, admitted that the February 2007 loan was “a construction loan for his personal residence,” CP 1028-29 ¶2, and therefore it was not a commercial loan, and not subject to the exceptions created by RCW 61.24.100(1) and (3) for serial foreclosure on different security instruments. Ms. Bartha also testified that the April 2008 loan was simply a refinance of this personal loan, and that it was secured by both Lot 10 and Lot 12. CP 1029 ¶3. There is overwhelming evidence showing that the April 2008 refinance was merely

a continuation in slightly different form of the personal construction loan on Mr. Gardner's residence. The April 2008 Promissory Note expressly supports this, by stating that it is secured by the February 2007 D/T. CP 1149. The February 2007 D/T covers future advances such as the April 2008 refinance, CP 1051, 1058 (definition of "Indebtedness" includes "future advances"), and the definition of "Note" secured by the February 2007 D/T includes "refinancings of, consolidations of, and substitutions for the promissory note" CP 1058. Further supporting Ms. Bartha's testimony that the April 2008 loan was a continuation of the February 2007 loan, and secured by Lot 10 as well as Lot 12, the Bank assigned the same loan number to both the February 2007 and April 2008 Promissory Notes. *Compare*, CP 1128 (February 2007 Note – loan number 3171700011), *with* CP 1149 (April 2008 Note – loan number 3171700011).

On May 14, 2010, the Bank elected its remedy to satisfy Mr. Gardner's defaulted personal construction loan – it elected to go forward with a *nonjudicial* foreclosure on Lot 12. According to the Notice of Trustee's Sale for that sale, the security for Lot 12 was the April 2008 D/T, CP 1169, and the default on indebtedness was Loan Number 3171700011, with a total amount due after interest and costs of \$896,574.86 (as of May 10, 2009, when the Notice was first given). CP

1170. *Therefore, it is beyond dispute that the May 2010 Lot 12 nonjudicial foreclosure was for default in the same personal construction loan that was secured by the February 2007 D/T.*

Mr. Gardner did not try to restrain this first nonjudicial foreclosure. Had the Bank conducted itself properly,⁷ it was permitted ONE bite at the personal loan apple under the Nonjudicial Foreclosure Act. But the Act, strictly construed in favor of the borrower Mr. Gardner, clearly prohibits “[a]ny judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed,” except with respect to commercial loans. RCW 61.24.100(3)(b). The February 2007 D/T is a “deed[] of trust . . . granted to secure the obligation that was secured by the [April 2008] deed of trust foreclosed” on May 14, 2010. Therefore, it was illegal, and a direct violation of this statute, to permit the April 1, 2011 nonjudicial foreclosure of the February 2007 D/T.

⁷ As argued below, the Bank’s failure to try to work out the loan based on the Ellis PSA, followed by its appropriation of the benefit of that PSA, constituted an unfair practice under the Consumer Protection Act which gives rise to a claim for damages. This kind of behavior might now be precluded by the Washington Foreclosure Fairness Act, which in many cases will require neutral third-party mediation including assessment of loan restructuring, prior to nonjudicial foreclosure. Laws of 2011, Ch. 58, §§ 5-7.

This action was filed in October, 2010, specifically to enjoin the pending sale of Lot 10 under the February 2007 D/T. CP 1111-1182. The Continuation of Trustee's Sale makes it clear that the Lot 10 sale is carried out under the February 2007 D/T, which secured the same personal construction loan as the previously nonjudicially-foreclosed April 2008 D/T. CP 1179. The Trustee's Deed given April 1, 2011, by Thomas A. Lerner on behalf of SEL, Inc., confirms this fact. CP 168-69. Because the statute only permits serial nonjudicial foreclosure on different collateral for the same obligation in the context of *commercial loans*, as a matter of law this second nonjudicial foreclosure violated RCW 61.24.100(3)(b).

The Bank argued below that it proceeded with two separate nonjudicial foreclosures because the Bankruptcy Court only granted its relief from stay in part, releasing Lot 12 but not Lot 10 from the automatic stay. CP 237, 222 ¶2. But nothing compelled the Bank to rush to nonjudicial foreclosure on May 14, 2010 -- it could have waited to properly execute on all its collateral at once. The Bank could have waited until the bankruptcy was dismissed, which in fact happened barely more than one month after the first trustee's sale, on June 22, 2010. CP 1004. Alternatively, as *Thompson v. Smith, supra*, makes clear, the Bank could always have chosen to proceed with a judicial foreclosure, under which there is no limitation on serial foreclosure of personal obligations because

there are greater protections for the borrower (upset price, right of redemption, judicial oversight). *Thompson v. Smith, supra*, 58 Wn. App. at 365-66. The Bank made an election of remedies – it was in a hurry, to the detriment of Mr. Gardner’s ability to get back on his feet through a sale to Ellis. Mr. Gardner was clearly prejudiced by the Bank’s rush to sell. The Bank should not now be permitted to have its cake and eat it too – it must live with its election to nonjudicially foreclose on the personal construction loan based on the Lot 12 collateral only.

