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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 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; and John and Jane Does, occupants of the premises,

Defendants.

# BRIEF OF RESPONDENT

William L. Larkins, Jr., WSBA #33423
Cody Hoesly, WSBA #41190
LARKINS VACURA LLP
621 SW Morrison Street, Suite 1450
Portland, Oregon 97205
Telephone: 503-222-4424
Attorneys for Respondent

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## I. INTRODUCTION

This is a straightforward commercial debt collection and foreclosure action. When defendants defaulted on their commercial loan, plaintiff's predecessor-in-interest filed this action for a money judgment and foreclosure of the real property collateral. The trial court granted summary judgment in plaintiff's favor.

Defendants now appeal, raising three main arguments. First, they argue that plaintiff's predecessor-in-interest breached a duty of good faith and fair dealing by failing to modify the loan after defendants were in default. Second, defendants argue that plaintiff's predecessor-in-interest failed to mitigate its damages by not suing them sooner. Finally, the guarantors on the loan argue that RCW 61.12.120 required plaintiff to wait until after the sheriff sold the real property collateral in this case before it could bring a separate lawsuit against them for any deficiency.

All of defendants' arguments are meritless as a matter of law based on the undisputed evidence in the record. Defendants' theories are contrary to well-established and controlling precedent. Defendants ignore the basic principles of contract and foreclosure law and misrepresent the record throughout their opening brief. For all of these reasons, this Court should affirm the judgment below.

## II. STATEMENT OF FACTS

### A. The making of the Loan and defendants' default

On or about February 27, 2007, defendant MTB Enterprises, Inc. ("MTB"), obtained a commercial loan ("Loan") from ANB Financial, N.A. ("ANB") to finance the purchase of certain real property located in Monroe, Washington ("Property"). CP 496. The Loan was evidenced by a promissory note ("Note") executed by MTB in favor of ANB in the principal amount of $3,300,000 and with a term of one year. CP 456-57. To secure MTB's obligations under the Note, MTB executed a deed of trust ("Deed of Trust") encumbering the Property, which named ANB as beneficiary. CP 459-65. Additionally, defendants Michael Tony Bilanzich and Hairware USA, Inc. ("Guarantors"), each executed guaranties under which they each unconditionally guaranteed payment of all indebtedness owing under the Note. CP 466-69. Bilanzich is the president of both MTB and Hairware. CP 468, 496.

On or about April 9, 2008, MTB and ANB entered into a Commercial Debt Modification Agreement that extended the maturity date of the Note to April 27, 2008. CP 470. MTB did not repay the Note by that date, nor has it ever done so; neither have the Guarantors. CP 454. MTB never even attempted to pay ANB. CP 484.

**B. Post-default negotiations and the October 31, 2008, deadline**

On May 9, 2008, ANB was closed by the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation ("FDIC") was named receiver for ANB. CP 454. The FDIC hired Q Financial, a loan servicer, to act on its behalf with regard to the Loan. CP 221, 264.

In the meantime, MTB obtained verbal approval from Plaza Bank to refinance the Property, conditioned on an appraisal and receipt of a payoff quote from the FDIC. CP 205, 254, 260, 481. Significantly, however, MTB's dealings with Plaza Bank were still in the early stages; the parties had not signed a term sheet, let alone a commitment letter or any formal loan documentation. CP 482. Plaza Bank never obtained an appraisal of the Property. CP 254.[1]

In terms of a payoff quote, MTB began to negotiate with the FDIC for a write-down of the Loan. CP 204-05. On June 2, 2008, MTB was told that the FDIC likely would approve a payoff "at 95% of the loan amount[,] which would be $3,135,000." CP 263. MTB sought further concessions throughout the summer of 2008, but the FDIC's position did not change. CP 264.

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[1] Defendants admit that "it is extremely difficult to refinance a property loan that is in default. This is primarily because a default is an automatic disqualification for a lender. In addition, lenders can not [*sic*] and do not want to interfere with the current bank's remedies under its loan agreement. Nor do potential lenders want to deal with the current lenders on the terms and conditions of any new loan with the potential lender." CP 497.

On October 16, 2013, there was an exchange of three emails between Q Financial and MTB. First, Q Financial sent MTB an email in which it offered to accept a payoff of the Loan in the amount of $3,150,000. CP 509. The email stated: "The subject case has been approved at a payoff of $3,150,000 principal. The accrued interest and fees have also been waived." *Id.* The email went on to give mailing and wire instructions for payment and concluded: "This commitment will expire on 10-13-08." *Id.* MTB responded to the email by asking whether the 10-13-08 date was a mistake, and Q Financial replied that the date was "transposed" and "[s]hould be 10-31-08." CP 508.

MTB then called Q Financial and requested an extension of the October 31, 2008, deadline. CP 221, 481, 483. Q Financial did not agree to any extension. CP 483. Instead, it told MTB that the FDIC was switching loan servicers and that MTB would have to talk to the new loan servicer that would begin servicing the Loan after October 31, 2008. *Id.*

MTB did not pay off the Loan by October 31, 2008, nor did it tender any payment by that date. CP 484.

### C. Negotiations after October 31, 2008

Instead, MTB "assumed" that the FDIC would hold open or renew the terms of the Q Financial offer by extending the payoff deadline retroactively. CP 483. MTB continued to seek an extension of that deadline from the FDIC's new loan servicer, Situs. CP 221, 417, 483. On December 3, 2008, Situs sent an email to MTB asking "How much of an extension will you need until in order to get the propert[y] refinanced in full or sold *if I can get the FDIC to agree to an extension* of the terms [from October] as far as a principal payoff? 1/31/0[9] or 2/28/0[9]?" CP 508 (emphasis added). MTB responded that it would like an extension until February 28, 2009. CP 221. However, the FDIC did not agree to that, or any other, extension. CP 221, 483-84.

Instead, Situs sent MTB a default notice, which MTB received on December 29, 2008. CP 271. The notice referenced MTB's default and demanded immediate payment of all sums due under the Loan. CP 308. The notice also identified the total amount due under the Loan and included a breakdown of principal, interest, and fees, as well as a statement of the daily amount of interest that would continue to accrue on the Loan. *Id.*

Also on December 29, 2008, Situs told MTB that, despite the default notice, it was still willing to discuss a discounted payoff of the Loan. CP 271. Toward that end, Situs asked MTB for its financial information, CP 269, 271, and on January 8, 2009, Situs representatives met with MTB's president, Bilanzich, to get to know him and discuss matters further, CP 272, 482.

On January 16, 2009, Situs sent MTB a Pre-Negotiation Agreement. CP 273, 297, 417. Situs used the Agreement "when entering negotiations with *anybody* for a * * * compromise" and "as a part of *any* negotiation of a settlement." CP 297 (emphasis added). Among other things, the Agreement stated that any discussions between Situs and MTB would not constitute a waiver of any of the FDIC's rights under the loan documents or an agreement to refrain from or delay exercising those rights, and that the loan documents would remain in force and binding on the parties. CP 417. The Agreement further stated that Situs would discuss the Loan with MTB only if MTB agreed to certain conditions, including that MTB acknowledge that it was in default under the Loan and that it agree not to rely on any oral discussions regarding the Loan (as opposed to written agreements). CP 417-18. The Agreement also required MTB to provide Situs with certain documents, including a statement of the status of MTB's other loans with the FDIC. CP 418, 421.

