

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COLUMBIA COMMUNITY BANK,

Respondent/Cross Appellant,

v.

NEWMAN PARK, LLC,

Appellant/Cross Respondent.

No. 41470-8-II

PART PUBLISHED OPINION

Armstrong, P.J. — Joseph Sturtevant borrowed money from Columbia Community Bank, providing collateral with a deed of trust for the Newman Park, LLC property. To ensure a first priority position, Columbia paid off Newman Park’s existing loan from another bank, Hometown National Bank, and delinquent property taxes on Newman Park’s property. When Sturtevant defaulted on the loan, Columbia learned that he might not have had authority from Newman Park to obtain the loan. Columbia then sued Newman Park to enforce the loan security agreement or, in the alternative, to be equitably subrogated to Hometown’s loan to Newman Park.

On summary judgment, the trial court denied Columbia’s claim that Newman Park was liable for the loan Sturtevant had obtained, but the court held that to prevent unjust enrichment, Newman Park was liable for the amount Columbia paid on the Hometown loan and the delinquent property taxes. Both parties appeal. Columbia argues that issues of material fact exist as to whether Sturtevant had actual or apparent authority to obtain the Columbia loan. Newman Park argues that the trial court erred by subrogating Columbia to Hometown’s loan because Columbia acted as a “volunteer” in making its loan. Finding no error, we affirm.

FACTS

In October 2004, Sturtevant submitted an application for an employer identification number on behalf of Newman Park to the secretary of state. He signed the application “Joseph Sturtevant, Managing Member.” Clerk’s Papers (CP) at 662. On October 18, Sturtevant also applied to form a limited liability company (LLC) with the state. Newman Park is a manager-managed LLC.¹

Newman Park has 12 investor-members, including Landmark Development Ventures, Inc.; Brian and Maya Allen; Rick and Christine Goode; William Lowry; Kurt and Susan Rylander; Jim and Jean Schroeder; and Jeff and Kathleen Sunshine. All the investor-members had invested with Sturtevant before. Sturtevant is not, individually, an LLC member.

Landmark initially owned 39 percent of Newman Park; the other members owned 61 percent. Sturtevant is the sole shareholder, director, and officer of Landmark.

I. Newman Park Operating Agreement

Newman Park’s operating agreement identifies Sturtevant as the “manager” and “managing member.” CP at 471, 475. In annual reports submitted to the secretary of state, Sturtevant also referred to himself as “manager,” and once as “managing member.” CP at 128-35. The operating agreement does not list Sturtevant as an LLC member; instead, Sturtevant has only an indirect membership interest through Landmark. The operating agreement provides, in relevant part:

1.3 Nature of Business. The LLC shall acquire, own, develop, sell and complete

¹ A limited liability company is member-managed unless the operating agreement expressly provides that it is “manager-managed.” RCW 25.15.150. “Manager-managed” is a term of art referring to the choice to have the manager exclusively decide the company’s activities. 6 Unif. Ltd. Liab. Co. Act 203(a)(6) (1996); Rev. 6A U.L.A. 407(a) (2006).

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a residential subdivision project known as Newman Park situated in Olympia, Thurston County Washington, known as follows:

3822 Wiggins Road SE (Tax Parcel 11829330300)

Member Joseph Sturtevant is 100% responsible for satisfactory real estate development and project completion.

CP at 649.

The operating agreement limits the power of members to borrow money or encumber company property; no member can: (1) incur liability greater than \$25,000; (2) pledge company property to secure a loan over \$50,000; or (3) refinance any obligation leading to aggregate indebtedness of over \$50,000.

II. Newman Park Property

In December 2004, Newman Park purchased real property in Thurston County for \$500,000. Newman Park financed the purchase with a \$393,100 loan from Hometown. Sturtevant provided Hometown with copies of Newman Park's application to form an LLC, the certificate of formation, and the operating agreement. Newman Park granted Hometown a deed of trust on the property. The deed to Hometown was executed on Newman Park's behalf and signed: "Landmark Development Ventures, Inc., Manager of Newman Park LLC By: Joseph A. Sturtevant, President of Landmark Development Ventures, Inc." CP at 670-77.