The Bank may attempt to rely on *Donovick v. Seattle-First National Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988), to argue that serial nonjudicial foreclosure is permitted, but that would be a mis-reading of *Donovick*. In *Donovick*, the sales of the two parcels occurred ***at the same time***, not nearly a year apart, and there was no harm to the Debtor shown; indeed, the single nonjudicial foreclosure sale upon two parcels described in two deeds of trust was identical in all material respects to a sale of two parcels described in a single deed of trust. *Donovick, supra*, 111 Wn.2d at 414, 417. The Court did not purport to decide the legality of two sales widely separated in time, in which the first hurry-up disposition of collateral was directly to the disadvantage of the Debtor due to a pending PSA on the collateral. As stated by the Court in *Donovick*:

It might be that different procedures, such as delaying sale of the second parcel to the lender's unfair advantage or to the debtor's substantial detriment, or otherwise circumventing the purposes of the act could lead to a conclusion contrary to that we reach here. Those circumstances, however, are not before us. Thus, we tailor our holding closely to the facts of this case.

Donovick v. Sea-first, supra, 111 Wn.2d at 418.

The Nonjudicial Foreclosure Act serves several purposes:

We construe the Act to further three objectives: (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) the process should promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Albice v. Premier Mortgage, supra, 157 Wn. App. at 920; *accord, e.g., Amresco v. SPS Properties, supra*, 129 Wn. App. at 537. The Bank's method of serial foreclosure, spread out over many months, violates all three of these fundamental purposes. There is nothing efficient or inexpensive about piecemeal serial foreclosure, since it spreads the process over time, necessarily increases costs of sale by duplication, and increases the opportunities for error and low-ball bidding to the detriment of the Borrower. While it might seem that serial foreclosure provides more opportunity for interested parties to prevent wrongful foreclosure, in this case the Bank argued below (and may argue again) waiver based on failure to challenge the first nonjudicial foreclosure, CP 7, 12, 337, 967,

1096-97, which in fact operates to limit the ability of Borrowers to make legitimate challenges to wrongful subsequent serial foreclosures. Finally, serial nonjudicial foreclosure undermines the stability of land titles by dragging out the uncertainty with respect to collateral left out of the initial round of foreclosures. Owners and purchasers are left to wonder whether the beneficiary under the first foreclosed deed of trust is satisfied, or whether it will come back against more collateral at some undefined later date, thus casting a cloud over all remaining collateral.

The conclusion is inescapable that serial nonjudicial foreclosure on a personal loan violates RCW 61.24.100(1) and (3)(b).

2. The Trial Court Erred by Denying Preliminary Injunctive Relief Twice, and by Denying Plaintiffs' and Granting the Bank's Summary Judgment

a. The Initial Injunction Denial Missed the Issue

The initial Motion for Preliminary Injunctive Relief raised the above issue under the rubric of seeking an illegal deficiency through a second nonjudicial foreclosure against different collateral. CP 1106, 1108; VRP 12-13. In the oral ruling and the written order denying the first preliminary injunction, the trial court never once mentioned this issue – apparently, it missed it entirely. CP 980-81; VRP 15-16. Because the statute prohibits serial foreclosure of a personal loan, and the Bank itself

admitted that this was a personal residential construction loan, it was an abuse of discretion to deny the preliminary injunction.

b. The Denial of Summary Judgment Erred by Failing to Give Effect to All Provisions of the Statute

The trial court first addressed this issue in its Order Denying Plaintiffs' Motion for Summary Judgment, entered March 22, 2011:

The Court further finds that First Heritage Bank has not sought a deficiency judgment in these proceedings, and no such prayer for relief is pending. Absent an explicit prayer for relief by First Heritage Bank seeking entry of a judgment for a deficiency following a non-judicial foreclosure, the continued assertion that the Bank is seeking a deficiency judgment shall be deemed an argument not made in good faith.

CP 6. This is error because it fails to give full effect to all provisions of RCW 61.24.100. The statute does not simply say that "a deficiency judgment shall not be obtained" except for commercial loans. RCW 61.24.100(1). It goes on to specify that this prohibition against deficiency is not violated *for commercial loans* by "judicial or nonjudicial foreclosures of any other deeds of trust . . . granted to secure the obligation that was secured by the deed of trust foreclosed." RCW 61.24.100(3)(b). By this provision, the Legislature is telling us that nonjudicial foreclosure of other deeds of trust granted to secure a *personal* obligation secured by the deed of trust foreclosed *does constitute a prohibited deficiency*. If serial foreclosure did not violate the general antideficiency rule of

§.100(1), there would have been no need to carve out the specific §.100(3)(b) exception governing commercial serial foreclosure of collateral. The trial court's ruling treats §.100(3)(b) of the statute as if it were meaningless, unnecessary surplusage.

