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No. 69954-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ADC VENTURE 2011-2, LLC,

Respondent,

v.

MTB ENTERPRISES, INC.; MICHAEL TONY BILANZICH,
JANE DOE BILANZICH, AND HAIRWARE USA, INC.

Appellants,

and

Betty Jean Bilanzich and John Doe Bilanzich, wife and husband;
Prime Pacific Bank, N.A.; Ultimate Survival Technologies,
LLC; John and Jane Does; occupants of the premises,

Defendants.

BRIEF OF APPELLANTS

On Appeal from Snohomish County Superior Court

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I. INTRODUCTION

This Court need hardly be reminded of the tremendous turmoil and confusion that the financial and business world fell into beginning in the Spring of 2008 and stretching well into 2009. It was during this time frame that Appellant MTB Enterprises, Inc. ("MTB") modified once - and had an agreement to modify again - a short-term commercial loan for property located in Monroe, Washington ("the Monroe Loan").

Specifically, MTB had a $3.3 million loan with ANB Bank ("ANB") on property in Monroe. This was one of several loans MTB had with ANB during that time frame. ANB had approved one modification to the Monroe Loan to make the payoff date April 27, 2008, and to reduce the interest rate from ten percent to nine percent. ANB was then closed by the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for ANB. In October 2008, shortly after approving a modification to another MTB loan for property located in Utah, the FDIC agreed in writing to allow MTB to modify the Monroe Loan. When MTB sought clarification of the terms, the FDIC's then servicing agent referred MTB to the new servicing agent, SitusServ ("Situs"). Significantly, MTB was not told that the October agreement was a take it or leave it deal.

Acting on behalf of the FDIC, Situs then reneged on the October 2008 agreement and attempted to link modification of the Monroe Loan with the resolution of a lawsuit MTB had brought against ANB/FDIC in April 2008 concerning a construction loan on property located in Kuna, Idaho ("the Kuna Loan"). The Kuna Loan was completely unrelated to the Monroe Loan. This linkage was improper because, having agreed in writing to modify the Monroe Loan pursuant to its powers under the applicable loan documents, the FDIC had an obligation to exercise its powers in good faith. It did not do so and a reasonable jury could have so found but for the Trial Court's decision to overlook material factual disputes in the parties' cross-motions for summary judgment. This is reversible error.

In addition, the evidence shows that the FDIC and its successor, ADC Venture 2011-2, LLC ("ADC") failed to mitigate its damages by wrongfully delaying foreclosure on the Monroe property, just now noting a Sheriff's Sale for a date over five years beyond the extended due date. ADC, which is majority owned by the FDIC, now stands to reap the enormous windfall judgment of millions of dollars in additional interest (at the 18% default rate) beyond that obtained if the FDIC had acted in a commercially reasonable manner and foreclosed in the typical 12 - 18 month time frame. As a result, the Trial Court should not have rewarded ADC as the successor to the FDIC for its unreasonable delay and deducted a substantial portion of interest from the judgment awarded.

Finally, the FDIC/ADC brought a claim in this foreclosure action seeking a judgment against the Monroe Loan guarantors, Appellants Michael T. Bilanzich ("Bilanzich") and Hairware USA, Inc. ("Hairware"). In pursuing both claims simultaneously, ADC violated the prohibition on concurrent actions as set forth in RCW 61.12.120. Thus, the Trial Court erred as a matter of law by awarding a deficiency judgment against the guarantors when they actually should have been dismissed from the lawsuit as the statute requires.

Taken individually or together, these errors cast great doubt on the correctness of the Trial Court's decision. The failure of the Trial Court to (1) recognize material factual disputes on the issue of whether the FDIC complied with its contractual obligations to MTB under the loan documents; (2) reduce ADC's interest award by the number of months of unreasonable delay in seeking foreclosure; and (3) enforce the prohibition against concurrent actions by not dismissing the guarantors all support a reversal of the Trial Court's order and a remand for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting summary judgment to ADC for foreclosure of the Monroe Property.

2. The Trial Court erred in granting summary judgment to ADC for a pre-foreclosure judgment against MTB, Bilanzich, and Hairware.

3. The Trial Court erred in granting summary judgment to ADC for an award of attorney fees and costs against MTB, Bilanzich, and Hairware.

4. The Trial Court erred in granting summary judgment to ADC for execution against MTB, Bilanzich, and Hairware for any deficiency judgment.