Among those other loans was one secured by real property in Kuna, Idaho. CP 414. That loan was the subject of a lawsuit filed by MTB against the FDIC. *Id.*[2] Situs asked MTB to discuss the Kuna loan as

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[2] MTB filed that lawsuit in Idaho state court on April 16, 2008, Canyon County District Court Case No. CV08-4005. The original defendant in that lawsuit was ANB, but the FDIC substituted in as the defendant. On October 3, 2008, the FDIC removed the lawsuit to the Idaho federal court, Case No. 08-421. On April 24, 2009, the Idaho federal court transferred the lawsuit to the Western District of Arkansas, Case No. 09-5091. Based on

well as the subject Loan, but MTB refused to do so. CP 271, 414.

On January 19, 2009, Situs asked to speak with MTB by telephone and reiterated that "[i]t is imperative" that MTB sign the Pre-Negotiation Agreement before the call. CP 273. On January 21, 2009, MTB's lawyer gave Situs a list of proposed revisions to the Agreement. CP 275-77. Among other things, those revisions would have deleted the portions of the Agreement recognizing MTB's default, that the loan documents remained in force and binding on the parties, and that the FDIC was entitled to exercise its rights under those documents. *Id.*

On January 23, 2009, Situs rejected the proposed revisions and again asked MTB to sign the standard-form Agreement. CP 279. When the parties telephoned later that day, Situs mentioned that it still had not received the signed Agreement. CP 261, 280. MTB's lawyer reiterated that MTB would not sign the Agreement without his proposed revisions. CP 261. Situs then ended the call. *Id.* MTB never signed the Agreement. CP 259. On January 26, 2009, Situs emailed MTB a second default notice demanding full payment of the Loan. CP 261-62, 370. Negotiations stopped shortly thereafter. CP 261-62, 283-84, 483.

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the stipulation of the parties, that court dismissed the lawsuit without prejudice on June 9, 2010. On June 28, 2012, MTB and the Guarantors filed a second lawsuit about the Kuna loan, this time in Idaho federal court, Case No. 12-331, and against the plaintiff in this case. That lawsuit was dismissed with prejudice on May 1, 2013. MTB and the Guarantors filed an appeal, which is still pending.

**D. This debt collection and foreclosure action**

On February 9, 2011, the FDIC filed this action to foreclose the Deed of Trust and obtain a money judgment against defendants. CP 524-34.[3] On October 28, 2011, defendants stipulated to entry of an order appointing a custodial receiver to manage the Property. CP 585.

On December 20, 2011, plaintiff ADC Venture 2011-2, LLC, acquired the Loan and loan documents from the FDIC and substituted in as the named plaintiff in this action. CP 454, 458, 471-75, 488-93.

On September 10, 2012, plaintiff moved for summary judgment. Defendants filed their own motions for summary judgment on May 20, 2011, September 26, 2012, and December 7, 2012; the latter two motions were "amended" versions of the original motion. CP 394, 424, 570.

The trial court granted plaintiff's motion and denied defendants' motion and entered judgment accordingly. CP 160-68, 98-105. The trial court then entered a supplemental judgment in plaintiff's favor for costs and attorney fees. CP 542. Defendants filed this appeal. The property was sold at a sheriff's sale on June 7, 2013. CP 536.[4]

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[3] Other parties also were named as defendants in this action, to foreclose their junior liens on the Property, but they are not parties to this appeal and are not discussed further here. All references to "defendants" in this brief are to appellants MTB and the Guarantors.

[4] Defendants objected to the sale. A confirmation hearing is scheduled for July 24, 2013.

## III. ARGUMENT

Defendants make three arguments on appeal. They argue that genuine issues of material fact exist regarding (1) whether the FDIC breached a duty of good faith and fair dealing by failing to modify the Loan and (2) whether the FDIC failed to mitigate its damages. Defendants also argue that RCW 61.12.120 required dismissal of the Guarantors from this lawsuit. All of defendants' arguments are meritless as a matter of law.

### A. Standard of review

A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Eugster v. State*, 171 Wn.2d 839, 843 (2011). Summary judgment is appropriate when, construing the evidence in the record in favor of the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Lybbert v. Grant County*, 141 Wn.2d 29, 34 (2000). In defending a motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading" but instead "must set forth specific facts showing that there is a genuine issue for trial." CR 56(e); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132 (1989) (same). If the nonmoving party fails to do so, summary judgment "shall be entered against him." CR 56(e).

**B. There was no breach of any duty of good faith.**

Defendants' first argument on appeal is that summary judgment was improper because there are genuine issues of material fact as to whether the FDIC breached a duty of good faith and fair dealing that it owed to defendants.[5] The exact nature of the alleged breach is unclear. As best as plaintiff can tell, defendants assert that the FDIC (1) failed to give defendants a loan payoff number so that they could refinance the Loan; (2) breached a loan modification agreement reached in October 2008; and (3) improperly conditioned resolution of the subject Loan on resolution of the Kuna loan.

There are numerous flaws in defendants' theory. First, all of their arguments are based on a gross misrepresentation of the record. The uncontradicted evidence in the record shows that the FDIC twice gave defendants a payoff number, including on October 16, 2008, when the FDIC told MTB that it would accept $3,150,000 in full payment of the Loan if that sum was received by October 31, 2008. The uncontradicted evidence in the record also shows that MTB did not accept the FDIC's offer by paying the stated sum by the stated deadline. The offer therefore expired, so no agreement resulted.

Another flaw in defendants' theory regarding the purported

[5] Defendants' claim that genuine issues of material fact exist is hard to square with the fact that they moved for summary judgment themselves – not once, but three times.

"agreement" is that no such agreement could have been formed because there was no consideration: defendants did not promise the FDIC anything they did not already owe the FDIC. And there was no signed agreement sufficient to comply with the Statute of Frauds, RCW 19.36.110.

With regard to the Kuna loan, even if the record evidence permitted the inference that the FDIC conditioned resolution of the subject Loan on resolution of the Kuna loan, that would not have been a breach of any duty of good faith, because the FDIC did not owe any such duty to defendants. Even if it did, defendants cannot enforce that duty because they defaulted under the Loan by failing to repay it by the maturity date.

Finally, defendants' arguments about the relationship between the FDIC and plaintiff are irrelevant here, and plaintiff is not liable for the FDIC's acts in any event.

**1. The FDIC gave defendants a final payoff number twice.**

Defendants assert that:

> In January 2009, MTB was in the process of obtaining approval to refinance [this] Loan to take out the FDIC. All that was required was a final payoff number from the FDIC. However, Situs refused to provide either to MTB or to the new lender [Plaza Bank] the payoff information so that the [new] loan could be processed and completed.

Brief of Appellants at p. 15 (citations omitted).

That is a gross misrepresentation of the record. The FDIC gave defendants "a final payoff number" on October 16, 2008, when it offered to accept $3,150,000 in full payment of the Loan, as long as it received that sum by October 31, 2008. CP 508-09. And in December 2008, the FDIC gave defendants a default notice that identified the total amount due under the Loan as $3,569,463.02; the notice also told defendants that interest was accruing at the rate of $1,627.40 per day. CP 271, 308. In short, the FDIC gave defendants "a final payoff number" on two separate occasions before January 2009. Defendants' assertion to the contrary has no basis in the record.

**2. There was never a second agreement to modify the Loan.**

Defendants next contend that the FDIC "agreed in writing to modify [this] Loan" in October 2008 and then "reneged on that agreement." Brief of Appellants at p. 14. Defendants again misrepresent the record. The FDIC never agreed to modify this Loan after April 2008, and it never reneged on any such agreement.