A fundamental principle of statutory construction is:

We are required, when possible, to give effect to every word, clause and sentence of a statute. *International Paper Co. v. Dept. of Rev.*, 92 Wn.2d 277, 281; 595 P.2d 1310 (1979), citing 2A C. Sands, *Statutory Construction* § 46.06, at 63 (4th ed. 1973). No part should be deemed inoperative or superfluous unless the result of obvious mistake or error. C. Sands, *supra*.

Cox v. Helenius, supra, 103 Wn.2d at 387; accord, e.g., *Albice v. Premier Mortgage, supra*, 157 Wn. App. at 923. It was reversible error for Judge Wilson to fail to give full effect to RCW 61.24.100(3)(b), by allowing the Bank's serial nonjudicial foreclosure of collateral securing the same personal loan that had already been the subject of a prior nonjudicial foreclosure.

The trial court erred further by failing to applying the rule that "courts must strictly construe the [nonjudicial foreclosure] statutes in the borrower's favor." *CHD, Inc. v. Boyles, supra*, 138 Wn. App. at 137. Construing the entirety of RCW 61.24.100 in the borrower's favor, it is clear that the Legislature intended that serial foreclosure on personal loans be treated as a species of prohibited deficiency recovery. This not only

accords with the express language of RCW 61.24.100(1) and (3)(b), but it makes sense because serial foreclosure on collateral operates to satisfy a deficiency arising from the first nonjudicial foreclosure. *But for the existence of a deficiency*, the second or third serial foreclosure cannot go forward.⁸

c. The Second Injunction Denial Fails to Address the Merits, Instead Erroneously Holding that the Court is Already Bound

Immediately after denial of his summary judgment in March, 2011, Mr. Gardner made his second application for preliminary injunctive relief. This was not done out of disrespect for Judge Wilson's summary judgment ruling, but because the sale was set for April 1st, and a pre-sale application for injunction is the approved method of raising and preserving all possible objections to the sale. *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (Div. 1 2008); *see also*, RCW 61.24.130(1) (borrower may seek to restrain trustee's sale). Nonetheless, the trial court interpreted this as some sort of assault upon its bench:

The Court finds that Plaintiffs failed to comply with SCLCR 7(b)(1)(B) by failing to identify specific facts upon

⁸ This is true both factually and legally. Mr. Lerner testified that the total indebtedness was \$2.2 million, the earlier foreclosure garnered about \$1.2 million, and the "total remaining principal" (*i.e.*, *deficiency*) was just over \$1 million. CP 632 ¶5. Legally, it is requisite to deed of trust nonjudicial foreclosure that there be both a default and amounts due. RCW 61.24.030(3), (8)(d), (e), (f); RCW 61.24.110.

which their Motion depended, and which were not presented to Judge Castleberry on October 27, 2010, when Plaintiffs unsuccessfully sought the identical relief.

The Court further finds that Plaintiffs have asserted that they were likely to prevail on arguments which had been expressly rejected by Judge Wilson merely two days before Plaintiffs filed the instant motion. Nevertheless, Plaintiffs failed to address that Order, or how Plaintiffs could assert in good faith that they are likely to prevail on their claims for relief in the wake of that Order. Judge Wilson held specifically that Plaintiffs were estopped from continuing to pursue certain claims, while other claims which were the subject of Plaintiff's Motion were waived. . . .

IT IS HEREBY ORDERED that the motion is DENIED. . . .

CR 11 Sanctions reserved for trial.

CR 12-13.

This Order is in error because it never ruled on the merits, but instead erroneously held that the motion was precluded by prior orders. The first TRO/ preliminary injunction, at the very outset of the case, was solely for the purpose of preserving the *status quo ante*, did not adjudicate the ultimate merits, and cannot have any collateral estoppel or *res judicata* effect as a matter of law. *Rabon v. City of Seattle, supra*, 135 Wn.2d at 286; *McLean v. Smith*, 4 Wn. App. 394, 400, 482 P.2d 798 (Div. 2 1971). Furthermore, in October, 2010, Judge Castleberry *did not even address* the serial foreclosure / deficiency issue, and expressly (albeit erroneously) stated that there was not enough evidence before him to rule for the

plaintiff on the agricultural use exception. CP 980-81. It was the very purpose of the 2011 Gardner declaration to supply additional evidentiary support for the agricultural use of Lot 10, CP 364-70; CP 382 (Covenants); CP 421 (Snohomish County Farm Use Approval); CP 426-563 (documents pertaining to business of Rising Sun Arabians).