5. The Trial Court erred in denying summary judgment to MTB for dismissal of Bilanzich and Hairware.

6. The Trial Court erred in denying summary judgment to MTB, Bilanzich, and Hairware for attorney fees and costs incurred.

7. The Trial Court erred in entering the Judgment and Decree of Foreclosure against MTB, Bilanzich, and Hairware.

8. The Trial Court erred in entering the Supplemental Judgment for Attorney Fees and Costs against MTB, Bilanzich, and Hairware.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are there material factual disputes about whether ADC's predecessor and majority owner, the FDIC, breached its duty of good faith and fair dealing when the FDIC agreed in writing to a modification of the Monroe Loan and then later reneged on that agreement in an attempt to obtain concessions in the lawsuit over the Kuna Loan? (Assignments of Error 1, 2, 3, 4, 7, 8.)

2. Are there material factual disputes about whether ADC should have been required to mitigate its damages to prevent a windfall of over $2 million? (Assignments of Error 1, 2, 3, 4, 7, 8.)

3. Should the guarantors Bilanzich and Hairware be dismissed from this foreclosure action because ADC is pursuing concurrent actions in violation of RCW 61.12.120? (Assignments of Error 5, 6.)

4. Are MTB, Bilanzich, and Hairware entitled to attorney fees and costs on appeal?

IV. STATEMENT OF THE CASE

A. Origination and First Modification of the Monroe Loan.

On February 27, 2007, MTB entered into an agreement with ANB to borrow $3.3 million to purchase property in Monroe, Washington. CP 456-57. The Monroe Loan was secured by a Deed of Trust on the property. CP 459-65. Bilanzich and Hairware also guaranteed the Monroe Loan. CP 466-69. A section of the loan agreement entitled "Obligations Independent" states in pertinent part:

> You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. (Of course, you are entitled to only one payment in full.) **I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time-to-time without limit or notice and for any term without affecting my liability for payment of the note.**

CP 457 (emphasis added).

While the original due date for the Monroe Loan was February 27, 2008, MTB and ANB entered into a loan modification agreement that extended the due date to April 27, 2008, and reduced the interest from ten percent to nine percent. CP 456, 470. In May 2008, the Office of the Comptroller of the Currency closed ANB, and the FDIC was named as the receiver for ANB. CP 454.

B. Second Modification of the Monroe Loan.

MTB struggled to make interest payments under the Monroe Loan and was attempting to refinance it throughout the Summer of 2008. *See* CP 204-05. On October 16, 2008, the FDIC, through its representative Mark Wolin, sent an email to Bilanzich agreeing to again modify the Monroe Loan by reducing the principal to $3.15 million, and to waive the accrued interest and penalties. CP 509. The commitment was good until October 31, 2008. *Id.* Bilanzich sought clarification from Wolin about the timing. CP 255. Wolin responded to Bilanzich by stating: "Well, you'll have to talk to whoever has the loan package after 10-31." *Id.*

C. The FDIC's Linkage of the Monroe Loan and the Kuna Loan.

Several months before the FDIC agreed to again modify the Monroe Loan, MTB sued ANB and the FDIC for breach of an unrelated construction loan agreement to finance the development of a different property owned by MTB in Kuna, Idaho ("Kuna Loan"). CP 414. On

November 10, 2008, MTB filed an Amended Complaint in the litigation on the Kuna Loan. CP 299.

Bilanzich was not contacted by anyone from the FDIC with respect to the Monroe Loan until the middle of November 2008, after the Amended Complaint in the Kuna Loan litigation had been filed. *See* CP 256-57, 299. Specifically, Stacey Efaw of Situs, the new loan servicer for the FDIC, contacted Bilanzich to discuss the Monroe Loan. CP 256-57. Bilanzich gave Efaw Mark Wolin's telephone number so that Efaw could speak to Wolin about the Monroe Loan modification that the FDIC, through Wolin, had reached with MTB in October. CP 257. On December 3, 2008, Efaw contacted Bilanzich and asked how much of an extension Bilanzich would require in order to complete the agreed upon modification. CP 508. Bilanzich told him he needed until February 28, 2009, to complete the refinancing process. CP 258.