Sturtevant also executed a real estate tax affidavit, settlement statement, and closing instructions on Newman Park's behalf, signing each document as "Joseph Sturtevant, President of Landmark Development Ventures, Inc., Managing Member." CP at 85-87, 91, 93, 679. He signed the promissory note as "Landmark Development Ventures, Inc. Manager of Newman Park

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LLC By: Joseph A. Sturtevant, President of Landmark Development Ventures, Inc.” CP at 699.

In contrast, Sturtevant signed the “Limited Liability Company Resolution to Borrow/Grant Collateral” as “Joseph A. Sturtevant, Manager of Newman Park LLC.” CP at 694.

On February 21, 2005, Sturtevant e-mailed to the investors copies of the LLC formation application, the certificate of formation, the final closing HUD (Housing and Urban Development) papers, the deed transferring title to Newman Park, and the deed of trust to Hometown. No member objected to the documents.

III. Columbia Community Bank Loan to Trinity Development-Northwest, LLC

Sturtevant formed Trinity Development-Northwest, LLC in October 2007. Sturtevant holds a 95 percent interest in Trinity and Robert Leach holds a 5 percent interest.

In January 2008, Sturtevant sought a loan for Trinity from Columbia. When Sturtevant met with Bradley Volchok, the assistant vice president of Columbia, to discuss the loan, he told Volchok that Landmark was the sole member or owner of Newman Park.

On February 1, Columbia sent Sturtevant a commitment letter offering to lend Trinity between \$1,500,000 and \$2,500,000 as a revolving line of credit. The loan amount depended on whether Columbia paid off Hometown’s loan for the Newman Park property and whether the loan was secured both by sufficient real estate and a \$1,000,000 certificate of deposit.

The loan commitment letter explained that the loan was to “[p]rovide liquidity for real estate investments and development projects,” but it did not specify a project. CP at 288, 297.

The bank included one contingency in the letter:

[A] new appraisal for the Newman Park property and an updated appraisal of Joe Sturtevant’s personal residence, both to be reviewed and accepted by Columbia Community Bank. The loan officer will visit both sites as well.

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CP at 299.

The commitment letter limited the loan to 65 percent of Newman Park's property's appraised value together with 80 percent of the appraised value of Sturtevant's personal residence. Further, the commitment letter stated:

Additionally, we would appreciate the opportunity for the deposit relationship with Landmark Development Ventures, Inc. and other entities, plus your personal deposit relationship.

CP at 290.

Sturtevant signed and returned the letter to Columbia accepting a loan of \$1,500,000 without the \$1,000,000 certificate of deposit as additional collateral.

On February 22, Sturtevant sent Columbia an altered copy of Newman Park's operating agreement, which stated that Landmark owned 100 percent of Newman Park. In addition, Sturtevant provided Columbia with: (1) the Newman Park certificate of formation; (2) Newman Park's application to form a limited liability company; (3) a "Limited Liability Company Resolution to Borrow/Grant Collateral" on Trinity's behalf that Sturtevant signed as "Managing Member of Trinity"; and (4) a "Corporate Resolution to Grant Collateral/Guarantee" also on Trinity's behalf that Sturtevant signed as "President/Secretary of Landmark." CP at 343-44, 346. Sturtevant provided Columbia with Trinity's certificate of formation and operating agreement, along with Landmark's certificate of incorporation, bylaws, and corporate resolutions.

IV. Deed of Trust

On February 28, Sturtevant executed a promissory note for \$1,500,000 to Columbia on Trinity's behalf. The promissory note required payment of all interest and principal by February

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28, 2009. The collateral instrument pledged the Newman Park property as security for the Trinity loan by granting Columbia a deed of trust. Sturtevant signed the deed of trust as follows:

Grantor:
Newman Park, LLC
Landmark Development Ventures, Inc., member of Newman Park, LLC
By: Joseph A. Sturtevant, President/Secretary of Landmark Development Ventures, Inc.

CP at 208.

