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No. 69225-9-I

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

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TOP LINE BUILDERS, INC., a Washington corporation,

Respondent/Cross-Appellant,

v.

U.S. BANK, N.A.,

Appellant/Cross-Respondent

And

FREDERICK W. BOVENKAMP and SHARON M. BOVENKAMP,  
husband and wife, and the marital community composed thereof, dba  
BOVENKAMP FAMILY, LLC-SERIES 8466 CAMAS; OLD  
REPUBLIC SURETY COMPANY, Bond No. YLI264739,

Respondents

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**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT**

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## I. INTRODUCTION

Appellant (“US Bank”) on October 31, 2011, just one day prior to trial, filed with the trial court a trial memorandum where it set forth claims that it had not previously pled. CP 354-369. Many of the claims set forth in US Bank’s trial memorandum mirrored claims pled and pursued by Defendants Fred Bovenkamp and Sharon Bovenkamp, husband and wife, dba Bovenkamp Family, LLC – Series 8466 Camas (“Bovenkamp”). CP 444-463.

Upon receiving a copy of US Bank’s trial memorandum, Respondent, Top Line Builders, Inc. (“Top Line”) brought a motion *in limine* before the trial court, seeking to have the trial court declare that US Bank did not have standing to argue the issues relating to the construction contract between Bovenkamp and Top Line and specifically the change order provisions and the amount owed. CP 350-353; VRP 3-29. The court ultimately denied Top Line’s motion and allowed US Bank to argue the contract issues. VRP 29.

After a bench trial and entry of Findings of Fact and Conclusions of Law, US Bank filed the present appeal. Top Line filed a cross-appeal arguing that US Bank does not have standing.

## II. ARGUMENT

The doctrine of standing prohibits a litigant from asserting another's legal right. Miller v. US Bank of Wash, N.A., 72 Wn. App. 416, 424, 865 P.2d 536 (1994). Standing is a question of law that the court reviews *de novo*. Kayes v. Pac. Lumber Company, 51 F.3d 1449, 1454 (9th Cir. 1995); In Re Guardianship of Karan, 110 Wn. App. 76, 81, 38 P.3d 396 (2002). In Washington, the doctrine of standing prohibits a party from asserting another's legal right. West v. Thurston County, 144 Wn. App. 573, 578, 183 P.3d 346 (2008) "The rule insures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute." Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010).

In the present case it is clear that US Bank is asserting another's legal rights; specifically, the rights and defenses of Bovenkamp under the construction contract between Top Line and Bovenkamp. The pleadings also establish that US Bank did not exercise any right to assignment of the construction contract, and therefore waived that claim.

### 1. Standing Is Not Limited To Claims of Plaintiffs

The doctrine of standing is not limited to a plaintiff or claimant asserting a claim, as argued by US Bank. The doctrine of standing prohibits *a party* from asserting another's legal right. *See*, Miller v. US

Bank of Washington, N.A., 72 Wn. App. at 424 (emphasis added). The claims asserted by US Bank at trial and on this appeal mirror the actual affirmative defenses pled and the claims brought and filed by Bovenkamp in Bovenkamp's answer, affirmative defenses and counterclaim to Top Line's complaint. CP 444-463.

US Bank tries to skirt the issue of standing by arguing that as a named defendant it is not required to establish standing in order to provide a defense to the claims of Top Line. However, no monetary claims were made by Top Line as against US Bank. CP 792-798. No claims were made by US Bank as against Top Line. CP 374-407. The issues at trial centered on how much money Bovenkamp owed Top Line. The sole issue between Top Line and US Bank was that of lien priority, which had already been established at a prior summary judgment hearing and order. CP 575-579. Thus, US Bank did not have standing at trial to argue about the amount(s) due and owing between Bovenkamp and Top Line. The fact that US Bank failed to plead that the construction contract had been assigned to it, also supports the conclusion that US Bank does not have standing.

**2. The Claims Brought By US Bank At Trial And On Appeal Are Compulsory Counterclaims.**

Civil Rule 13(a) specifies a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against

any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. US Bank had an obligation when it was served with the complaint by Top Line to assert as a counterclaim any claim which it had as against Top Line. Instead, US Bank did not make any claim that the construction contract between Bovenkamp and Top Line had been assigned to it, along with the rights thereto. CP 374-407. US Bank properly and appropriately brought its claims of breach of contract and indemnification against Bovenkamp, the real party in interest. CP 374-407.

### **3. US Bank Did Not Exercise Rights Of Assignment**

Before US Bank could process its loan to Bovenkamp, it also needed Bovenkamp and Top Line to execute a Residential Construction Loan Procedures Assignment and Consent Agreement (hereinafter referred to as "Loan Procedures Agreement"). VRP 265; DEF EX 38. US Bank argues that by virtue of the Loan Procedures Agreement, all rights to the construction contract were assigned to it and, therefore, US Bank has standing to make the claims it brings on appeal. The pleadings filed in this case, as well as the Loan Procedures Agreement, indicate otherwise.