On December 17, 2008, Situs sent MTB documentation for the renegotiation of both the Monroe Loan and the loan associated with the Kuna Loan. CP 269. A few days later, on December 22, 2008, Situs sent a Notice of Default and Demand for Payment of the full amount of the Monroe Loan. CP 308-09. On December 29, 2008, Efaw asked to meet with Bilanzich in Salt Lake City on January 8, 2009 to discuss the refinancing of the Monroe Loan. CP 271-72. Efaw also indicated that he wanted to discuss the Kuna property as well. *Id.* Bilanzich informed Situs that he was unwilling to discuss the Kuna Loan without counsel. *Id.*

In anticipation of that meeting, Situs sent Bilanzich a pre-negotiation agreement for the Monroe property. CP 310-14. This pre-negotiation agreement was not required as a matter of FDIC policy. CP 297-98. Yet, Situs refused to accept any modification of the pre-negotiation agreement for the Monroe Loan. CP 279. On January 26, 2009, it notified MTB that it was in default on the Monroe Loan and demanded full payment. *See* CP 261-62. That was the last communication from Situs or the FDIC to MTB. CP 262.

D. <u>The FDIC'S Transfer of the Monroe Loan to ADC.</u>

On February 9, 2011, two years after its last communication with MTB, the FDIC filed this foreclosure lawsuit, asking for a decree of foreclosure to foreclose on the property in Monroe, an appointment of a receiver, and a deficiency judgment. CP 262, 524-34. In addition to MTB, the FDIC also joined the two guarantors, Bilanzich and Hairware, and Bilanzich's ex-wife, Betty Jean Bilanzich, as defendants, requesting money judgments against these additional defendants. CP 524-34. In December 2011, the FDIC requested that MTB send financial information to it as part of renewed settlement discussions. *See* CP 323. While these settlement discussions were pending, the FDIC formed ADC, and sold the Monroe Loan to ADC. CP 344-64, 458. ADC was substituted as the named Plaintiff, replacing the FDIC, in the foreclosure lawsuit on March 19, 2012. CP 488-93.

Both ADC and MTB filed for summary judgment, and this matter was argued to the Trial Court on January 4, 2013. CP 168. The Trial Court made its oral ruling at the hearing, and a written Order Granting Summary Judgment was entered on January 29, 2013. CP 160-68. The Trial Court denied MTB's summary judgment motion, except that summary judgment was granted dismissing the FDIC/ADC's claim for a money judgment against Betty Jean Bilanzich. CP 162. With that one exception, the Trial Court granted ADC's motion for summary judgment. *Id.* Specifically, the Trial Court ruled, in part, that:

- A decree of foreclosure for the Monroe property shall be entered. CP 163.
- ADC is entitled to a money judgment against MTB, Bilanzich, and Hairware, in the principal amount of $3.3 million; plus $2,595,698.80 for interest through August 8, 2012; $5,200.00 for

late fees; $189,377.86 for taxes advanced and owing; plus additional interest at $1,627.40 per day from August 9, 2012, forward; reasonable attorney fees and costs less any monies already received from the receiver. CP 162-63.

- ADC is prohibited from executing on the judgment against MTB, Bilanzich, and Hairware until after a deficiency amount has been determined. CP 163-64.

- ADC is entitled to execute against any property of MTB, Bilanzich, and Hairware for any deficiency on the judgment that remains after application of the proceeds of the sale. *Id.*

MTB, Bilanzich, and Hairware filed its Notice of Appeal on February 28, 2013. CP 84-97.

On February 28, 2013, the Trial Court entered the Judgment and Decree of Foreclosure, and MTB, Bilanzich, and Hairware filed their Amended Notice of Appeal on March 28, 2013. CP 98-105; SCP ____ - ____ (Sub. No. 97). On March 29, 2013, the Trial Court entered a Supplemental Judgment for Attorney Fees and Costs, awarding ADC $118,000 for attorney fees and $4,330.21 for costs, with interest to accrue at 12 percent per annum. SCP ____ - ____ (Sub. No. 100). The Monroe property is scheduled to be sold at a Sheriff's Sale on June 7, 2013. SCP ____ - ____ (Sub. No. 104).

V. ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR ADC BECAUSE THERE WERE MATERIAL FACTUAL DISPUTES ABOUT WHETHER ADC'S PREDECESSOR AND MAJORITY OWNER, THE FDIC, BREACHED ITS DUTY OF GOOD FAITH AND FAIR DEALING WITH MTB.