**i. There was no agreement in October 2008.**

When defendants say the FDIC "agreed in writing to modify [this] Loan," they refer to the emails of October 16, 2008, between Q Financial and MTB. *Id.* Those emails, however, do not evidence any "agreement" to modify the Loan. Rather, as explained below, they evidence only an offer by the FDIC to accept $3,150,000 in full payment of the Loan, as long as it received that sum by October 31, 2008. The FDIC did not receive that sum, or any part of it, by that deadline, so the offer expired. Therefore, there was no "agreement" despite defendants' contrary characterization of these undisputed facts.

The exact text of the email chain makes this clear. The first email referenced the Loan in the subject line and stated: "The subject case has been approved at a payoff of $3,150,000 principal. The accrued interest and fees have also been waived." CP 509. The email went on to give mailing and wire instructions for payment and concluded with: "This commitment will expire on 10-13-08." *Id.* MTB responded to that email by asking whether the 10-13-08 date was a mistake, and Q Financial replied that it was and the date "[s]hould be 10-31-08." CP 508.

The only permissible inference from these emails is that the FDIC's offer to accept $3,150,000 in full payment of the Loan was conditioned on defendants' making that payment by October 31, 2008. Defendants knew that, because they obtained clarification of the deadline. Because defendants did not make any payment by the deadline, CP 483, the FDIC's offer expired by its own terms.

This is basic contract law. "A valid contract requires mutual assent, which generally takes the form of offer and acceptance." *Lietz v.*

*Hansen Law Offices, PSC*, 166 Wn. App. 571, 585 (Div. II, 2012). "An offer to form a contract is open only for a reasonable time, unless the offer specifically states how long it is open for acceptance." *Sherrod ex rel. Catone v. Kidd*, 138 Wn. App. 73, 75-76 (Div. III, 2007). If an offer is not accepted within the time allowed, "there is no contract," *id.* at 76 (quoting *Coleman v. Davies*, 39 Wn.2d 312, 320 (1951)), and "there is nothing which the acceptor can do to revive the offer, or produce an extension of time." *Wax v. N.W. Seed Co.*, 189 Wash. 212, 219 (1937).

The FDIC's offer of October 16, 2008, specifically stated "how long it [was] open for acceptance," *i.e.*, until October 31, 2008. In order to accept the offer, defendants needed to pay the FDIC the entire $3,150,000 by that deadline. *See Multicare Med. Ctr. v. DSHS*, 114 Wn.2d 572, 584 (1990) ("[U]nder a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed."). Defendants, however, did not make any payment by that deadline and therefore did not accept the offer before it expired.

Indeed, defendants specifically told Q Financial that they could not meet the October 31, 2008, deadline because they could not close the new loan with Plaza Bank by then. CP 221, 481, 483. Thus, even if there had been an agreement for payment in full of $3,150,000 by October 31, 2008, defendants repudiated that agreement and thus excused any performance by the FDIC. As this Court explained two decades ago: "Repudiation of a contract by one party may be treated by the other as a breach which will excuse the other's performance." *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620 (Div. I, 1991). "An intent to repudiate may be expressly asserted or circumstantially manifested by conduct," such as by any "statement or action indicating distinctly and unequivocally that the repudiating party will not substantially perform his contractual obligations." *Id. See also id.* ("An anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time for performance.").

Defendants asked Q Financial for an extension of the deadline, but Q Financial never agreed to one, explaining that defendants would have to raise that issue with the new loan servicer that would be taking over the Loan on November 1, 2008. CP 221, 481, 483. This, too, is further evidence that there was no agreement to modify the loan. *Cf. Sea-Van Inv. Assocs. v. Hamilton*, 125 Wn.2d 120, 126 (1994) ("Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract.").[6]

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[6] Defendants further misrepresent the record when they characterize their request for an extension of the October 31, 2008, deadline as a request for "clarification of the terms of the agreement." Brief of Appellants at p. 14. There was no agreement to "clarify."

Defendants contend that the October 16, 2008, offer "was in no way a 'take it or leave it' opportunity" for them. Brief of Appellants at p. 14. That is beside the point. The very fact that defendants believe they had a third option – continued negotiation – shows that there was no "agreement" to modify the Loan on October 16, 2008.

**ii. There was no agreement after October 2008.**

Nor was there any such agreement at any later date. While defendants "assumed" the FDIC would extend the payoff deadline, no extension was ever granted. CP 221, 483-84. The closest the record comes to such an extension is a December 3, 2008, email from Situs asking how long of an extension defendants needed "if I can get the FDIC to agree to an extension of the terms [from October] as far as a principal payoff?" CP 508. The facts that (1) this was a question, not a statement, (2) it was conditioned on the FDIC's agreement, and (3) the FDIC never agreed, all show that this email did not constitute an extension of the October 16, 2008, offer. *See also Badgett v. Sec. State Bank*, 116 Wn.2d 563, 574 (1991) (bank officer's promise of further negotiations is not enforceable where further approval from bank management is necessary).

The lack of an extension is perhaps most explicitly shown by the default notice which Situs sent defendants at the end of December 2008 and which demanded immediate payment of all sums due under the Loan.

CP 308. While Situs told defendants that, despite the default notice, it was still willing to discuss a discounted payoff of the Loan, CP 271, no extension of the October 2008 terms was ever granted, and no other agreement was ever reached. CP 221, 483-84.

Defendants do not even argue otherwise on appeal. Accordingly, plaintiff does not need to repeat here its argument below, CP 238-39, that defendants cannot rely on any oral or unsigned modification or extension agreement. *See* RCW 19.36.110 ("A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor."); *Cowlitz Bank v. Leonard*, 162 Wn. App. 250, 253 (Div. II, 2011) (affirming summary judgment for creditor where debtor relied on oral statements).[7]

**iii. There was no consideration for any agreement.**

Not only was there no "agreement" to modify the Loan as a matter of undisputed fact, there also was no such agreement as a matter of law. That is because there was no consideration for the "agreement" that defendants are attempting to enforce. Again, that purported agreement required the FDIC to accept a partial payment in full satisfaction of the

[7] *See also* RCW 19.36.100 (defining "credit agreement" to include modification and extension agreements); CP 470 (written and signed April 2008 modification agreement giving defendants notice required by RCW 19.36.140 about RCW 19.36.110's requirements); RCW 19.36.130 ("Notice, once given to a debtor, shall be effective as to all subsequent credit agreements and effective against the debtor, and its guarantors, successors, and assigns."); CP 482 (defendants admitted familiarity with the notice).

Loan. No additional obligations were imposed upon defendants.

The problem for defendants is that "[i]ndependent, additional consideration is required for the valid formation of a modification or subsequent agreement." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834 (2004). "There is no consideration when 'one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract.'" *Id.* (quoting *Rosellini v. Banchero*, 83 Wn.2d 268, 273 (1974)). Because defendants were obligated to pay the entire amount owing under the Loan, their "agreement" to pay a reduced sum is not sufficient consideration to make that "agreement" a valid modification of the Loan. *See also Kibler v. Frank L. Garrett & Sons*, 73 Wn.2d 523, 525 (1968) ("Where the debtor pays what in law he is bound to pay and what he admits that he owes, such payment by the debtor and its acceptance by the creditor, even though tendered as payment in full of a larger indebtedness, do not operate as an accord and satisfaction of the entire indebtedness, because there is no consideration therefor.").

This issue was raised in the briefs below, CP 239-40, but, significantly, defendants did not mention it in their opening brief on appeal. That may be because defendants recognize there is no way around this independently fatal flaw in their argument.