V. Default

Columbia paid off the entire Hometown loan and delinquent property taxes on the Newman Park property when it made the loan to Trinity. The Newman Park members discovered the transaction in June 2009. At that time, the members also discovered that Sturtevant had presented an altered operating agreement to Hometown.

Trinity defaulted on the loan. When Columbia attempted to foreclose on its deed of trust, it learned about possible problems with Sturtevant's authority to obtain the loan.

Columbia filed a complaint for declaratory judgment, equitable subrogation, and unjust enrichment. It sought a declaration that its deed of trust on Newman Park's property was valid and enforceable. In the alternative, it sought a lien on the Newman Park property under the doctrines of equitable subrogation and unjust enrichment. Newman Park filed a complaint seeking a declaration that the deed of trust was invalid and unenforceable. The actions were consolidated.

Newman Park moved for summary judgment, arguing that the deed of trust securing Trinity's loan was invalid and unenforceable because Landmark had neither actual nor apparent authority to sign the documents. The trial court granted the motion, ruling that Newman Park's

operating agreement unambiguously named Sturtevant as its manager and that Landmark had no actual authority to pledge Newman Park's property as security. The court also concluded that Columbia's apparent authority claim failed because Columbia required a resolution in order to confirm authority for the loan.

Columbia then moved for partial summary judgment to establish a lien on the Newman Park property through equitable subrogation or unjust enrichment. The trial court granted the motion, awarding the bank an equitable lien and judgment in the amount of \$491,037.31, plus interest. Newman Park moved for attorney fees, which the trial court denied because both parties had prevailed on substantive issues.

Newman Park appeals the trial court's partial summary judgment for Columbia on its unjust enrichment and equitable subrogation claims. Columbia cross-appeals the trial court's grant of summary judgment determining the deed was invalid.

ANALYSIS

I. Summary Judgment Standard

We review a trial court's grant of summary judgment de novo. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). A court may grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). In reviewing a summary judgment, we view "all facts and inferences in the light most favorable to the nonmoving party." *Fitzpatrick*, 169 Wn.2d at 605 (quoting *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)).

Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. *See Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). The nonmoving party avoids summary judgment when it “set[s] forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *Meyer*, 105 Wn.2d at 852 (citation omitted). Thus, the nonmoving party may not rely on speculative or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

II. Equitable Subrogation

Newman Park argues that the trial court erred in granting Columbia summary judgment on the basis of equitable subrogation. Newman Park contends that equitable subrogation does not apply because Washington law limits equitable subrogation in this context to mortgagees competing for priority and Columbia is not a priority creditor. Further, according to Newman Park, Columbia is not entitled to relief because it volunteered to make the loan.

The Washington Supreme Court recently adopted *Restatement (Third) of Property: Mortgages* § 7.6(a) (1997), which describes equitable subrogation as:

One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.

Subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs an obligation under the following circumstances:

(1) in order to protect his or her interest; (2) under a legal duty to do so; (3) on

account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.

BNC Mortg., Inc. v. Tax Pros, Inc., 111 Wn. App. 238, 255-56, 46 P.3d 812 (2002).

One purpose of equitable subrogation is to preserve the proper priorities by allowing a mortgagee who satisfies another mortgagee's loan to take that mortgagee's priority position. *Bank of Am. v. Prestance Corp.*, 160 Wn.2d 560, 564-65, 160 P.3d 17 (2007). But the doctrine of equitable subrogation is an equitable remedy that generally applies "to avoid a person's receiving an unearned windfall at the expense of another." *Bank of Am.*, 160 Wn.2d at 567. And equitable subrogation may arise when one pays or performs in full an obligation owed by another and secured by a mortgage. Restatement (Third) of Property: Mortgages § 7.6 (cmt. a) (1997).