Nor did Judge Wilson's summary judgment order preclude the second request for injunction. First, the law is clear that it is only a request for preliminary injunction – not a summary judgment ruling – that will preserve a challenge to presale defects. *Brown v. Household Realty, supra*, 146 Wn. App. at 163 (statutory injunction procedure is exclusive remedy for presale defects). Second, denial of summary judgment simply means that there are disputed issues of material fact – it is an interlocutory ruling, that does not bind the court. *DGHI Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 949-50, 977 P.2d 1231 (1999). Any findings of fact made on summary judgment are superfluous, and will be disregarded on appeal. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 614, 141 P.3d 652 (Div. 3 2006). Judge Wilson's interlocutory error of law in application of RCW 61.24.100 did not bind Judge Okrent on the second injunction.

The second Motion for Preliminary Injunction was the trial court's first chance to actually address the serial foreclosure argument in the

procedural context of a request for injunctive relief, and its first chance to address the injunction request based on agricultural use with on a full evidentiary record. It was not a frivolous filing, and it is unfortunate that the trial court refused to address the merits. Mr. Gardner was deprived of the benefit of any kind of a ruling on the merits of his serial foreclosure theory for injunctive relief, and this was an abuse of discretion.

d. The Grant of Summary Judgment to the Bank is Error Due to the Presence of Material Disputed Facts

Mr. Gardner was also denied a trial, based on Judge Castleberry's erroneous grant of summary judgment to the Bank and SEL, by oral opinion on May 25, 2011, VRP 34-38, memorialized only by the final Judgment entered June 10, 2011. CP 20-21. In granting summary judgment, the trial court stated:

I don't think there is any factual dispute that these loans were in fact commercial in nature. The declarations indicate that, the purpose of the loans indicate that, and any suggestion to the contrary is just without any support whatsoever.

VRP 34-35/25-4. This ignores not only the contrary allegations of the Verified Complaint and the sworn testimony of Mr. Gardner, CP 364-65 ¶¶9-10; CP 1117 ¶3.2, but also the *face of the documents themselves*, CP 1050 (February 2007 D/T titled "Construction Deed of Trust"); CP 1051 (D/T secures performance under "Construction Loan Agreement"); *and the sworn testimony of Bank V-P Bartha*. CP 1028-29 ¶¶2-3 ("Mr.

Gardner’s relationship with First Heritage Bank began with a construction loan for his personal residence”). In reality, the undisputed material facts demonstrate that Mr. Gardner was entitled to summary judgment as a matter of law for violation of RCW 61.24.100(1) and (3)(b). But at a bare minimum, it was reversible error to grant summary judgment to the Bank and SEL on the serial foreclosure issue.

C. The Trial Court Erroneously Allowed a Nonjudicial Foreclosure Despite a Likelihood of Proving that Lot 10 Was Used Principally for Agricultural Purposes

1. The Evidence Shows that Lot 10 was Part of a Working Horse Farm

RCW 61.24.030 provides in relevant part:

It shall be requisite to a trustee's sale: . . .

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods . . .

RCW 61.24.030(2). This statute vindicates what Washington Practice calls “the clear legislative intent to prevent nonjudicial foreclosures of agricultural land.” 27 Washington Practice – Creditors’ Remedies - Debtors’ Relief, §3.40 (West Group 1998).

In this case, Mr. Gardner's development company recorded Covenants permitting a horse farm on Lot 10 in October, 2006. CP 382-94; CP 991 ¶10. This use was therefore of record for all to see from a very early date. Roger Gardner acquired his personal interest in Lot 10 in January, 2007. CP 1117 ¶ 3.1. It was vacant land zoned A-1, Agricultural, *which Mr. Gardner immediately began to use for the pasturing of his horses. Id.*; CP 1035. On February 27, 2007, the first deed of trust was granted, containing the statement that the land "is not used principally for agricultural purposes." CP 1051. At that point, Lot 10 was used for no purpose other than pasturing horses, CP 1035; CP 1117 ¶ 3.1; CP 1085 (house not yet built), so the statement is false.⁹

On November 7, 2007, Gardner and Sinclair formed Rising Sun Arabians LLC, for the purpose of training and breeding Arabian horses on Lots 10, 11 and 12. CP 364 ¶7. After this date, on November 29, the February 2007 D/T was amended to accommodate the modification of the amount secured. CP 1029 ¶3, 1142-46. The false statement that the land

⁹ There is no conflict between the argument that the loan secured by the February 2007 and April 2008 D/Ts was a personal residential construction loan not subject to serial foreclosure under RCW 61.24.100, and the argument that the property was primarily used for agricultural purposes. The first issue looks to *the purpose of the loan*, while the second issue turns on the *principal use of the property*. It is common for a farmer to have a personal residence on property primarily used for agriculture.

“is not used principally for agricultural purposes,” was reaffirmed, by the November 29th Amendment stating that “the terms of the original deed of trust shall remain unchanged and in full force and effect.” CP 1143.