### 3. The FDIC never reneged on any modification agreement.

Not only was there no "agreement" to modify the Loan, as a matter of law and undisputed fact, but the FDIC never reneged on any such agreement. Defendants assert that Situs "attempted to link refinancing of [this] Loan to resolution of the Kuna litigation" and that "[w]hen MTB refused to link the loans together, Situs ceased all communications with MTB." Brief of Appellants at pp. 14-15. Defendants view this as "reneg[ing] on th[e] agreement in an attempt to obtain concessions in the lawsuit over the Kuna loan." *Id.* at p. 14.

There are several problems with defendants' theory. First, as discussed above, there was no "agreement" on which the FDIC could "renege." Second, defendants overstate the record regarding the Kuna loan. Third, even if Situs did link those two loans, that was not a breach of any duty of good faith because the FDIC did not owe defendants any such duty. Finally, defendants are not in a position to enforce any such duty because they are in breach of the loan documents.

#### i. Defendants overstate the record regarding the Kuna loan.

It is worth reiterating that by December 29, 2008, defendants had been in default under the Loan for eight months; they had missed the October 31, 2008, deadline on Q Financial's workout offer; they had received Situs' first default notice; and yet, nonetheless, Situs was willing to continue discussing a discounted payoff of the Loan. CP 271.

On December 29, 2008, a Situs representative sent Bilanzich an email planning a meeting on January 8, 2009, to discuss the subject Loan. CP 271. The email mentioned that Situs "would also like to discuss" the Kuna loan. *Id.* Bilanzich responded that he did not believe he could talk about the Kuna loan without the parties' attorneys being present. *Id.* The January 8 meeting took place as scheduled without any discussion of the Kuna loan. CP 270-71, 414, 482.

On January 16, 2009, Situs continued negotiations with MTB by sending MTB its standard-form Pre-Negotiation Agreement. CP 273, 417. The FDIC used the Agreement "when entering negotiations with anybody for a * * * compromise" and "as a part of any negotiation of a settlement." CP 297. The Agreement reiterated the FDIC's rights as to the defaulted Loan and also contained a boilerplate list of documents requested of all borrowers. CP 417-21. Those documents included a "[l]ist and status of other loans with FDIC." CP 421. While that list would in this case include the Kuna loan, the Agreement did not mention that loan or litigation; nor did it seek any detailed or privileged information. It was instead a generalized request for the basic "status" of *any* loans MTB had with the FDIC.

MTB did not sign the Agreement. On January 19, 2009, Situs told MTB "[i]t is imperative" that it do so. CP 273. Two days later, MTB's lawyer sent Situs an email proposing revisions to the Agreement that would have eliminated its provisions recognizing MTB's default, the continuing enforceability of the loan documents, and the FDIC's rights under them, among other things. CP 275-77.

Situs rejected the proposed revisions on the morning of January 23, 2009, and asked MTB to sign the Agreement "as originally drafted." CP 279. Situs asked that that be done before the parties held the conference call they had scheduled for later that day. *Id.* MTB still did not sign the Agreement. Accordingly, the conference call was a short one. As Bilanzich testified at his deposition:

> The first thing [Situs] said was, "We haven't received the signed [Agreement]." And [my lawyer] responded, "Well, I told you what I would take to sign the [Agreement]." And they said, "Okay, good-bye." And all we heard was hang-ups.

CP 261. Three days later, Situs sent defendants the second default notice. CP 261-62, 370. It was then that Situs "cut off communication with" defendants. CP 262.

Citing CP 262, defendants contend that Situs "ceased all communications with MTB" when "MTB refused to link the loans together." Brief of Appellants at p. 15. CP 262 does not support that contention, however. Instead, CP 262 indicates only that Situs ceased negotiating with MTB after it sent MTB the second default notice. And that was after MTB repeatedly refused to sign the Pre-Negotiation Agreement that Situs had told MTB it was "imperative" for it to sign.[8]

**ii. The FDIC did not owe defendants any duty of good faith.**

Even if Situs had conditioned resolution of this Loan on resolution of the Kuna loan and litigation, the FDIC could hardly be faulted if it wanted a global resolution with debtors as litigious as these. *Cf. Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 821-22 (Div. I, 1992) ("The bank was within its rights to demand additional collateral from the [debtors] as a condition of any new financing agreement."); *id.* at 823 ("[A] history of providing financing does not create a duty to provide future financing.").

More importantly, however, defendants' argument would still fail because the FDIC did not owe defendants any duty of good faith. There is no "free-floating duty of good faith." *Badgett*, 116 Wn.2d at 570. Rather, the duty "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.* at 569. Accordingly, "the duty arises only in connection with terms agreed to by the parties" and

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[8] Defendants also complain that Situs "ignored the request of the FDIC to try to resolve the matter before foreclosure." Brief of Appellants at p. 15. That is another distortion of the record. *See infra* p. 36 (pointing out same error in related context).

does not "inject substantive terms into the parties' contract" or "obligate a party to accept a material change in the terms of its contract." *Id.*

Defendants tie their "good faith" argument to the provision of the Note that recognizes that the FDIC "may at [its] 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 [defendants'] liability for payment of the note." Brief of Appellants at p. 13; CP 457. In defendants' view, that provision required the FDIC, once it began negotiating a possible workout of the Loan, to do so in good faith.

There are several problems with defendants' theory. As an initial matter, the quoted portion of the Note refers to extensions of the "note or debt" – not extensions of an offer to accept a reduced payoff amount in satisfaction of the matured, overdue debt. It is the latter extension that defendants are talking about. Because the contractual provision on which defendants pin their "good faith" theory does not apply to that theory, defendants' theory fails. *See Badgett*, 116 Wn.2d at 569 (duty of good faith "arises only in connection with terms agreed to by the parties").

Defendants' theory also turns the quoted portion of the Note on its head. The provision recognizes the unconditional right of the FDIC to extend the note or debt "without limit." CP 457. The provision further states that no extension will "affect[] [MTB's] liability for payment of the note" and that the FDIC may "give up any of [its] rights" without that "affect[ing] [MTB's] duty to pay this note." *Id.* The provision is, in short, a protection of the FDIC against the very claims that defendants raise in this appeal. To impute into this provision a duty on the part of the lender to negotiate a workout with the borrower-in-default would be to "inject substantive terms into the parties' contract" and "obligate [the lender] to accept a material change in the terms of its contract" – both things the duty of good faith does not do. *Badgett*, 116 Wn.2d at 569 (so recognizing). *See also Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 741 (Div. III, 1997) (the duty of good faith does not apply to a party's exercise of its unconditional contractual rights).

It is surprising that defendants cite *Badgett* in support of their good-faith claim. That case is directly on point and fatal to their claim. The bank in *Badgett* restructured the debtors' loan twice but rejected their proposal for a third restructuring. 116 Wn.2d at 565-67. The debtors then defaulted and sued the bank for unreasonably refusing the third restructuring proposal. *Id.* at 567-68. The bank counterclaimed for foreclosure. *Id.* The trial court granted the bank summary judgment on all claims, reasoning that "the Bank was under no duty to negotiate and that a prior course of conduct cannot create a new obligation on the part of the Bank." 116 Wn.2d at 568.