Newman Park argues that equitable subrogation does not apply because this is not a creditors' priority dispute. Newman Park focuses on the reference to "priorities" in chapter 7's title to support its argument. Appellant's Reply Br. at 31. But the *Restatement's* general discussion of equitable subrogation and the following example demonstrate that equitable subrogation applies more broadly than to just setting priorities:

28. Blackacre is owned by A and B, subject to a mortgage held by Mortgagee-1 securing a debt of \$100,000. A and B are tenants in common. A approaches Mortgagee-2 and induces it to make a loan of \$150,000, of which \$100,000 is used to pay off the first mortgage in full. The remaining \$50,000 is used by A for other purposes. B is not a party to this transaction, but A forges B's name on the note and mortgage to Mortgagee-2. Mortgagee-2 is subrogated to the first mortgage to the extent of \$100,000, and can enforce it against B's interest in Blackacre. Mortgagee-2 is not entitled to subrogation with respect to the remaining \$50,000.

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Restatement, *supra*, § 7.6.

This example illustrates that equitable subrogation applies even when a mortgagee pays off the only existing mortgage and the question is not one of priorities but whether the new mortgagee steps into the shoes of the paid-off mortgagee. Moreover, the example is similar to the facts here where one person encumbers the property of another but without authority to do so, and misuses some of the loan proceeds; the question then is whether the remaining owner should be enriched by getting the property debt free.

When Columbia made its loan, Hometown held a deed of trust on the Newman Park property. To become the first lien holder, Columbia paid Newman Park's loan from Hometown. Because it fully performed Newman Park's obligation to Hometown, Columbia is equitably subrogated to the amount it paid. To hold otherwise would give Newman Park a windfall.

Volunteer Rule

Newman Park further argues that equitable subrogation does not apply because Columbia was a volunteer.

Previously, we recognized the volunteer rule in the context of a commercial loan. *BNC Mortg., Inc.*, 111 Wn. App. at 254. After our decision in *BNC Mortgage, Inc.*, 111 Wn. App. 238, the Washington Supreme Court considered the volunteer rule in *Bank of America*, 160 Wn.2d 560. In *Bank of America*, the Court held that equitable subrogation was available in the refinance context and, as previously discussed, adopted *Restatement (Third) of Property Mortgages* § 7.6, which rejects the "volunteer" rule. *Bank of Am.*, 160 Wn.2d at 560-64. And our Supreme Court did not limit its adoption of the *Restatement* or attempt to preserve the

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volunteer rule. We now conclude that the volunteer rule is no longer a defense where a mortgagee pays off another mortgage holder. We therefore affirm the order granting partial summary judgment to Columbia on the basis of equitable subrogation.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

III. Deed of Trust—Sturtevant’s authority

Columbia argues that the trial court erred in granting Newman Park summary judgment because both Sturtevant and Landmark had actual or apparent authority to execute the deed of trust. Newman Park responds that the deed of trust is invalid as a matter of law because Landmark was not an agent of Newman Park and it had no authority to execute the deed of trust to Columbia.

Sturtevant signed the deed of trust as the president and secretary of Landmark, not as the manager of Newman Park:

Grantor:
Newman Park, LLC
Landmark Development Ventures, Inc. member of Newman Park, LLC
By: Joseph Sturtevant, President/Secretary of Landmark Development Ventures,
Inc.

CP at 208.

According to the operating agreement, Landmark is a member, but not a manager, of Newman Park. The parties dispute, however, whether Sturtevant or Landmark executed the deed of trust as an agent with authority to act on Newman Park’s behalf.

A. Actual Authority

An LLC can act only through its agents. *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wn. App. 249, 263, 254 P.3d 827 (2011). An LLC may be member-managed or manager-managed. RCW 25.15.150. A nonmember manager has power to manage the LLC's business or affairs specified in the LLC agreement. RCW 25.15.150(2). Further, if the certificate of formation vests management of the limited liability company in a manager or managers, no member, acting solely in the capacity as a member, is an agent of the LLC. RCW 25.15.150(3).

Actual authority may be express or implied. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994), *superseded by statute on other grounds*. Implied actual authority depends on objective manifestations from the principal to the agent. *King*, 125 Wn.2d at 507. An agent acting with actual authority binds the principal. *Blake Sand & Gravel, Inc. v. Saxon*, 98 Wn. App. 218, 223, 989 P.2d 1178 (1999).