The horse breeding and training facility was completed in January, 2008, and by February, 2008, Rising Sun Arabians had a staff of trainers in residence. CP 365 ¶17; CP 1085. Gardner and Sinclair applied for and, on April 14, 2008, they were granted, special tax classification for Lots 10, 11 and 12, as Farm and Agricultural Land. CP 366 ¶15; CP 421. Snohomish County’s approval is issued pursuant to RCW 84.34.020(2), CP 421, which provides in relevant part:

“Farm and agricultural land” means:

- (a) Any parcel of land that is 20 or more acres . . . :
 - (i) *Devoted primarily to the production of livestock or agricultural commodities for commercial purposes;*
 - (ii) Enrolled in the federal conservation reserve program or its successor administered by the United States department of agriculture; or
 - (iii) Other similar commercial activities as may be established by rule . . .

RCW 84.34.020(2) (emphasis added).

The April 2008 refinance was completed *after* all this, on April 22, 2008. CP 1149-50; CP 1152, 1160. Despite the presence of a fully functioning horse boarding and breeding business, and Snohomish County’s statutory finding that Lot 10 was “[d]evoted primarily to the

production of livestock . . . for commercial purposes,” the April 22, 2008 D/T again falsely represented that the Real Property “is not used principally for agricultural purposes.” CP 1153.

The agricultural use continued until the date of the April 1, 2011 trustee’s sale, as is evidenced by the 2011 and 2012 breeding contracts. CP 367 ¶24; CP 526-28, 529-31, 535-37. Mr. Gardner and his horses remained in residence on Lot 10 until after the 4/1/2011 sale, when he was forced to vacate in response to the Bank’s Unlawful Detainer action. CP 104-05 ¶10; CP 117, 119, 127-28; VRP 23/11-18 (5-25-11 hearing; counsel for Bank states Mr. Gardner vacated “last Friday”).

The statement in the D/Ts that the property was not used for agricultural purposes was false when the D/Ts were given, when they were amended, and at the time of the 4/1/2011 trustee’s sale. Accordingly, RCW 61.24.030(2) precludes use of nonjudicial foreclosure against Lot 10.

2. The Trial Court Never Addressed Agricultural Use on a Full Record, and Erred by Reading the Covenants to Mean the Opposite of What they Say, So this Issue Should be Remanded for Trial

The issue of the agricultural use exception first came up in connection with Mr. Gardner’s initial Motion for TRO, in October, 2010. CP 1106-08. The Order Denying Injunctive Relief states:

Plaintiffs' request for injunctive relief rests entirely on the conclusory statement in their Complaint that the property at issue is used for agricultural purposes. This statement remains unsupported by factual evidence from which the Court could draw that legal conclusion.

CP 980. This was error in two respects: the Complaint was verified, though the Court didn't know it, *compare* CP 1111-12, *with* VRP 15/1-16 (Oct. 27, 2010); and the evidence went well beyond mere conclusions.

As a preliminary matter, although Judge Castleberry was corrected about verification of the Complaint on the record by alert counsel for the Bank, that wasn't done until *after* the ruling. VRP 15-16/25-4 (10-27-2010). Viewed in context, the Judge's mistaken belief that the Complaint was unverified contributed significantly to his ruling that there was "nothing to contradict the Bank's position." VRP 15/3-4. Since quantum of proof was so crucial to the trial court, defense counsel's post-ruling reminder that the Complaint was verified did not cure this error.

More importantly, it is simply not accurate that the statement in the Complaint was conclusory; nor was it accurate that this supposedly "conclusory" statement was all the evidence plaintiff relied upon, in light of the attached documentary evidence. The Complaint stated facts:

Immediately following acquisition [January 2007] and continuing to the present day, the Plaintiff began using the land for agricultural purposes, specifically as pasture solely for horses. The plaintiffs applied for and received classification as Farm and Agricultural land. A true and correct copy of this

approval is attached here and incorporated herein by this reference as “*Exhibit A*”.

CP 1117 ¶ 3.1. Exhibit A, which constitutes documentary evidence incorporated into the Verified Complaint, is an official Snohomish County approval, bearing a recording statement showing recording on April 14, 2008. CP 1126. Exhibit A states that Lots 10, 11 and 12, belonging to Roger Gardner and Lyle Sinclair, are approved for classification as Farm and Agricultural Land under RCW 84.34.020(2). *Id.* As we have already seen, that constitutes an official governmental determination that Lot 10 is “[d]evoted primarily to the production of livestock or agricultural commodities for commercial purposes,” RCW 84.34.020(2)(a)(i).

The Bank produced *no evidence* directly countering Mr. Gardner’s sworn testimony and documentary proof of primary agricultural use of Lot 10. Instead, the Bank argued that even if there was agricultural use, the Lot was not *principally* used for agricultural purposes, and if it had been, any such use had long since ended. CP 1097-99. To support this, the Bank relied upon three sources of evidence: (1) that Mr. Gardner’s “million dollar” home was located on Lot 10, CP 1097; (2) that primary agricultural use was supposedly contrary to the Covenants, CP 1097; CP 991 ¶10; and (3) that Gardner’s horse boarding/breeding business was necessarily gone “two years” before the date of the October 2010 TRO

application, based on Gardner's Chapter 11 Plan's statements that the 2008 economic crash hit so hard that "the horse boarding [business] was affected drastically," and "[a]s the months went on more and more of the clients moved out of the barn, most of the clients moved their horses to their own homes or sold them." CP 1085; CP 1098.