US Bank, for the first time raised the issue of an assignment of the construction contract in oral argument on Top Line's motion *in limine* the first day of trial. VRP 6. This lawsuit had been filed in January 2010. CP

799-805. Trial did not occur until November 1, 2011, nearly two years later. During that time US Bank did not include in any of its pleadings that the construction contract between Top Line and Bovenkamp had been assigned to US Bank and that it would be enforcing the rights thereunder. Instead, US Bank made a cross-claim against Bovenkamp for breach of contract, specifically breach of the Loan Procedures Agreement, and for indemnification by Bovenkamp. CP 374-407. US Bank's own actions leading up to the first day of trial acknowledge that Bovenkamp was the party with standing to pursue the claims related to the construction contract.

#### **4. Any Assignment Right Cannot Be Bifurcated**

Even if there was an unconditional assignment of the construction contract to US Bank, such assignment includes the obligation to provide written notice to Top Line of US Bank's intent to enforce the terms of the construction contract. *See*, DEF EX. 38.

The Loan Procedures Agreement addresses Bovenkamp's assignment of the construction contract, but also addresses US Bank's acknowledgment that the construction contract is between Bovenkamp and Top Line. Paragraph 11 of the Loan Procedures Agreement reads as follows:

The construction contract is between the Borrower(s) and the Contractor, therefore, the Lender or its assigns will not be held responsible for the construction of the building in accordance with the blueprints, specifications and/or break-down sheet, nor responsible for the quality of work.

DEF EX 38.

The main issue at trial was whether Top Line and Bovenkamp followed the change order provisions of the construction contract and whether there were unforeseen modifications to the plans and specifications of the residence that consisted of extra work in *quantum meruit*. Only Top Line and Bovenkamp have privity to those issues as they were the real parties involved. US Bank's Loan Procedures Agreement contemplates that by specifying that the construction contract is between Top Line and Bovenkamp and US Bank is not responsible to assure that the building is constructed according to the blueprints and specifications.

DEF EX 38.

The purpose of the written notice requirement under the Loan Procedures Agreement is to assure Top Line that it is negotiating with the correct party on any construction matters; the party that has the right to bind Top Line. Taking US Bank's position that it has the right to come in *after* all construction has been completed and accepted by Bovenkamp and individually enforce specific terms within the construction contract, is exactly what the doctrine of standing tries to avoid.

US Bank's argument will lead to inconsistent and contradicting results and potential liability to unknowing contractors. For example, Top Line and Bovenkamp could have amended certain terms of the construction contract subsequent to the execution of the Loan Procedures Agreement. Under US Bank's argument, it would have the right after construction has been completed to enforce the terms of original construction contract as against Top Line. This would subject Top Line to further and unknown liability.

Another example, Top Line and Bovenkamp agree on a change order to the construction contract that greatly reduces the cost of several items (i.e. changing from granite countertops to Formica; changing radiant heat throughout to space heaters). While Top Line and Bovenkamp agree to such change, and no notice is required to US Bank under the Loan Procedures Agreement, according to US Bank's argument, after construction has been complete and accepted by Bovenkamp it could require Top Line to install the granite countertops and the radiant heat as per the original construction contract. This would subject Top Line to unknown liability.

The written notice requirement to Top Line of US Bank's exercising Bovenkamp's rights to the construction contract is there to avoid these

issues. US Bank admittedly did not provide any notice to Top Line of assuming Bovenkamp's rights under the construction contract until trial.

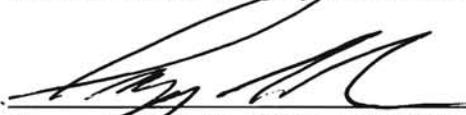
In the instant case, US Bank's argument contradicts the very purpose behind the doctrine of standing. Allowing US Bank to argue the same theories and claims as Bovenkamp, when US Bank did not have privity of the construction process, is what the doctrine of standing seeks to prevent.

### III. CONCLUSION

For the foregoing reasons, Top Line respectfully requests that the Court rule that US Bank did not have standing at the trial court level to argue breach of contract matters between Bovenkamp and Top Line, and also does not have standing to bring this appeal. Top Line respectfully requests that US Bank's appeal be dismissed and that Top Line be awarded its reasonable attorney's fees and costs incurred herein pursuant to RAP 18.1.

Respectfully submitted this 28<sup>th</sup> day of March, 2013.

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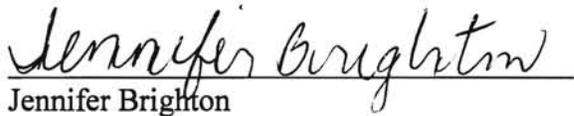
## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Reply Brief of Respondent-Cross Appellant to:

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