

**Supreme Court Case No. 93771-1
Court of Appeals Case No. 73100-9-I**

SUPREME COURT OF THE STATE OF WASHINGTON

BANNER BANK, a Washington corporation,

Respondent/Plaintiff.

v.

JOSEPH R. AND MELANIE W. ELENBAAS,
husband and wife, and the marital community composed thereof,

Petitioners/Appellants/Defendants,

**RESPONDENT'S ANSWER TO REQUEST FOR EXTENSION OF
TIME TO FILE PETITION FOR REVIEW BY SUPREME COURT**

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I. INTRODUCTION

Respondent Banner Bank, a Washington banking corporation (“Banner Bank”), Plaintiff in the Superior Court and Respondent in the Court of Appeals, by and through its attorneys, HACKER & WILLIG, INC., P.S., respectfully presents this Answer to the Request for Extension of Time to File Petition for Review By Supreme Court (the “Motion”) filed by Joseph R. Elenbaas and Melanie W. Elenbaas (the “Petitioners” or the “Elenbaases”).

The Elenbaases filed a “Petition for Review by Supreme Court” of the Court of Appeals decision in the *Elenbaas v. Banner Bank* matter (the “Petition”) after the deadline for filing a petition for review as set forth the Washington Rules of Appellate Procedure (“RAP”) 13.4.¹ As a result of the late filing, the Supreme Court required the Petitioners to file a motion for extension of time in order to avoid summary dismissal of the matter, which motion the Elenbaases timely filed on or about November 28, 2016. Despite now being property noted, the Motion fails to meet the minimum criteria for consideration as required under RAP 18.8(b) and must therefore be denied.

II. HISTORY OF LATE FILING

¹ The Petitioners apparently also failed to sign the check for the filing fee and were to have that deficiency remedied by November 28, 2016 as well. Ironically, the Petitioners’ perpetual late and short payments are the crux of the case against them.

The Elenbaases filed the Petition on October 24, 2016, three (3) days after the October 21, 2016 deadline. The late filing is of particular note because it is consistent with the Petitioners' pattern of late filings and delays which began in the Whatcom County Superior Court in 2014, after five (5) years of similar deliberate delaying/obstructionist behavior that the Elenbaases engaged in when they defaulted in making their loan payments to Banner Bank.

RAP 18.6(c) clearly states that a petition for review is timely filed only if it is received by the appellate court within the time permitted for filing. There is nothing hidden or complicated about this particular rule. Presumably, the Elenbaases' appeal counsel informed them of this deadline before they withdrew from the case (over the Elenbaases' objection).

The Elenbaases have an established pattern of delay and late filing in both the superior court and the court of appeals. Beginning with a three week delay (22 days) in the superior court case due to their avoidance of service of process of the complaint, their further delays were as follows: opposing summary judgment with purported substantive arguments [CP 159-183], requesting additional time for response after terminating their counsel [CP 155-156, 312-313], moving for reconsideration [CP 307-311, 344-360], moving for post-judgment preliminary injunction [CP 304-306,

437-438], objecting to the confirmation of the Sheriff's Sale [CP 471-472].

Further, the notice of appeal was filed on or about February 11, 2015, however, the Elenbaases failed to perfect the record on appeal for an additional three (3) months, *See* Notation Rulings dated April 6, 2015 denying motion for stay, Notation Ruling dated May 5, 2015 and Court of Appeals letter dated June 8, 2015 attached hereto as **Exhibit A**. The Elenbaases filed a Motion for Extension of Time to “clear up, or correct whatever deficiencies exist as it relates to the Courts [sic] advise per letters of May 5 and June 8, that the “...amended designation of clerk's papers is not of record...” *See* Motion for Extension of Time (not dated, but mailed June 17, 2015.

The Elenbaases further failed to timely file their opening brief on appeal on the first deadline or November 30, 2016, instead filing a motion for extension on the day the brief was due, causing another month delay. *See* Motion for Extension of Time to File Appellants' Opening Brief dated November 30, 2015.²

In the Court of Appeals, through various delays, the Elenbaases enjoyed an additional seven (7) months to file the Appellants' Brief.

² A second motion for extension of time to file the opening brief was made on January 5, 2016 as a result of a “computer glitch” and the brief was technically filed on January 6, 2016. *See* Second Motion for Extension of Time to File Appellants' Brief dated January 5, 2016.

III. THE MOTION DOES NOT MEET CRITERIA OF RAP 18.8(b)

RAP 18.8(b) applies strict restrictions on granting a motion for extensions of time in certain circumstances, as follows:

Restriction on extension of time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

See, RAP 18.8 (b) (West 2016).

By limiting the extension of time to file a notice of appeal as set forth in RAP 18.8 (b), the rules express a public policy preference for finality of judicial decisions over the competing policy of reaching the merits in every case. *Shumway v. Payne*, 136 Wn.2d 383, 395 (1998); *citing, Pybas v. Paolino*, 73 Wn.App. 393, 401 (Ct. of Appeals, Div. 2 1994).

In the unusual cases where the Courts of Appeal have granted extra time, the moving party had actually filed a notice of appeal within thirty (30) days, but some aspect of the filing was defective. *See, Reichelt v. Raymark Industries*, 52 Wn.2d 763, 765-66 (1988); *Followed by, King v.*

Mockovak, 2013 Wash. App. LEXIS 334, *12-13 (Unpub. 2013); *see also*, *Beckman v. DSHS*, 102 Wn.App. 687, 695 (Ct. of Appeals, Div. 2 2000). Negligence, or the lack of “reasonable diligence,” does not amount to “extraordinary circumstances.” *Beckman*, 102 Wn.App. at 695.