Mr. Gardner responded: (1) that the house footprint was but a small part of the 22-acre Lot 10, and it wasn't unusual for a dwelling to be located on farm land; (2) that the Covenants expressly permit use of Lots 10, 11 and 12 as a horse farm – as an exception to the usual single-family dwelling usage; and (3) that diminishment of business or even losing money due to economic hard times does not preclude the presence of primary agricultural use – in other words, the agricultural use need not be profitable to be principal. CP 982-88.

Because of the trial court's heavy reliance on the Covenants applicable to Sky Acres Development, of which Lot 10 is a part, it is necessary to quote the applicable provision in full. After limiting use to single-family dwellings, the Covenants provide:

This prohibition is not intended to prevent an owner from operating a home occupation (cottage business) which utilizes up to two employees, providing said business does not in any way create a nuisance to the neighbors. For purposes of this paragraph, breeding, boarding, providing lessons and training of horses shall be considered a cottage business. It is understood that within Sky River Estates there will be a

working horse facility on Lots 10, 11 & 12, which facility shall be exempt from the two employee limit.

CP 385 §2.6 (Gardner decl.) & 1018 §2.6 (Lerner decl.). Clearly, this language operates to **permit, not prohibit**, operation of a horse farm on Lots 10, 11 and 12.

On this record, the trial court denied preliminary injunctive relief, stating:

The principal use of the property must be for the production of crops, livestock or aquatic products. RCW 61.24.030(2). No evidence of such production has been presented, and engaging in such activity is inconsistent with the Covenants that govern the property . . .

For Plaintiffs' conclusory statement to be true would place Plaintiffs in violation of the Covenants, which itself would deprive Plaintiffs of the right to seek equity from the Court. Further, that the conduct claimed by Plaintiffs is inconsistent with those Covenants invites the conclusion that any agricultural activity is not the property's principal but merely incidental use.

This was blatant error, and an abuse of discretion.

The key determination on a TRO, or preliminary injunction, is likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. State DOR*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). In making that determination here, the trial court plainly based its decision on untenable grounds and untenable reasons: that the Complaint was not verified, that there was "no evidence" of production of livestock, that any such evidence was purely

“conclusory,” and that the Covenants were “inconsistent” with use of Lot 10 as a horse farm. ***All of these statements are wrong!*** Indeed, it is difficult to believe that trial court even read the Covenants.

Furthermore, the trial court totally ignored (or was unaware of) the record showing prior governmental approval of Lot 10 as property “[d]evoted primarily to the production of livestock . . .” RCW 84.34.020(2)(a)(i).

But it gets worse. As already noted in the context of the serial foreclosure issue, in response to what appeared to be Judge Castleberry’s view that there was not sufficient evidence of agricultural use before him, Mr. Gardner filed an extensive declaration covering (*inter alia*) the agricultural use issue in detail. CP 363-605. This declaration filled in the facts stated under section (B)(3) of the Statement of the Case regarding Agricultural Use by Rising Sun Arabians, including formation of Rising Sun Arabians, LLC, its website, the purpose to build and operate a horse-breeding, training, and boarding facility consisting of a barn, stable and arena, the breeding of stock, the contracts for future breeding, and the farm’s use of veterinary care, and purchases of feed, hay and shavings. CP 364-70; CP 382 (Covenants); CP 421 (Snohomish County Farm Use Approval); CP 426-563 (documents pertaining to business of Rising Sun Arabians). Nonetheless, in denying summary judgment on March 22, 2011,

Judge Wilson first found “that the evidence presented is consistent with the Court’s October 27, 2010 Order that the property . . . is not currently nor principally used for the production of livestock, nor, given the Covenants encumbering that property . . . is that property susceptible to being principally used for the production of livestock.” CP 6. This ruling compounds multiple errors:

- In deciding likelihood of success on the merits, “[t]he court . . . obviously does not does not adjudicate the ultimate rights in the lawsuit.” *Tyler Pipe Indus., Inc. v. State DOR, supra*, 96 Wn.2d at 793. As already noted, preliminary injunction rulings are purely interlocutory, and are not *res judicata* regarding any issue in the case. *McLean v. Smith, supra*, 4 Wn. App. at 400. To the extent Judge Wilson relied upon Judge Castleberry’s prior ruling, instead of evaluating the record and ruling himself, he committed error.
- The ruling fails to appreciate that new evidence has been presented on agricultural use.
- The ruling perpetuates Judge Castleberry’s completely backwards misreading of the Covenants.