Columbia asserts that RCW 25.15.150(3) does not prevent a member, who is also a manager, from acting as an agent under his member status. Columbia cites no authority for this proposition, which would allow a member to act for the LLC where the LLC operating agreement names a nonmember manager. Nor does Columbia cite authority for its contention that a nonmember manager, such as Sturtevant, can act on a member's behalf alone and still bind the LLC. *See* RAP 10.3(a)(6). Here, Landmark is only a member of Newman Park, and it is a business entity separate from Sturtevant, the designated nonmember manager of Newman Park.

Newman Park's operating agreement specifically named Sturtevant as manager. But

Sturtevant was not acting as a manager when he executed the deed of trust to Columbia; rather, he signed the instrument on Landmark's behalf as a member of Newman Park. Sturtevant's signature on Landmark's behalf as a member did not bind Newman Park because Landmark had no actual authority as a matter of law. *See* RCW 25.15.150(3).

The trial court did not err in ruling that Landmark was not an agent of Newman Park and had no authority to execute the deed of trust. The deed of trust was, therefore, invalid as a matter of law.

B. Apparent Authority

Columbia argues that both Sturtevant and Landmark had apparent authority to act on Newman Park's behalf. Because the deed of trust is signed by Landmark as a member, the issue is whether Newman Park made objective manifestations to Columbia that Landmark had authority to obtain the Columbia loan. Columbia asserts that disputed issues of material fact preclude summary judgment on the issue. We hold that the trial court properly granted summary judgment in Newman Park's favor because Landmark did not have apparent authority to execute the deed of trust to Columbia.

An agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent's authority "to a third person." *King*, 125 Wn.2d at 507. While apparent authority can be inferred from the principal's actions, there must also be evidence that the principal knew of the agent's act. *State v. French*, 88 Wn. App. 586, 595, 945 P.2d 752 (1997). To create apparent authority, a principal's objective manifestations must (1) cause the one claiming apparent authority to actually believe the agent has authority to act for the principal,

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and (2) the claimant's actual belief must be objectively reasonable. *King*, 125 Wn.2d at 507 (citing *Smith v. Hansen, Hansen, & Johnson, Inc.*, 63 Wn. App. 355, 364, 818 P.2d 1127 (1991)). To prevail, Columbia must prove that Newman Park, the alleged principal, made objective manifestations to Columbia, the third party, that caused it to subjectively and reasonably believe that Landmark, the alleged agent, had authority to execute the deed of trust.

In *Kiniski v. Archway Motel, Inc.*, 21 Wn. App. 555, 586 P.2d 502 (1978), Division One of this court found no corporate liability based on apparent authority when two corporate directors signed documents in their individual capacities. Kiniski entered into a loan transaction with the Thorstads, who held two of the three corporate director positions at Archway Motel, Inc. *Kiniski*, 21 Wn. App. at 557. The Thorstads signed all the loan documents, including a promissory note and mortgage, in their individual capacity. *Kiniski*, 21 Wn. App. at 558. Kiniski did not ask about the actual ownership of the motel; she assumed that the Thorstads owned the property individually because the Thorstads lived on the motel property and said they owned it. *Kiniski*, 21 Wn. App. at 563-64. After the Thorstads defaulted on the loan, Kiniski discovered that the motel was a corporation and not the Thorstads' individual property. *Kiniski*, 21 Wn. App. at 558-59. Because the corporation had done nothing to suggest it was authorizing the transaction, the court concluded that Kiniski failed to prove the Thorstads acted with apparent authority on the corporation's behalf. *Kiniski*, 21 Wn. App. at 564.

Similarly, the issue here is the capacity in which Sturtevant signed the deed of trust. Before entering into this transaction, Sturtevant sent Columbia an altered copy of Newman Park's operating agreement, which stated that Landmark owned 100 percent of Newman Park. The

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altered operating agreement does state that Sturtevant is the manager of Newman Park. And Sturtevant gave Columbia Newman Park's certificate of formation and its application to form an LLC, which showed that the LLC was electing to be manager-managed. Columbia reasons that by naming Sturtevant "manager," Newman Park conveyed to third parties that Sturtevant was an agent who could act on the LLC's behalf. The argument fails for several reasons.