While Mrs. Elenbaas’ illness and Mr. Elenbaas’ alleged cognitive impairment have been mentioned to every court that has heard this case, these conditions do not rise to the level of “extraordinary circumstances,” and, needless to say, neither has there been any gross miscarriage of justice. In fact, the opposite is true: The Elenbaases have been given every opportunity and enormous leeway to present their case. They are simply disgruntled with the rulings against them.

Further, although the Elenbaases attorneys have since withdrawn, the Elenbaases were, in fact, represented during the case before the Court of Appeals and at the summary judgment hearing in the Whatcom County Superior Court case. Both the trial court and the court of appeals thoroughly reviewed the record before them and found in favor of Banner Bank. The judgment and decisions of those courts should stand without any further review.

IV. CONCLUSION

Consistent with their established pattern in both the superior court and the court of appeals, the Petitioners have delayed this case at every

level through late filings and other delays, including and up to the late filing of the Petition in this court. The Elenbaases cannot and do not meet the requirements set forth under RAP 13.4(b) for the allowance of discretionary review by the Supreme Court, and they have failed to meet the strict criteria for allowance of a late filed Petition as set forth in RAP 18.8 (b). To allow the Motion, would cause the parties to incur additional fees without purpose. For these reasons, Banner Bank respectfully requests that the Request for Extension of Time to File Petition for Review by Supreme Court be denied.

DATED this 21st day of December, 2016.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.

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EXHIBIT A

RICHARD D. JOHNSON,
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April 6, 2015

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CASE #: 73100-9-I
Banner Bank, Resp. vs. Joseph & Melanie Elenbaas, Apps.

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on April 6, 2015:

This is an appeal from a money judgment in the total amount of \$17,665.32 and an order of default of loan obligations authorizing foreclosure of property against Joseph and Melanie Elenbaas. On March 26, 2015, the Elenbaases, pro se, filed what appears to be an emergency motion to stay the enforcement of the trial court's judgment pending appeal. Essentially, they ask this Court to stay the sheriff's sale scheduled for April 10, 2015 pending appeal. It appears that the trial court denied the same relief. As explained below, the Elenbaases' motion is denied. The Elenbaases may obtain a stay of the sheriff's sale by posting a supersedeas bond or cash in the trial court.

FACTS

In September 2014, Banner Bank filed a complaint for judicial foreclosure on property located in Bellingham, Washington. On December 5, 2014, after a hearing, the trial court granted summary judgment for the bank in the total amount of \$17,665.32. The trial court concluded that the Elenbaases were in default and liable on their loan obligations to the bank. In January 2015, the court denied reconsideration and entered an order of default stating that the Elenbaases were in default on their loan obligations and that the bank was entitled to proceed with foreclosure of its deed of trust. On February 4, 2015, the trial court entered a decree of foreclosure, and on February 10, 2015 an order of sheriff's sale. On February 12, 2015, the Elenbaases filed a notice of appeal from the December 2014 judgment and January 2015 order of default.

More than a month later, on March 26, 2015, the Elenbaases filed in this Court a "Motion Requesting Preliminary Injunction Against Threatened Sheriff's Sale, Filed in Whatcom County Superior Court – Matter Pending." They ask to postpone the scheduled sheriff's sale without posting a bond. They request a "preliminary injunction" under CR 65 requiring Banner Bank to show cause why their request should not be granted.

It appears that the Elenbaases' similar motion was denied by the trial court.

DECISION

Although the Elenbaases request a "preliminary injunction" under CR 65, that rule applies to trial court proceedings. RAP 8.1 and RAP 8.3 govern this Court's authority to grant a stay or an injunctive relief.

Under RAP 8.1(b)(2), the Elenbaases "may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property . . . by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4)." Although this Court has discretion under RAP 8.3 to issue orders, including an injunction, this Court "will ordinarily condition the order on furnishing a bond or other security." RAP 8.3.

In their motion, the Elenbaases make factual assertions without any reference to the record. To the extent they seek a stay of the sheriff's sale without posting a supersedeas bond or cash, their request is denied. They may obtain a stay by posting a supersedeas bond or cash in the trial court. Also, Banner Bank does not dispute that the property, once sold, is subject to a one-year right of redemption under RCW 6.23.010 and .020(1).

Therefore, it is

ORDERED that the Elenbaases' emergency motion for a preliminary injunction is denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal line extending to the right.

Richard D. Johnson
Court Administrator/Clerk

hek

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
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May 5, 2015

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Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on May 4, 2015, regarding appellant's motion to compel Clerk to prepare clerk's papers:

The designation of clerk's papers filed by the Appellant does not comply with the Rules of Appellate Procedure. See RAP 9.6(b)(2) and (3). The motion to compel is denied. If a proper designation is not filed in the trial and appellate court by May 20, 2015, the case will be subject to dismissal without further notice.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

hek

The Court of Appeals
of the
State of Washington

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Court Administrator/Clerk

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June 8, 2015

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Counsel:

The Court's records indicate the Appellant's amended designation of clerk's papers is not of record in this court as required by RAP 9.6(a) and Clerk's Ruling dated May 4, 2015..

If the amended designation of clerk's papers is not filed within 10 days, a court's motion to impose sanctions and/or dismiss in accordance with RAP 18.9 is set for Friday, June 26, 2015, at 10:30 a.m. The court's motion will be stricken if the amended designation of clerk's papers or a motion for an extension of time is filed on or before June 18, 2015.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

hek

HACKER & WILLIG, INC., INC

December 21, 2016 - 12:23 PM

Transmittal Information

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