But it gets worse still. In refusing to even address the merits of the arguments in response to Plaintiffs’ second Motion for Preliminary Injunction, the trial court perpetuated the errors above – the most

damaging of which, with respect to the agricultural use issue, were (1) the complete failure to notice that extensive additional evidence had been submitted on agricultural use; and (2) that the Covenants said the very opposite of what Judge Castleberry said. CP 12-13. At a minimum, Mr. Gardner has raised a question of fact, calling for a trial on the merits of his claimed principal agricultural use of Lot 10 as a horse farm. Reversal and remand for that trial is warranted.

**D. The Trial Court Erred in Granting Summary Judgment
Dismissal of the Consumer Protection Act Claim and
Denying the Motion to Amend**

On April 15, after the April 1st trustee's sale was completed, the Bank and SEL filed a Motion for Summary Judgment, asserting that all remaining claims were waived. CP 141-45. The Motion quotes *Brown v.*

Household Realty:

A party waives the right to postsale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.

Brown v. Household Realty, supra, 146 Wn. App. at 163; CP 145. *Brown* goes on to say that “a failure to seek presale remedies under the Act bars a borrower's claim arising out of any underlying obligation secured by the foreclosed deed of trust,” *id.* at 167, and that the waiver extends to tort claims, *id.* at 169.

Under the express terms of the case law, Mr. Gardner did not “fail[] to bring an action to obtain a court order enjoining the sale,” and therefore the waiver doctrine does not apply. The obvious purpose of this rule is to protect land titles against those who would hide in the bushes while foreclosure goes forward, and then attack it after the fact. That is not what Mr. Gardner did. By bringing his claims forward prior to the nonjudicial foreclosure he intended to challenge, and seeking preliminary injunctive relief, he has preserved his claims for wrongful foreclosure.

The trial court erred by finding that Mr. Gardner’s unsuccessful attempt to seek injunctive relief constituted a waiver of all further claims. As stated by Judge Castleberry in granting summary judgment to defendants:

[T]he argument today is can a claim for damages survive the foreclosure action when the party attempted to restrain it and failed to restrain it. I agree with the bank that under these sets of circumstances there has been a choice on the part of the plaintiffs to choose to attempt to restrain. That effort obviously has failed and they cannot now legally proceed on the basis that we are now going to be claiming damages.

VRP 36/4-11; *accord*, VRP 37-38/23-1 (CPA claims). This is reversible error.

“[A] party who unsuccessfully attempted to enjoin the sale should not be held to have waived the right to contest the completed sale. Under such circumstances, an action to set aside the trustee's sale may be

appropriate.” J. Hoffman, *Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L.Rev. 323, 336 (1984). If this were not the rule, the court would be empowered to bootstrap its own erroneous denial of injunctive relief into a bar on further consideration of the wrongfulness of the foreclosure. In Mr. Gardner’s case, at a minimum, the declaratory judgment and quiet title claims should be remanded to the trial court to resolve disputed issues of material fact pertaining to illegal serial foreclosure and applicability of the agricultural exception.

The Consumer Protection Act claims should also be remanded for trial. The unfair or deceptive acts claimed are: (1) nonjudicial foreclosure against agricultural land; (2) serial nonjudicial foreclosure which in effect seeks a deficiency on a personal loan; (3) the unfair practice of appropriating the Ellis PSA after opposing it for inadequate price; and (4) by the Motion to Amend filed May 9, 2011, the fraudulent boundary line adjustment. The first two clearly arise in relation to the attempted foreclosure of Lot 10, and were raised pre-sale, and therefore are not waived. The third arises out of the first sale, but the operative facts (the May 15, 2010, sale to Ellis at the same price) did not occur until the day after the first sale, and therefore it could not have been raised pre-sale, and it is not waived. The fourth occurred in the course of this litigation, and is not a basis for a challenge to the trustee’s sale anyway, so it is not waived.

The trial court's reasoning that the "choice" to seek an injunction – which is really no choice, given the law that most pre-sale challenges are waived if a preliminary injunction is not sought – waives all other claims, erroneously applies law pertaining to post-sale challenges to pre-sale claims. The court refers to RCW 61.24.127, which preserves certain claims, including CPA claims, in favor of persons who failed to assert a pre-sale challenge, provided they take no further steps to cloud title. VRP 38/2-9. This statute simply does not apply to Mr. Gardner, who was diligent in asserting his claims pre-sale.

With respect to Mr. Gardner's Motion to Amend to add the CPA claim arising out of the fraudulent boundary line adjustment, "[l]eave to amend should be freely given 'except where prejudice to the opposing party would result.'" *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987), quoting, *Caruso v. Local Union 690 of Int'l Brotherhood of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). This motion was made in early May, 2011, about five months after the false swearing first was presented to Snohomish County Planning and Development, and just a few weeks after the document was first recorded. It was presented at the time summary judgment was pending, but before it was granted, so this issue could easily have been carved out

for trial. It was a manifest abuse of discretion to deny the amendment to add this claim.