This court reviews an order granting summary judgment de *novo*. *City of Oak Harbor v. St. Paul Mercury Ins. Co.,* 139 Wn. App. 68, 71, 159 P.3d 422 (2007). The court can only grant summary judgment if there are no issues of material fact. CR 56(c). All facts are to be construed "in the light most favorable to the nonmoving party . . ." *St. Paul Mercury Ins. Co.*, 139 Wn. App. at 71-72. In this case, the Trial Court failed to consider the material facts, and the inferences therefrom, in MTB's favor.

1. The Monroe Loan Documents Provide the FDIC Powers Which They Have a Duty to Exercise in Good Faith. There Are Material Factual Disputes About Whether The FDIC Breached This Duty of Good Faith.

MTB contends that there are material questions of fact whether the FDIC, and later ADC, failed to exercise its express power under the Monroe Loan documents in good faith, and thereby breached their implied covenant of good faith and fair dealing inherent in the agreements themselves.

In a section of the February 27, 2007, loan agreement between MTB and ANB entitled "Obligations Independent," ANB and MTB agree as follows:

> You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me of my duty to pay it. (Of course, you are entitled to only one payment in full.) **I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time-to-time without limit or notice and for any term without affecting my liability for payment of the note.**

CP 457 (emphasis added). This provision gives the FDIC the express power to extend or modify the terms and conditions of the Monroe Loan in its discretion. *Id.* However, as an express contractual provision, the FDIC had an obligation to exercise that power in good faith. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id.* It promotes "faithfulness to an agreed common purpose and consistency with the justified expectation of the other party." *Culuccio v. King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007) (quoting Restatement (Second) of Contracts §205 cmt. a (1981)). "Generally, summary judgment is not appropriate where 'good faith' is an issue. *Roy v. Everett*, 118 Wn.2d 352, 366, 823 P.2d 1084

(1992). As discussed below, there are material questions of fact whether the FDIC did not do so here.

a. The FDIC Acted in Bad Faith When it Agreed in Writing to a Modification of the Monroe Loan and Then Later Reneged on That Agreement in an Attempt to Obtain Concessions in the Lawsuit over the Kuna Loan.

The principal actor in the FDIC's wrongful conduct against MTB was Situs whom the FDIC acknowledged "was the same thing as dealing with the FDIC itself." CP 292. The evidence presented to the Trial Court raises questions of fact that Situs had acted in bad faith towards MTB.

Immediately prior to Situs's involvement with MTB, the FDIC had agreed in writing to modify the Monroe Loan. CP 509. It did this in October 2008, just shortly after it had agreed to modify a different loan MTB had on another property in Utah. CP 204-05. The October 2008 agreement to modify was in no way a "take it or leave it" opportunity for MTB. To the contrary, when MTB sought clarification of the terms of the agreement, the then servicing agent for the FDIC referred MTB to the new servicing agent, Situs. CP 255.

When Situs took over as servicer of the Monroe Loan for the FDIC in November 2008, it contacted MTB and learned of its pre-existing agreement with the FDIC. CP 256-57. Situs inquired how much time MTB needed to refinance the loan. CP 508. Situs then attempted to link refinancing of the Monroe Loan to resolution of the Kuna litigation about which Situs was aware. CP 271. When MTB refused to link the loans together, Situs ceased all communications with MTB. CP 262. Indeed, it even ignored the request of the FDIC to try to resolve the matter before foreclosure. CP 295.

In January 2009, MTB was in the process of obtaining approval to refinance the Monroe Loan to take out the FDIC. CP 254, 260, 283-84. All that was required was a final payoff number from the FDIC. *Id.* However, Situs refused to provide either to MTB or to the new lender the payoff information so that the loan could be processed and completed. *Id.*

These material facts could easily persuade a reasonable jury that the FDIC, through the deliberate and intentional actions of its agent Situs, impeded MTB from renegotiating the loan and from ultimately paying it off. The FDIC thus breached its express and implied obligations to MTB under the loan documents. Indeed, to the extent that Situs's behavior thwarted MTB's ability to satisfy the loan obligation, a jury could find that the FDIC was in express violation of the loan documents. In any event, several different conclusions in favor of ADC and MTB can be reached from these facts, and summary judgment for ADC was not proper.

b. ADC is Liable for the Conduct of its Predecessor, the FDIC.

On or about December 20, 2011, the FDIC created ADC Venture 2011-2, LLC. CP 344-47. It then sold forty percent (40%) of its ownership interest in ADC to a third-party, California ADC Loan Portfolio Private Owner, LLC, and retained the remaining sixty percent (60%) ownership interest for itself. CP 348-60. At the same time, the FDIC entered into an Asset Contribution Agreement ("ACA") with ADC whereby the FDIC transferred certain assets to ADC. CP 361-64.