First, Columbia had agreed to make the loan before it received the altered operating agreement on February 22. On February 1, Columbia sent Sturtevant the commitment letter, which stated that the bank "has approved a commitment" for credit to Trinity and required only Sturtevant's acceptance. CP at 288-91. Thus, Columbia could not have believed and relied on the altered documents when it agreed to make the loan.

Second, Sturtevant did not sign the deed of trust as Newman Park's manager. He signed on Landmark's behalf, as a member. And nothing in Newman Park's operating agreement represented that Landmark was Newman Park's manager. In fact, the documents Sturtevant supplied showed that he was the nonmember manager of Newman Park. Finally, Columbia presented no evidence that it relied on Hometown's deed of trust, which Sturtevant signed in the same manner.

The trial court found that Columbia's request for an LLC resolution from Newman Park evidenced the bank's concern about who had authority to act, undermining the bank's later apparent authority argument. Like the deed of trust, Sturtevant signed the resolution to grant collateral as president and secretary of Landmark, member of Newman Park. The resolution does not represent that Sturtevant was signing as Newman Park's manager.²

² Newman Park submits that when a lender requires a resolution to borrow or grant collateral,

Columbia failed to present evidence that Landmark had apparent authority to execute the loan or that Newman Park made objective manifestations to Columbia of such authority as would bind Newman Park to Trinity's loan from Columbia. The trial court did not err in granting summary judgment to Newman Park on the issue.

C. Ratification

Columbia also broadly asserts that Newman Park ratified Landmark's grant of a deed of trust to Hometown. But Newman Park's ratification of a single, prior transaction does not show that Landmark acted with authority in the loan transaction with Columbia. Because there is no evidence that Columbia relied on Landmark's signature on the Hometown deed of trust, this argument fails.

Under agency law, a principal can ratify an agent's unauthorized act by, with full knowledge of the act, accepting its benefits or intentionally assuming without inquiry its obligation. *Stroud v. Beck*, 49 Wn. App. 279, 286, 742 P.2d 735 (1987). The principal's constructive knowledge of the act may be sufficient to prove ratification. *Stroud*, 49 Wn. App. at 286.

In *Stroud*, the plaintiffs received copies of all the legal documents facilitating a purchase of apartments secured by a promissory note and deed of trust in the sellers' favor. Even though the plaintiffs did not read the documents, we held that they ratified their agent's authority by assuming the obligation without inquiry and by accepting tax benefits without question. *Stroud*, 49 Wn. App. at 286.

apparent authority is absent, citing to *National Bank of Bossier City v. Nations*, No. 16826-CA, 465 So. 2d 929 (La. App. 2nd Cir. 1985). However, as Newman Park concedes, no Washington case supports this bright line rule.

Here, in contrast, Columbia presented no evidence that Newman Park knew Sturtevant had fraudulently obtained the loan until a year after the transaction. Newman Park's members discovered the transaction only when Trinity defaulted on the loan and Columbia started foreclosure proceedings. Nor is there evidence that Newman Park members received any benefit from the loan.³

D. Doctrine of Comparative Innocence

Columbia argues that factual issues exist as to which party should bear the risk of Sturtevant's actions. Specifically, Columbia urges us to use "comparative innocence" principles to validate the deed of trust. Br. of Cross Appellant at 48. Newman Park responds that if there is no agency, comparative innocence does not apply. The trial court concluded that comparative innocence did not apply as a matter of law because Landmark did not have agency authority.

The comparative innocence doctrine provides that where two innocent persons must suffer because of a third person's fraud, the loss should fall on the "innocent" party who enabled the fraud. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 542 n.16, 146 P.3d 1172 (2006) (citing *Stohr v. Randle*, 81 Wn.2d 881, 882, 505 P.2d 1281 (1973)). But to apply the doctrine, the evidence must clearly show that the party to suffer the loss acted with some voluntary "act or neglect" that made the fraud possible. *Stohr*, 81 Wn.2d at 883.