The Supreme Court affirmed, holding that "[w]hile the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so." *Id.* at 572. Otherwise, the court reasoned, "[a]ny request for a modification would impose a duty to negotiate, which would then open the door for factual allegations of a lack of good faith in negotiating." *Id.* at 572 n.3. The court noted that the debtors had "received the full benefit of their contract when they received the amount of money they bargained for at the agreed rate of interest for the agreed period of time." *Id.* at 570. The bank properly refused to restructure the loan, the court held, because "as a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Id.* It did not matter that the bank "had been flexible in dealing with [the debtors] in the past," because "a course of dealing does not override express terms in a contract or add additional obligations." *Id.* at 572.

*Badgett* is dispositive here. The FDIC properly stood on its rights and remedies upon defendants' default. The FDIC was not obligated to negotiate with defendants at all, let alone in good faith. Nor was the FDIC obligated to continue negotiating with defendants after it began doing so. The Note provisions quoted above say nothing to the contrary. *See also Keystone Land & Dev. v. Xerox Corp.*, 752 Wn.2d 171, 177-80 (2004) (holding that, absent a specific contract term requiring parties to negotiate in good faith, no duty to do so exists); *id.* at 180 (holding that there is no implied "duty to continue negotiations until a final agreement is reached"); *Johnson v. Yousoofian*, 84 Wn. App. 755, 762 (Div. I, 1996) ("If there is no contractual duty, there is nothing that must be performed in good faith."); *Schwartz v. World Sav. Bank*, No. 11-631-JLR, 2012 WL 993295 (W.D. Wash. Mar. 23, 2012) (granting bank summary judgment because "there is no basis for Plaintiffs' claim that the Bank breached its duty of good faith by not modifying the note after default").

**iii. Defendants are the ones in breach of contract.**

Defendants' good-faith theory fails for a final, independently sufficient reason. Even if the FDIC did owe defendants some contractual duty of good faith, defendants are not in a position to enforce that duty because defendants are themselves in breach of the loan documents.

"A party is barred from enforcing a contract that it has materially breached." *Rosen v. Ascentry Techs., Inc.*, 143 Wn. App. 364, 369 (Div. I, 2008). *See also Downs v. Smith*, 169 Wash. 203, 206 (1932) (same). Defendants have been in breach of the Loan at all times since April 28, 2008, because they failed to repay the Loan by April 27, 2008. Defendants are therefore "barred from enforcing" any duty of good faith that the FDIC might have owed them.

In *Rosen*, for example, the parties signed a settlement agreement which called for the defendant to pay the plaintiff $50,000 in exchange for the plaintiff's release of his claims against the defendant. 143 Wn. App. at 369. The defendant failed to pay, however; in response, the plaintiff pressed his original claims against the defendant. *Id.* The defendant raised the release clause of the settlement agreement as a bar to those claims, but this court held that the defendant "was not entitled to enforce the settlement agreement because it breached and [the plaintiff] was free to pursue his original claims." *Id.*

Under *Rosen*, defendants are not entitled to enforce any duty of good faith that the FDIC might have owed them because defendants breached the loan documents, and the FDIC was free to pursue this debt collection and foreclosure action. *See also id.* ("A material breach by one party gives the other party the right to withhold future performance.") (quoting *Bailie Comm'ns v. Trend Bus. Sys.*, 53 Wn. App. 77, 81 (Div. I, 1988)); *Jacks v. Blazer*, 39 Wn.2d 277, 285 (1951) (same).

Significantly, defendants did not mention this issue in their opening brief on appeal, even though it was raised in the briefs below, CP 192. That may be because defendants recognize there is no way around this independently fatal flaw in their argument.

### 4. Plaintiff's relationship with the FDIC is irrelevant here, and plaintiff is not liable for the FDIC's acts in any event.

Finally, defendants assert that plaintiff is "liable for the conduct of its predecessor, the FDIC." Brief of Appellants at p. 16. Defendants do not identify any disputed issue of material fact in that regard, but they engage in a lengthy discussion about the transfer of the Loan from the FDIC to plaintiff and argue that plaintiff is bound by the purported modification "agreement" made by the FDIC in October 2008 and the duty of good faith purportedly owed by the FDIC to defendants, both of which are addressed above.

Defendants' entire discussion is irrelevant. That is because, as explained above, as a matter of law, there was no second modification "agreement" between the FDIC and defendants, and the FDIC did not owe defendants any duty of good faith. In other words, even if the FDIC were still the plaintiff in this case, as it was in October 2011 when defendants stipulated to entry of an order appointing a custodial receiver to manage the Property, defendants' substantive arguments all would still fail. Because defendants' arguments would be meritless even against the FDIC itself, plaintiff need not assert any special protections provided to a subsequent purchaser of the Loan.

Defendants' discussion is also incorrect. Defendants made the same argument in the Kuna litigation, and the federal court summarily dismissed that case based on the same documents at issue here. *See MTB Enters., Inc. v. ADC Venture 2011-2, LLC*, 2013 U.S. Dist. LEXIS 63752 (D. Idaho May 1, 2013). As the court explained, the "plain language" of the Asset Contribution Agreement is "unambiguous" and provides that plaintiff "did not assume liabilities for any acts by either ANB or the FDIC prior to November 4, 2011." *Id.* at *13-14. Because defendants in this case, as in the Kuna litigation, complain only about acts which precede that date, acts engaged in by the FDIC through its loan servicers, plaintiff "is not a successor to the liabilities" of the FDIC. *Id.*

Moreover, although defendants challenge the validity of the FDIC's transfer of assets to plaintiff while retaining the relevant liabilities, the court in the Kuna litigation rejected the same challenge, holding that the transfer "was proper" because the federal Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") "authorized the FDIC to separate ANB's assets from its liabilities," transfer ANB's assets to plaintiff, and retain the liabilities of both ANB and the FDIC. *Id.* at *19-23. *See also Benito v. IndyMac Mortg. Svcs.*, 2010 U.S. Dist. LEXIS 51259, at *11-14 (D. Nev. May 21, 2010) (holding that FIRREA preempts contrary state laws of successor liability).

For all of the foregoing reasons, defendants' "good faith" theory fails as a matter of law in this appeal.

### C. There was no failure to mitigate here.

Defendants' second argument on appeal is that there exists a genuine issue of material fact as to whether the FDIC failed to mitigate its damages. Defendants' theory is that the FDIC should have filed this lawsuit sooner than it did and, if it had, the judgment against defendants would have been smaller, because less interest would have accrued. Defendants ask that plaintiff's interest award be reduced to account for the FDIC's "unreasonable delay" in filing this lawsuit.[9]

#### 1. The FDIC had no duty to mitigate.

Defendants' argument fails for multiple reasons. The primary reason is that the FDIC "had no duty to mitigate." *Metro. Mortg. & Secs. Co. v. Becker*, 64 Wn. App. 626, 631 (Div. III, 1992). In *Becker*, as here, debtors who were defending a debt collection action argued that the creditor "breached its duty to mitigate its damages." *Id.* The Court of Appeals, Division Three, disagreed, explaining that, "[w]hile an injured party cannot recover damages which could reasonably have been avoided

[9] Defendants recognize that plaintiff has a contractual right to its full measure of interest, but assert that "even a contract right can be waived by a parties' [*sic*] conduct." Brief of Appellants at p. 23. While defendants did not actually assert any waiver here (or in the trial court), it is worth noting that the very case they cite shows that there was no waiver. *See Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386 (2003) (waiver by conduct "requires unequivocal acts of conduct evidencing an intent to waive.") (quoting *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 143 (Div. I, 1995). Any delay in filing this lawsuit does not amount to an "unequivocal act evidencing an intent to waive" plaintiff's right to its full measure of interest under the loan documents.

by reasonable efforts and expenditures, this action is for an unpaid debt, not damages." *Id.* (citation omitted). Accordingly, "[t]he trial court correctly determined [the creditor] had no duty to mitigate." *Id.*

Debt collection is not the only exception to the rule regarding mitigation of damages. In *Champa v. Wash. Compressed Gas Co.*, for example, the state Supreme Court recognized that the rule does not apply "in cases of nuisance, or in cases of intentional, or positive and continuing torts." 146 Wash. 190, 201 (1927) (quoting 17 C.J. 177). *See also Desimone v. Mut. Materials Co.*, 23 Wn.2d 876, 884 (1945) (same); *Wilson v. Walla Walla*, 12 Wn. App. 152, 153 (Div. III, 1974) (mitigation of damages is also inapplicable in cases involving reckless conduct).