Pursuant to Section 2.2 of the ACA, ADC agreed to:

> **[A]ssume[] as of the Cut-Off Date [November 4, 2011] the Obligations, and agrees to perform and pay the obligations when due,** and (ii) in addition to and without limitation of clause (i), shall indemnify and hold harmless the Transferor [FDIC] from and against all costs and expenses (including attorneys' fees and litigation and similar costs, and other out-of-pocket expenses, actually incurred in investigating, defending, asserting or preparing the defense of any Action), judgments, awards, fines, amounts paid in settlement or penalties incurred by the Transferor (at any time after the cut-off date) arising out of, resulting from or otherwise in connection with any Assumed Closing Date Asset Litigation.

CP 362 (emphasis added).[1] There is no reference to excluded liabilities in

[1] "Obligations" are defined as all liabilities (including any liability to make an extension of credit or other advance) of the Receiver under any Transferred Contract, in each case to the extent the same are, in accordance with the FDIC Legal Powers (interpreted as set forth in the last sentence of Section 2.2 of the Contribution Agreement), legally binding on and valid against the Receiver. *See* CP 362.

this section. CP 332, 362. Similarly, Section 2.9 of the ACA states:

> **Notwithstanding any of the provisions of this Agreement to the contrary, the Company acknowledges and agrees that each Asset is conveyed, contributed and sold to the Company subject to any and all contracts and agreements to which the Transferor or any predecessor-in-interest is a party with respect to such Asset as of the Closing Date, including any settlement agreements, restructuring agreements or sale and purchase agreement (other than any Transferor Loan Servicing Contract).**

CP 363-64 (emphasis added).

ADC acknowledged that the FDIC transferred the Monroe Loan to it as part of the Asset Contribution Agreement. CP 333-34. ADC has also acknowledged that under its Operating Agreement it expects to receive cash distributions from its management of assets such as the Monroe Loan. CP 330-31, 345-47. It is well-settled under Washington law that a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation, ***except*** where (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability. *Hall v. Armstrong Cork Inc.*, 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984).

In this case, at least two of these criteria are satisfied or there are genuine factual disputes on that issue. The language of Section 2.2 of the ACA indicates that ADC is assuming the FDIC's liabilities for the Monroe Loan. CP 362. In addition, Section 2.9 supports a finding that ADC is subject to any obligation that either the FDIC or ANB may have undertaken to MTB including, but not limited to, the covenant of good faith and fair dealing. *See* CP 363-64. Indeed, ADC's designated representative acknowledged the validity of this reading of Section 2.9:

> **Q. So tell me if I'm interpreting this Section 2.9 correctly. It seems to me that if an asset is subject to an agreement with the FDIC, and someone else, and then that asset is conveyed to ADC by way of this Asset Contribution Agreement, then ADC takes the asset subject to the agreement. Would you agree?**
>
> ...
>
> **A. Yes. By looking at the language in that section, that makes sense.**

CP 334-35 (emphasis added).

In addition, because the FDIC established ADC and remains its majority owner, it appears that ADC is merely a continuation of the FDIC. Washington courts rely on several factors to determine whether a successor business is a mere continuation of a seller. These include a common identity between the officers, directors and stock holders of the selling and purchasing companies and the sufficiency of the consideration running to the seller corporation in light of the assets being sold. *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wn.2d 475, 482, 209 P.3d 863 (2009). In considering these factors, the objective of the court is to discern whether the purchaser represents "merely a new hat for the seller." *Id.* There are sufficient facts on the record now to support such a finding:

- The FDIC owned the Monroe Loan. CP 524-34.
- The FDIC transferred that loan as a capital contribution to ADC, an entity it established and in which it has a sixty percent (60%) ownership interest. *See* CP 344-64.
- ADC is now seeking to exercise its rights under the Monroe Loan to the monetary benefit of its members, including the FDIC. *See* CP 344-64, 488-93, 524-34.
- ADC's Rule 30(b)(6) representative, Christopher Pierson, testified that ADC performed many of the same functions with respect to its assets as the FDIC did when it controlled those same assets. CP 326-27.
- The FDIC is entitled to receive a 60% distribution of cash generated by ADC until the revenue coming in exceeds several million dollars. CP 345-46.