In *Bergin v. Thomas*, 30 Wn. App. 967, 972, 638 P.2d 621 (1981), Division Three of our court refused to apply comparative innocence where no agency existed. The Thomases sold their clothing store to their son Greg and his wife, Shelly. *Bergin*, 30 Wn. App. at 968. Mrs. Thomas

³ Because of our application of equitable subrogation, Newman Park owes Columbia the same amount it would have owed Hometown.

testified that she might have informed the existing creditors of the change. *Bergin*, 30 Wn. App. at 968. Greg told the salesman of a distributor that he owned the clothing store; the salesman suggested, however, that he should not disclose this fact for credit reasons. *Bergin*, 30 Wn. App. at 968-69. Later, Greg and Shelly defaulted on their obligation to the distributor and its assignee sued them and the Thomases. *Bergin*, 30 Wn. App. at 969. The court reasoned that because the Thomases did not induce or mislead the third party into believing that Greg was their agent, there was no apparent agency.⁴ *Bergin*, 30 Wn. App. at 972. And because there was no agency, the doctrine of comparative innocence was inapplicable. *Bergin*, 30 Wn. App. at 969, 972.

We need not reach the issue of whether the doctrine of comparative innocence applies only if there is a finding of agency. Here, there is no evidence that Newman Park acted with some voluntary “act or neglect” that made the fraud possible. *See Stohr*, 81 Wn.2d at 883. Under these circumstances, comparative innocence does not apply.

IV. Attorney Fees

Columbia’s deed of trust provides for attorney fees to the prevailing party “at trial and upon any appeal.” Br. of Resp’t at 49; CP at 521. The trial court denied Newman Park’s motion for attorney fees.⁵ On appeal, both parties seek attorney fees under RAP 18.1. The issues are, first, which party prevailed and, second, what effect, if any, the deed of trust has on the grant of

⁴ In dicta, the court stated that even if agency was ostensibly found, Greg put the salesman of the distributor on notice and this information should be imputed to the principal. *Bergin*, 30 Wn. App. at 971-72. Therefore, the court determined that neither of the two parties was innocent. *Bergin*, 30 Wn. App. at 972.

⁵ Newman Park assigns error to the trial court’s denial of its attorney fees. But Newman Park provides neither argument nor citation to authority to support the claimed error. RAP 18.1(b). Newman Park does not properly argue for attorney fees on appeal.

attorney fees.

A prevailing party may recover attorney fees authorized by statute, equity, or the parties' agreement. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). The prevailing party in a contract action is entitled to attorney fees if the contract authorizes such an award. RCW 4.84.330.⁶ We can award attorney fees and costs to the prevailing party even when we have declared the contract containing the attorney fee provision invalid. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

A party is generally a prevailing party if he receives an affirmative judgment in his favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails then the substantially prevailing party can recover attorney fees. *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000). In some instances, if both parties prevail on major issues, the court may find neither party to be the prevailing party and, thus, neither is entitled to attorney fees. *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996).

In support of their respective positions, the parties point to the various claims and amounts at issue. Newman Park argues that if we hold the deed of trust is invalid, it is the prevailing party. Newman Park further argues it is the substantially prevailing party because invalidating the deed of trust reduced Columbia's claim against the land and eliminates most of the

⁶ RCW 4.84.330 states:

In any action on a contract or lease . . . where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

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Trinity loan from Columbia's claim.⁷ Columbia responds that if it "prevails on appeal it is entitled to costs and its reasonable attorneys' fees." Br. of Resp't at 49.

The trial court denied Newman Park's motion for attorney fees because both parties had prevailed on substantive issues. On appeal, both parties again prevail on major issues. Newman Park prevails as to validity of the deed of trust. But Columbia prevails on its equitable subrogation claim. We conclude that we cannot fairly declare either Columbia or Newman Park the prevailing party. Thus, neither is entitled to attorney fees on appeal.

Affirmed.

Armstrong, P.J.

We concur:

Hunt, J.

Johanson, J.

⁷ Newman Park cites *Rowe v. Floyd*, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981), in support of its assertion that we should consider Newman Park the substantially prevailing party. In *Rowe*, however, Division Three of this court upheld the trial court's order finding each party responsible for its own costs and attorney fees because both parties prevailed. *Rowe*, 29 Wn. App. at 535-36.