Washington is like most states in recognizing debt collection and foreclosure as matters falling outside the general duty to mitigate. *See, e.g.*, *Wells Fargo Bank Minn., N.A. v. Diamond Point Plaza L.P.*, 171 Md. App. 70, 136-37 (2006), *aff'd & rev'd in part on other grounds*, 400 Md. 718 (2007) (indicating that creditors have no duty to mitigate through foreclosure); *Bd. of Mgrs. of Honto 88 Condo. v. Red Apple Child Dev. Ctr.*, 2012 N.Y. Misc. LEXIS 6004, at *14 (Jan. 22, 2012) ("Mitigation of damages is not a defense to a foreclosure action."); *Rockville Bank v. Southington Hospitality Group*, 2011 Conn. Super. LEXIS 1248, at *8 (May 12, 2011) ("Various judges of this court have held that the special defense of failure to mitigate damages is not applicable to a mortgage foreclosure. This court agrees. The concept of mitigation of damages is inapplicable to a mortgage foreclosure action where the damages consist of a sum certain, the repayment of which has been agreed to by the defendant maker of a promissory note.") (citations omitted).

The Supreme Judicial Court of Massachusetts considered an argument similar to that of these defendants in *Seppala & Aho Constr. Co. v. Petersen*, 373 Mass. 316 (1977). The court rejected the argument for several reasons. First, the court noted that "it is the duty of the debtor to pay his debt" – "it is not the duty of the creditor to see that it is paid." *Id.* at 324 (quoting *Lewis v. Blume*, 226 Mass. 505, 508 (1917)). Second, the court recognized that creditors enjoy "flexibility regarding the timing of foreclosure" because of laws specifically permitting the postponement of foreclosure sales. *Id.* at 325. Third, the court cited the applicable statutes of limitation to note that "the Legislature contemplated the passage of considerably long periods of time before a mortgagee loses his right to foreclose." *Id.* at 325-26. Fourth, the court recognized that accepting the debtor's position "would be tantamount to permitting the mortgagor or junior lienholder to compel foreclosure. We have found no case in American jurisprudence which authorizes such compulsion." *Id.* at 326. On the contrary, the court cited several decisions holding that "a mortgagor or one claiming under him has no right to compel the mortgagee to foreclose on breach." *Id.* at 326 n.7. For all of those reasons, the court in *Petersen* reaffirmed that "mere forbearance to foreclose a mortgage given as security is no defence" to an action for foreclosure. *Id.* at 324 (quoting *Lewis*, 226 Mass. at 508).

RCW 4.16.040(1) permits creditors to file debt collection and foreclosure actions at any time up to six years after the claim accrues. (This lawsuit was filed within three years of defendants' default.) Also, RCW 6.21.050(2) permits sheriff's sales to be postponed for up to 30 days, and RCW 61.24.040(8) permits trustee's sales to be postponed for up to 120 days. These statutes fit comfortably within the reasoning of *Petersen*. The other rationales of that decision also apply equally well under Washington law. *See also Becker*, 64 Wn. App. at 631 (distinguishing "action for unpaid debt" from action for "damages").

It is notable that defendants have not cited a single case holding, or even intimating, that a creditor can lose its right to recover unpaid debt simply because the creditor "takes too long" to foreclose. The authorities cited above are unanimous and against defendants. *Becker* is directly on point and fatal to defendants' argument.

**2. The FDIC did not fail to mitigate.**

Even if the FDIC had a duty to mitigate, it did not violate that duty here. Defendants' argument goes as follows: Even though Situs recommended to the FDIC in May 2009 that it foreclose on the Property, this lawsuit was not filed until February 2011, and the sheriff's sale did not take place until June 7, 2013. In defendants' view, this lawsuit should have been filed in May 2009, in which case the sale would have occurred in October 2009, which would have saved defendants nearly four years' worth of interest on the judgment. Defendants believe it would be inequitable to permit plaintiff to recover the interest that accrued over those four years.[10]

There are several flaws in that reasoning. Above all, as defendants recognize, their argument was expressly rejected in *Farm Credit Bank v. Tucker*, 62 Wn. App. 196 (Div. III, 1991). In that case, the debtors defaulted on a loan in May 1987 and offered to deed the property to the creditor in lieu of foreclosure, to make partial payments, and to otherwise cooperate with the creditor on a workout. *Id.* at 198-99. The creditor rejected all of those offers but did not file a foreclosure lawsuit until October 1988. *Id.* That lawsuit resulted in an April 1989 judgment for the creditor in the amount of almost $1.5 million. *Id.* at 198. If the creditor had foreclosed in May 1987, the deficiency would have been minimal, and little interest would have accrued by April 1989. *Id.* at 199.

[10] It is not clear what mathematics defendants are performing to determine their desired amount of interest reduction, so plaintiff does not discuss any particular figure here.

Based on those facts, the trial court concluded that it would be "inequitable to allow the [creditor] to accrue interest on the full principal balance" between May 1987 and April 1989. *Id.* The trial court therefore disallowed prejudgment interest during that period, as well as postjudgment interest, and reduced the creditor's money judgment accordingly. *Id.* at 199-200.

The creditor appealed, and the Court of Appeals, Division Three, reversed, holding that "the [trial] court erred when it disallowed interest on equitable grounds," because the creditor's right to interest was based on contract, not equitable principles. *Id.* at 201. The court explained:

> Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. *Where it is reserved expressly in the contract*, or is implied by the nature of the promise, *it becomes part of the debt, and is recoverable as of right*; but when it is given as damages, it is often matter of discretion. * * * But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.

*Id.* (quoting *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884)) (emphasis in *Tucker*).

The *Tucker* court also explained that, "even if the rule disallowing prejudgment interest on equitable grounds was applicable," the creditor still was entitled to its full measure of interest because it did not delay foreclosure unreasonably. *Id.* at 202. Rather, the court noted, the parties engaged in a protracted course of negotiation throughout 1987 and into June 1988; the creditor filed suit in October 1988, after those negotiations proved fruitless. *Id.* at 202-03.

Defendants attempt to distinguish *Tucker* on the ground that, while the creditor in that case filed suit within four months after negotiations ceased, the comparable period here was 21 months. Defendants, however, cite no authority and offer no argument to explain why that 17-month difference should lead to a different result here compared to *Tucker*.

Defendants claim that "the FDIC does not even know why suit was not brought until February of 2011, despite Situs' recommendation to foreclose in May of 2009." Brief of Appellants at p. 21. That is yet another misrepresentation of the record. Defendants cite CP 295 to support their claim, but it does not do so. CP 295 is a page from the deposition of an FDIC representative. The representative testified that, in May 2009, Situs recommended foreclosure, the FDIC asked Situs to "see if [it] could resurrect [the October 2008] offer" of a workout, and Situs did so by reaching out to MTB's attorney – but "the attorney for MTB never responded." CP 295, therefore, indicates that the FDIC had good reason not to commence suit in May 2009: it was giving defendants one last chance to avoid foreclosure.