All these facts support the conclusion that the Monroe Loan ADC is now trying to enforce, is subject to MTB's defenses.

Since there are material questions of fact, this case should be remanded to the Trial Court for a determination of those questions.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR ADC BECAUSE THERE WERE MATERIAL FACTUAL DISPUTES ABOUT WHETHER ADC MITIGATED ITS DAMAGES.

Washington law recognizes the doctrine of mitigation of damages, or avoidable consequences, which prevents an injured party from recovering damages that the injured party could have avoided if it had taken reasonable efforts after the wrong was committed. *TransAlta Centralia Generation, LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006). "Whether a party properly mitigated her damages turns on a determination of reasonableness. An issue about which reasonable minds could differ is a jury question." *Id.* at 826.

The facts are undisputed that Situs made a recommendation to the FDIC to bring a foreclosure action against MTB in May 2009. CP 295. Yet, the FDIC waited nearly 24 months before initiating an action, and a sale is now scheduled for June 7, 2013. *See* CP 524-34; SCP ____ - ____ (Sub. No. 104. ADC now seeks to collect interest under the exorbitant contract default interest rate for the intervening 44 months that passed between when it should have foreclosed on the property (October 2009) and the currently scheduled foreclosure date (June 2013). *See* CP 295; SCP ____ - ____ (Sub. No. 104). Indeed, as of next month's Sheriff's sale, the amount of the default interest after 5-plus years will be approaching the underlying indebtedness, in large part because of the FDIC's unreasonable delay. *See id.* The default interest makes it impossible for ADC to be made whole from a sale of the property and will leave a substantial deficiency judgment, which is unfairly prejudicial to the guarantors, Bilanzich and Hairware USA, and represents a windfall to ADC.

It would not have been unreasonable for the FDIC to bring a foreclosure suit in a more timely fashion. Indeed, the FDIC does not even know why suit was not brought until February of 2011, despite Situs' recommendation to foreclose in May of 2009. CP 295. Accordingly, a jury could determine that the FDIC did not act reasonably with respect to mitigation and, therefore, its successor, ADC, should not be allowed to benefit by reaping what will likely be millions of dollars in additional interest as a result. To the extent there is a question about reasonableness, such question is better answered by the jury.

A brief review of the figures at play in this instance is instructive. The $3.3 million note was due on April 27, 2008, after which date the interest rate stepped up from nine percent to the eighteen percent default rate. CP 456, 470. Recall that about a year later, in May of 2009, Situs recommended that the property should be foreclosed. CP 295. Assuming that the property was sold in October of 2009, 18 months after the initial default, the balance of the loan, with interest accumulating at $1,627.40 per day, would have been $4,191,001. *See* CP 163. Instead, the FDIC delayed foreclosure on the Monroe property. If only the FDIC had followed through and foreclosed on the property in 2009, millions of dollars in damages could have been mitigated as opposed to the path that it instead chose to follow.

The difference between a foreclosure in 2009 and a foreclosure in 2013 is stark.

> **If Foreclosure Occurred in 2009.** In 2009, the three parcels at issue in this case were collectively assessed by Snohomish County to be worth $3,733,000. ER 201[2]. As noted above, the loan payoff, with default interest as of that date was $4,191,001. Thus, if the price at an October 2009 foreclosure sale was equal to the assessed value, the deficiency as of October 2009 would have been a mere $458,000, which as of June 7, 2013, would have grown to $759,526 after accounting for 44 months of additional default interest at $1,627.40 per day.

> **Foreclosure Set for June 2013.** In 2013, the three parcels at issue in this case are collectively assessed by Snohomish County to be worth $3,172,000. *Id.* The loan payoff, with default interest as of the June 7, 2013 Sheriff's sale will be $6,383,918. Thus, if the price at the June 2013 foreclosure sale is equal to the assessed value, the deficiency (on the Note balance only) as of June 2013 will be $3,211,918.

After comparing the present value of the likely 2009 deficiency against the likely 2013 deficiency, it becomes clear that the failure of the

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[2] ER 201, which is modeled on the Federal Rule, allows the Court to take judicial notice of such common facts as the assessed value published by Snohomish County, which can not be subject to reasonable dispute. ER 201; *See also* RAP 7.3.