The Bank's main objection was that granting amendment would be futile, since all claims for damages had been waived by the denial of injunctive relief. CP 76, 78. But since this is purely a claim for damages for a kind of fraudulent slander of title, not one that would impugn the integrity of the trustee's sale, it is protected under RCW 61.24.127, and should have been permitted to go forward.

The Declaratory Judgment/Quiet Title, and Consumer Protection Act claims were erroneously deemed waived, and were never tried on the merits. The final summary judgment in favor of the Bank and SEL should be reversed and the matter remanded for trial.

E. Attorneys' Fees

1. The Fee Award in Favor of the Bank and SEL Should be Reversed or Modified

The attorneys' fees were awarded to the Bank and SEL based on one-sided clauses in the Promissory Notes and Deeds of Trust. CP 20; *see, e.g.*, CP 1056 (February 2007 D/T). By operation of law in Washington, such one-sided clauses are automatically transformed into prevailing party clauses. RCW 4.84.330. If this Court reverses on the

merits, it should *ipso facto* reverse the award of attorneys' fees to the Bank and SEL.

As for the amount of attorneys' fees, that lies within the discretion of the trial court. *CHD, Inc. v. Boyles, supra*, 138 Wn. App. at 1040, and will not be set aside absent an abuse of that discretion. *Unifund CCR Partners v. Sunde*, 260 P.3d 915, 921 (Div. 2 2011). Reasonableness of fees is generally determined by the "lodestar" method:

Under this method, first, "a 'lodestar' fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Second, the 'lodestar' is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation."

Unifund CCR v. Sunde, supra, 260 P.3d at 921 n.2, quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983). While obviously the defendants were successful below, nonetheless Mr. Lerner and his firm only had to defend two preliminary injunctions, one summary judgment, and then make their own summary judgment. The nonjudicial foreclosure itself should not have been part of the litigation fees – rather, it should have been part of the costs recovered at the trustee's sale. Mr. Lerner in his declaration appears to agree with this, CP 31 ¶2 (claims to have redacted work "related to the underlying property . . . not directly related to this litigation"), yet the attached

billings include charges for foreclosure work. *See, e.g.*, CP 42 (billing \$1,200 on 4/1/11 with no itemization between services for: “Foreclosure sale. Prolonged attendance at assessors office to attempt to record, and then report to client. Travel. Preliminary review of Motion for Reconsideration.”). For defense of 3 motions and prosecution of one relatively simple summary judgment, Mr. Lerner claimed 135.3 hours, of which 91.7 were billed at \$365-\$375 per hour, for a total fee awarded of \$47,537.23. CP 31; CP 20. This was plainly excessive, and was opposed as such prior to entry of the order. VRP 59-51 (June 10, 2011). It is incumbent upon the trial judge to independently determine a reasonable fee, and the court here failed to do so. If the fee award is not totally set aside, it should nonetheless be reversed and remanded for determination of a *reasonable* fee in light of the services performed.

2. Attorneys’ Fees on Appeal Should be Awarded to Mr. Gardner

Pursuant to RAP 18.1, Mr. Gardner requests an award of reasonable attorneys’ fees on appeal. As noted, the Notes and D/T in issue contain one-sided attorneys’ fee provisions, which are transformed into prevailing party provisions by operation of RCW 4.84.330. Even if Mr. Gardner prevails by establishing that prior contracts containing attorneys’ fee provisions are unenforceable, he is entitled to recover prevailing party

fees under those agreements. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789, 197 P.3d 710 (Div. 1 2008).

V. CONCLUSION

The trial court erred by failing and refusing to enjoin the illegal nonjudicial foreclosure of April 1, 2011, against Lot 10. This nonjudicial foreclosure was against collateral given for a personal loan which had already been the basis for a prior nonjudicial foreclosure on May 14, 2010, and therefore serial attempts to realize on different collateral securing this same personal loan is prohibited by RCW 61.24.100(1) and (3)(b). Furthermore, this nonjudicial foreclosure was against land principally used for agricultural purposes, or, at a minimum, there is a disputed question of fact about this use, which should have been tried on the merits.

This Court should declare the April 1, 2011, Trustee's Deed null and void, the sale held that date illegal, reverse the attorneys' fee award and judgment, and award attorneys' fees and costs on appeal to Mr. Gardner. If this Court does not reverse outright, it should remand for trial on the merits of the validity of the April 1, 2011 sale. Furthermore, this Court should reverse the denial of amendment, and remand for trial on the Declaratory Judgment/Quiet Title and Consumer Protection Act claims.

DATED this 27th day of October, 2011.



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CERTIFICATE OF SERVICE

I, Michael T. Schein, Attorney for Appellant, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF APPELLANT to be sent by U.S. Mail, first class postage prepaid, to counsel of record for Respondents and to trial counsel/co-counsel for Appellant, at the following addresses:

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