Defendants' position is further confounded by their illogical points of reference. Defendants believe the comparison here should be between June 2013, when the Property was sold, and October 2009, when defendants inexplicably believe the Property should have been sold. Even if the FDIC had filed this lawsuit in May 2009, however, there is no reason to think it would have resulted in a sheriff's sale five months later. This lawsuit was filed in February 2011, and judgment was not entered until February 2013 because of the extremely vigorous manner in which defendants are defending it. *See also supra* nn. 2, 4 (describing defendants' years-long battle in the Kuna litigation and their filing of objections to the sheriff's sale in this case). There is no reason to think that defendants would have litigated this case differently in 2009. And only three months passed between entry of judgment and the sheriff's sale, which is about as fast as the court clerk and sheriff's office can handle such matters.

In short, although defendants talk about a "44 month delay," the "delay" (if it can be called that) was only 21 months. As a matter of law, that delay is not so unreasonable that plaintiff should not recover its full measure of interest. *See Lewis*, 226 Mass. at 506 (no interest reduction was appropriate although creditor waited *18 years* to foreclose); *Wells Fargo*, 171 Md. App. at 136 ("[Debtor's] assertions certainly do not set forth a cognizable basis for reversing [creditor's] award for damages simply because [creditor] did not act timely enough to suit [debtor's] needs as the mortgagor under the defaulted mortgage.").[11]

**D. There were not concurrent actions here.**

The final argument on appeal is made only by the Guarantors, Bilanzich and Hairware. They argue that they should have been dismissed from this lawsuit because of the single action rule of RCW 61.12.120. The Guarantors' argument is frivolous.

**1. RCW 61.12.120 permitted the judgment in this case.**

RCW 61.12.120 provides:

> 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.

The statute dates back to the first territorial legislature, Laws 1854, p. 208, and has remained unchanged since 1881 except for last year's gender-neutral vocabulary law, which added the words "or her" and "or she,"

[11] Defendants quote *In re Arland's Estate*, 131 Wash. 297, 299 (1924), to the effect that "[e]quity will not enforce a contract where the result will be harsh and oppressive." Brief of Appellants at p. 24. That principle does not apply here. *Arland's Estate* invoked equitable principles because the plaintiff sought equitable relief: specific performance. Here, by contrast, plaintiff's right to interest is a legal right; it arises by contract, not equity. *See Tucker*, 62 Wn. App. at 201 (so recognizing).

Laws 2012, ch. 117, § 164.

An unbroken line of decisions going back to territorial days affirms that a creditor can, consistent with the statute, obtain judgment on the debt and foreclosure of the collateral in a single action. According to that unbroken line of decisions, the two evils that the statute proscribes are (1) the filing of multiple simultaneous actions against the debtor for the same debt, and (2) an attempt, in one action, to foreclose on the collateral and also execute upon the debtor's other property. Those things did not happen here. Consistent with the unbroken line of decisions, the judgment in this single action requires plaintiff to wait until after the sheriff's sale of the collateral to execute upon defendants' non-collateral property.

In *Hays v. Miller*, 1 Wash. Terr. 143, 143-45 (1861), the creditor argued that, in a single suit, he could obtain not only a judgment for foreclosure of the collateral real property, but also a judgment on the debt which would be a lien on other real property of the debtor from the date of entry of the judgment. The territorial Supreme Court agreed, explaining:

> By the common law, and in many if not most of the States, a mortgagee, while he can have only one satisfaction, "may exercise all his rights at the same time, and pursue his remedy in equity upon the mortgage and his remedy at law upon the bond or covenant accompanying it concurrently." (4 Kent, p. 195.) Our statute prohibits concurrent action in such cases, and in the matter of remedies is a restraining act, and in derogation of common-law rights, and as such must be strictly construed. But for the prohibition in the

> act, a mortgagee might prosecute to the same term of the court a foreclosure on his mortgage and a suit at law upon his note, and in such case the decree would bind the mortgaged lands, and the judgment at law would be a lien on other real property of the defendant. Did the legislature, then, intend to deprive the mortgagee of these concurrent liens, which, but for the prohibition in the statute, he might acquire? or did it merely intend to prevent multiplicity of suits and costs, and enable the mortgagee in one suit to accomplish, substantially, what previously could be attained only by two actions?
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> * * *
>
> A fair and equitable construction of the act under consideration leads the court to the conclusion that in a foreclosure suit, under section 403 of the act, where the whole sum is due, the court may render a general judgment for the whole amount due, which will be a lien from that date on all the real property of the defendant liable to execution, and the judgment will have the force and effect of other general judgments, except as to the manner of satisfying the same, and in this matter the statute must be followed; and under the order of sale to the sheriff, he must first sell the mortgaged premises according to law, and if any deficiency exists, he must then levy upon and sell according to law the personal property of defendant subject to execution, and if none, then levy upon and sell all real property of defendant subject to execution, and in the case of the sale of real property, to report the sale, as well as the mortgage sale, to the next term of court for confirmation.

*Id.* at 146, 148.

The court relied for its decision in part on the predecessor of RCW 61.12.070, which provides, in relevant part:

> When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of

> foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor.

*Id.* at 145-46. The court also relied on the predecessor of RCW 61.12.090, which provides:

> A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary judgment or decree for the payment of money. The execution shall contain a description of the property described in the decree. The sheriff shall endorse upon the execution the time when he or she receives it, and he or she shall thereupon forthwith proceed to sell such property, or so much thereof as may be necessary to satisfy the judgment, interest, and costs upon giving the notice prescribed in RCW 6.21.030.

*Id.* at 146. Both of those provisions evidence the legislature's abiding intent that a judgment of foreclosure should also be for the debt.

After statehood, the state Supreme Court reaffirmed *Hays*. In *Shumway v. Orchard*, 12 Wash. 104, 105 (1895), the court considered "whether a personal judgment can be rendered against the makers of a note secured by their mortgage upon real estate at the time of the rendition of the decree of foreclosure upon such mortgage, so as to make such judgment a general lien upon all of the property owned by the mortgagors at the time of the entry of such decree or thereafter acquired." The court, citing *Hays*, answered that question in the affirmative, stating that the foreclosure statute "reasonably construed, gives the power to the court to render judgment for the deficiency at the same time that the decree of foreclosure is awarded in cases where there is an express agreement to pay the sum of money secured by the mortgaged premises." *Id.* at 105-06. The court further explained that, while the lien of the judgment on the debtor's non-collateral property is immediate, the sheriff can only levy on that non-collateral property *after* the sale of the collateral property. *Id.* at 106-07 (citing predecessor of RCW 61.12.090). *See also W.P. Fuller & Co. v. Hull*, 19 Wash. 400, 402 (1898); *Codd v. Von Der Ahe*, 92 Wash. 529, 533 (1916); *Lassen v. Curtis*, 40 Wn.2d 82, 86-87 (1952) (all same).

RCW 61.12.120 was designed to solve two problems. First, it "was passed to meet the evils coming from an abuse of remedies by mortgagees at common law. Mortgagees might sue for the debt, or maintain ejectment, or go into equity and foreclose. They could maintain these actions *severally and at the same time*." *Gray v. Davison*, 78 Wash. 482, 487 (1914) (emphasis added). RCW 61.12.120 prohibits such concurrent actions. The statute also serves a second purpose. As the Supreme Court noted in *Advance Thresher Co. v. Schimke*, 47 Wash. 162, 164 (1907), "[i]t was to prohibit a mortgagee securing, by writ of attachment or otherwise, an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale." In other words, the statute requires the creditor to wait until after the sale of the collateral to execute upon the debtor's non-collateral property.