FDIC to timely foreclose will end up costing MTB Enterprises ***and its guarantors*** millions of dollars in additional damages - all based on the FDIC's failure to mitigate. When a lender elects to pursue a default, it must be held to equitable standards of reasonableness. There is limited authority in Washington that addresses a lender's failure to timely foreclose, but one case does touch the issue - *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 183 P.2d 619 (1991). In that case, Division III reversed the trial court's decision to deduct interest from the deficiency judgment due to the lender's delay. *See id.* at 204. Yet, this case can be distinguished. In *Farm Credit*, the bank's delay was brought about by the borrower and the Court recognized there was no obligation of the bank beyond the contract terms. *Id.* at 202-03. Simply put, the bank did not delay. *Id.* Here, to the contrary, after it made its decision to foreclose in May of 2009, the FDIC delayed initiation of foreclosure proceedings for two years; MTB had nothing to do with the delay. CP 295, 524-34. While the FDIC's right to 18 percent interest is based on a contract, even a contract right can be waived by a parties' conduct. *Mike M. Johnson, Inc. v. The City of Spokane*, 150 Wn/2d 375, 386, 78 P.3d 161 (2003).

The Court here need not manufacture a new rule to address the unique facts of this case. This Court need only recognize the inequity of allowing ADC to collect nearly 44 months of interest at a default rate because of the bad acts of the FDIC. This is the kind of equitable outcome that is well within this Court's power to bring about. Indeed, the Washington Supreme Court long ago held, albeit in a different context: **"Equity will not enforce a contract where the result will be harsh and oppressive."** *In re Arland's Estate*, 131 Wn. 297, 299, 230 P. 157 (1924) (emphasis added). Enforcing the default interest rate in the Monroe Loan Documents without requiring the FDIC/ADC to mitigate their damages, is precisely the kind of result foreseen by the *Arland's Estate* Court.

Accordingly, this case should be remanded to the Trial Court with instructions to calculate a reasonable deduction from any deficiency judgment in order to account for the 44 month delay in foreclosure, which at the $1,627.40 daily per diem, amounts to $2,277,003.80.

C. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO MTB FOR DISMISSAL OF THE GUARANTORS BILANZICH AND HAIRWARE USA BECAUSE PURSUING THE GUARANTORS IN THIS FORECLOSURE ACTION IS A CONCURRENT ACTION IN VIOLATION OF RCW 61.12.120.

This Court reviews questions involving the legal interpretation of statutes *de novo*. *Boeing Employees' Credit Union v. Burns*, 167 Wn. App. 265, 270, 272 P.3d 908 (2012). "A court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. A court will look to the statute's plain language. If the statute is unambiguous, the inquiry ends. A statute is unambiguous when it is not susceptible to two or more reasonable interpretations." *Id.*

RCW 61.12.120 states:

> The plaintiff shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he or she is seeking to obtain execution of any judgment in such other action; **nor shall he or she prosecute any other action for the same matter while he or she is foreclosing his or her mortgage or prosecuting a judgment of foreclosure.**

Id. (emphasis added). Washington courts have long held:

> In transactions involving both notes and mortgages, the notes represent the debts, the mortgagee's security for payment of the debts. Either may be the basis of an action. . . . The mortgagee may sue and obtain a judgment upon the notes and enforce it by levy upon any property of the debtor. If the judgment is not satisfied in this manner, the mortgagee still can foreclose on the mortgaged property to collect the balance. Alternatively, the mortgagee may foreclose on the mortgaged property and obtain a deficiency judgment. . . . **Concurrent actions to obtain execution of a judgment and foreclose on the mortgaged property are prohibited.**

American Fed. Sav. & Loan Assoc. of Tacoma v. McCaffrey, 107 Wn.2d 181, 189-90, 728 P.2d 155 (1986) (internal citations omitted) (emphasis added).

On its face, the Complaint makes clear that ADC is seeking to obtain a foreclosure on its mortgage while it is simultaneously prosecuting an action against the guarantors for the same debt. CP 524-34. In his deposition, ADC's representative agreed that this foreclosure lawsuit is an action against the guarantors for the same debt. CP 339-40. In response to Bilanzich and Hairware's argument against concurrent actions, the Trial Court was concerned enough to specifically order that ADC could not pursue its money judgment against Bilanzich and Hairware until after the deficiency amount was established. CP 163-64. Logically, there would be no reason for this restriction unless the Trial Court recognized the protections of RCW 61.12.120. Clearly, the Court was concerned about ADC concurrently enforcing its judgment against the guarantors while the foreclosure was being completed. But instead of fashioning the remedy that it did, the Trial Court should have dismissed the guarantors as the statute requires.

The statutory scheme set forth in RCW 61.12.120 contemplates that the mortgagee will foreclose on the property, dispose of it at a sale, and then seek the deficiency from the mortgagor. *See, e.g.*, RCW 61.12.100. Indeed, the entirety of RCW 61.12. *et seq.* refers almost exclusively to remedies for and against a "mortgage debtor." Alternatively, the mortgagee may simply proceed against the guarantors to satisfy the debt. *See McCaffrey*, 107 Wn.2d at 190. However, ADC cannot do both at the same time, as it is doing here. Regardless of the how a mortgagee wishes to proceed, long-standing Washington law has recognized that **"the only proper parties to a foreclosure action are the mortgagor, the mortgagee and those who have acquired any interest from either of them, subsequent to the mortgage."** *Davis v. Starkenburg*, 5 Wn.2d 273, 281, 105 P.2d 54 (1940) (emphasis added). The guarantors, Bilanzich and Hairware USA, are not the mortgagor (MTB Enterprises), or the mortgagee (FDIC/ADC), nor are they parties who have acquired an interest in the Monroe property. Therefore, they are not proper parties in this foreclosure lawsuit and should have been dismissed on summary judgment. MTB requests that this matter be remanded accordingly.

D. MTB, BILANZICH, AND HAIRWARE SHOULD BE AWARDED FEES ON APPEAL.

Pursuant to RAP 18.1, MTB, Bilanzich, and Hairware request that they be awarded their attorney fees and costs if they prevail in this appeal, as provide for by the loan documents, RCW 4.84.330, and RCW 4.28.185(5). The Monroe Loan documents all provide that the lender is entitled to its attorney fees and costs. CP 457, 463, 466, 469. RCW 4.84.330 prohibits one-way attorney fees clauses, and provides that the prevailing party, whether that party is specified or not in the contact, "shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements." RCW 4.84.330.

Additionally, MTB, Bilanzich, and Hairware are all residents of Utah. CP 466, 468, 517, 528. Washington's long-arm statute provides for reasonable attorney fees to a prevailing out-of-state party. RCW 4.28.185(5). MTB, Bilanzich, and Hairware should be awarded their fees and costs on appeal.

VI. CONCLUSION

Appellants are well aware that courts in every jurisdiction throughout the country are awash in foreclosure actions resulting from the collapse of the real estate economy in 2008 and 2009. However, the seeming regularity of such cases should not dull this Court's sensitivity to factual disputes and, equally important, disputes over the inferences to be derived from undisputed facts. The reality is that there are significant disputes over factual matters as well as the inferences available from the facts at issue, disputed and undisputed, that make summary judgment inappropriate in this case.

MTB seeks a reversal of the Trial Court's Order in its entirety and a remand to the Trial Court for a resolution of the following issues:

- Whether the FDIC and its successor ADC breached their contractual obligations to MTB;
- What amount the interest award to ADC, if any, should be reduced by because of the failure on the part of the FDIC to timely bring an action for foreclosure;

- A reversal of the judgment against the guarantors because the Trial Court failed to dismiss them pursuant to RCW 61.12.120.

MTB also seeks an award of attorney's fees as provided for in RAP 18.1.

DATED this 13TH day of May, 2013.

Respectively submitted,

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- A reversal of the judgment against the guarantors because the Trial Court failed to dismiss them pursuant to RCW 61.12.120.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ADC VENTURE 2011-2, LLC, Respondent, vs. MTB ENTERPRISES, INC.; MICHAEL TONY BILANZICH and JANE DOE BILANZICH, husband and wife; and HAIRWARE USA, INC., Appellants, and Betty Jean Bilanzich and John Doe Bilanzich, wife and husband; Prime Pacific Bank, N.A.; Ultimate Survival Technologies, LLC; John and Jane Does; occupants of the premises, Defendants.	No. 69954-7-I GR 17(a)(2) DECLARATION OF RECEIPT OF FACSIMILE FOR FILING

I, the undersigned, hereby declare that I received the attached page 29 of the Brief of Appellants by facsimile. I have examined said document, determined that it consists of 3 pages including this declaration pages, and said document is complete and legible.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 13th day of May, 2013, at Seattle, Washington.

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CERTIFICATE OF MAILING

I certify that on May 13, 2013, I sent via email, and mailed, postage prepaid, a copy of the foregoing Brief of Appellants to:

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