By contrast, RCW 61.12.120 does not prevent a single action for foreclosure of the collateral and judgment on the debt, *including guaranties*. *See Tucker*, 62 Wn. App. at 201 (RCW 61.12.120 "does not prevent a [creditor] from pleading the terms of a note in a foreclosure action."); *Hinchman v. Anderson*, 32 Wash. 198, 206 (1903) (holding that the statute does not "prevent the [creditor] from making all the [debtors on] the notes parties to the action and proceeding against all in one action"); *Puget Sound Nat'l Bank v. Olsen*, 174 Wash. 200, 202 (1933) (affirming judgment in action that "was not only one to recover upon the notes and the contract of guaranty, but also to foreclose certain liens upon pledges of collateral security"); *Fed. Land Bank v. Miller*, 155 Wash. 479, 483 (1930) (creditor has "free choice" to seek "foreclosure of the mortgage and in the same suit a deficiency personal judgment against those liable upon such a covenant"); *Mkt. Operating Corp. v. Crull*, 165 Wash. 306, 308 (1931) (creditor who sought attachment only of its collateral "was not prosecuting another action for the debt secured by its lien"); Washington Real Property Deskbook §46.16(14) (3d ed. 1996) (form for mortgage foreclosure complaint seeking deficiency judgment).

Consistent with the foregoing authorities, and with RCW

61.12.070 and 090, the judgment in this case awarded plaintiff a money judgment against MTB and the Guarantors, ordered the sale of the Property, and authorized execution on the money judgment "if any deficiency remains" after the sale, while specifically prohibiting plaintiff from enforcing the money judgment until after confirmation of the sale (when the amount of the deficiency will be determined). CP 99-101.

**2. The Guarantors misread RCW 61.12.120.**

Despite the authorities cited above, the Guarantors believe RCW 61.12.120 required plaintiff to wait until after the sheriff's sale in this case to file a second lawsuit against them for recovery of the deficiency.

The fundamental flaw in the Guarantors' argument is that it calls for the exact same "multiplicity of suits and costs" that RCW 61.12.120 was enacted to prevent. *Hays*, 1 Wash. Terr. at 146. It is notable in this regard that the statutes governing judicial foreclosure differ from those governing nonjudicial foreclosure as regards guarantors. RCW 61.24.100(4) permits a creditor to sue a guarantor for a deficiency, but only "within one year *after* the date of the trustee's sale." That statute "does not apply" to judicial foreclosures. RCW 61.24.100(8). If the legislature had wanted to require deficiency suits against guarantors to follow sheriff's sales, it could have made RCW 61.24.100(4) applicable to all foreclosure sales. The legislature, however, adopted a different policy, one that is at odds with the Guarantors' argument.

It also is notable that MTB does not join the Guarantors' argument, even though that argument applies equally to MTB. MTB thus concedes that the money award against it did not violate RCW 61.12.120. And the Guarantors are, as set forth in their unconditional guaranties, just as liable as MTB for the unpaid debt. There is no logical reason why they would be treated differently from MTB with regard to the entry of a deficiency judgment. Their argument to the contrary completely ignores the unbroken line of authorities going back to territorial days that specifically authorized the judgment that was entered here.

The Guarantors cite only two authorities to sustain their position. Neither authority helps them. The Guarantors quote *Am. Fed. S&L Ass'n v. McCaffrey*, 107 Wn.2d 181, 190 (1986), to the effect that "[c]oncurrent actions to obtain execution of a judgment and foreclose on the mortgaged property are prohibited. RCW 61.12.120." The problem for the Guarantors is that there were not "concurrent actions" here. This was a single action seeking multiple remedies. *See* CR 2 ("There shall be one form of action to be known as a 'civil action'"); CR 8(e)(2) (a party to civil action may state multiple claims "whether based on legal or on equitable grounds or on both"); *Advance Thresher*, 47 Wash. at 164 ("[A]n attachment is not a separate action, but an ancillary proceeding

* * *."). Nor did this action simultaneously seek to "foreclose on the mortgaged property" and "obtain execution of a judgment" as to other property of defendants. The judgment specifically postponed execution on non-collateral property until after the sheriff's sale.[12]

The Guarantors also quote *Davis v. Starkenburg*, to the effect 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." 5 Wn.2d 273, 281 (1940) (emphasis added). The Guarantors take that quotation out of context. The court in *Davis* was merely reciting the rule that one cannot foreclose liens that are *prior* to the mortgage because those liens are paramount to the mortgage. *See Oates v. Shuey*, 25 Wash. 597, 599 (1901) ("[A] claim of prior and paramount adverse title could not be litigated in a foreclosure suit.") (cited in *Davis*, 5 Wn. 2d at 281). Moreover, *Davis* was a quiet title action; it did not mention RCW 61.12.120, nor did it concern the propriety of joining foreclosure and debt collection claims in a single action. *Oates*, by contrast, affirmed a judgment resolving both claims in one action against the mortgagor, *id.* at 597-601, and *Olsen* affirmed a similar judgment which included a money award against the guarantors of the mortgage

[12] Defendants characterize the testimony of plaintiff's representative as "agree[ing] that this foreclosure lawsuit is *an action* against the guarantors for the same debt." Brief of Appellants at p. 26 (emphasis added). That only underscores the fact that this lawsuit is a single action, not multiple concurrent actions, which is what RCW 61.12.120 prohibits.

loan, 174 Wash. at 202. In short, *Davis* does not help the Guarantors.

For the foregoing reasons, there is nothing wrong with the provisions of the judgment in this case regarding the Guarantors.

### E. Plaintiff is entitled to attorney fees and expenses, not defendants.

Pursuant to RAP 18.1 and the loan documents, CP 457, 463, 466, 469, plaintiff requests an award of attorney fees and expenses incurred in litigating this appeal. *See also Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 525 (2009) (recognizing contract as one ground for award of attorney fees). Because plaintiff, not defendants, should prevail here, defendants are not entitled to attorney fees or expenses under the loan documents, RCW 4.84.330, or RCW 4.28.185(5).

## IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to plaintiff and award it its costs and fees.

Respectfully submitted on July 16, 2013.

LARKINS VACURA LLP

William L. Larkins, Jr.
WSBA #33423
wlarkins@larkinsvacura.com
Cody Hoesly, WSBA #41190
choesly@larkinsvacura.com
Attorneys for Plaintiff

# CERTIFICATE OF SERVICE

I certify that on July 16, 2013, I caused a copy of the foregoing document to be placed in a sealed envelope and caused such envelope to be delivered to the following street address(es) by Federal Express by the next business day after the date listed above:

Sean N. Egan
Law Offices of Sean Egan
215 So. State Street, Suite 950
Salt Lake City, Utah 84111-2311
seannegan@sneganlaw.com
Fax: 801-363-5184
Attorney for MTB Enterprises, Inc., Michael Tony Bilanzich, and Hairware USA, Inc.

Jeffrey M. Sayre
Sayre Law Offices, PLLC
1320 University St
Seattle, WA 98101-2837
jeff@sayrelawoffices.com
Fax: 206-625-9040
Attorney for MTB Enterprises, Inc., Michael Tony Bilanzich, and Hairware USA, Inc.

Cody Hoesly