IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELIZABETH J. BEKKEVOLD, Appellant, v. EVERGREEN BANK, a Washington corporation; WESCOTT DEVELOPMENT LLC, a Washington limited liability company; and GEOFF JAMES and JANE DOE JAMES, husband and wife and the marital community comprised thereof, Respondents.	)	No. 64147-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 15, 2010

Grosse, J. — A seller who enters into a Real Estate Purchase and Sale Agreement in which the seller agrees to finance the buyer's purchase of property in return for a second position deed of trust holds an inferior interest. A non-judicial foreclosure pursuant to a deed of trust extinguishes all junior liens on the property. Here, Evergreen Bank held the first position deed of trust to the property sold by Elizabeth Bekkevold. As holder of the second deed of trust, any right that Bekkevold had to the property was extinguished by the trustee's sale. Moreover, by failing to follow the prescribed remedies set forth in the deeds of trust act, chapter 61.24 RCW, Bekkevold has waived the right to contest the trustee's sale of the property. We affirm.

FACTS

Bekkevold, as seller, and Westcott Development LLC, as buyer, entered into a Real Estate Purchase and Sale Agreement (REPSA) on January 29, 2007, for certain property located in Seattle, Washington. The total purchase price was $1,166,000.00. Bekkevold agreed to finance part of the purchase price for Westcott. The indebtedness was secured by a second position deed of trust. At closing, pursuant to the REPSA, Westcott paid $300,000.00 in cash to Bekkevold with an agreement to make monthly payments thereafter. The entire amount of the principal was due on September 1, 2007.

On February 28, 2007, Wescott executed a promissory note agreeing to pay Evergreen Bank the principal sum of $506,222.27. That same day, Westcott executed a first position deed of trust on the property in favor of Evergreen.

On March 2, 2007, Bekkevold signed a closing statement acknowledging that the Bekkevold deed of trust would be in the second position on the title. Evergreen's deed of trust was filed first under recording number 20070302002306. Bekkevold's deed of trust was filed the same day under recording number 20070302002307.

Westcott defaulted on the promissory note and Evergreen initiated non-judicial foreclosure proceedings on the property. Bekkevold did not contest the trustee's sale even though she had proper notice. Instead, the day before the

trustee's sale was finalized, Bekkevold brought this action to establish lien priority and placed a lis pendens on the property. The trustee's sale was finalized with Evergreen's purchase of the property for the minimum bid of the amount owed Evergreen. The trial court dismissed Bekkevold's suit and ordered the lis pendens removed. Bekkevold appeals.

ANALYSIS

Bekkevold does not dispute that the rights of junior lien holders were extinguished by the non-judicial foreclosure sale. Because Evergreen's deed of trust was filed first, Evergreen's deed is superior to that of Bekkevold.[1] Moreover, Bekkevold signed a REPSA acknowledging that her deed of trust securing the purchase price was in second position. Bekkevold also signed an estimated closing statement acknowledging that her money was secured by a second deed of trust and her deed of trust itself indicates that it is in the second position. Bekkevold argues, however, that as the holder of a "purchase money mortgage," she holds a superior interest to that of Evergreen.[2] Bekkevold relies on ALH Holding Co. v. Bank of Telluride,[3] in which a Colorado court held that purchase money mortgages have priority over all other liens because execution of the deed and mortgage are considered simultaneous acts and title never rests

[1] RCW 65.08.070 provides that "[a]n instrument is deemed recorded the minute it is filed for record."

[2] The Restatement (Third) of Property § 7.2 (1997) defines a "purchase money mortgage" as a "mortgage given to a vendor of the real estate or to a third party lender to the extent that the proceeds of the loan are used to: (1) acquire title to the real estate." Since Wescott used the Evergreen loan to buy the property, both Evergreen and Bekkevold are holders of purchase money mortgages.

[3] 18 P.3d 742 (Colo., 2000).

in the purchaser unencumbered by the mortgage.[4]

Further support for Bekkevold's position is found in the Restatement (Third) of Property:[5]

> Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case even though the vendor may know that the mortgagor is going to finance the transaction in part by borrowing from a third party and giving a mortgage to secure that obligation. In the final analysis, the law is more sympathetic to the vendor's hazard of losing real estate previously owned than to the third party lender's risk of being unable to collect from an interest in real estate that never previously belonged to it.

However, the Restatement also notes that the priority principle enunciated above can be subject to modification by agreement of the parties.[6] This is precisely what happened here. The REPSA specifically stated that Bekkevold's trust was in second position. Thus, any priority which she may have held as a holder of a purchase money mortgage dissipated when she signed that contract.

Nor is there any merit to Bekkevold's argument that her interest cannot be subordinated to Evergreen because there was no specific subordination agreement. There is no requirement to have a subordination agreement. Both the REPSA and the closing documents clearly indicate that Bekkevold's interest was in second position.[7] Pursuant to the seller's estimated closing statement and the REPSA, Evergreen's deed of trust was filed prior to Bekkevold's. The

---

[4] ALH, 18 P.3d at 746-47.
[5] Restatement § 7.2, illus. d.
[6] Restatement § 7.2, illus. d.
[7] Indeed the deed of trust acknowledged by Bekkevold stated, "This deed of trust is junior and subordinate to deed of trust recorded under number [blank]."

final closing statement clearly stated that Evergreen was the lender and that the principal amount of the borrower's loan was $506,222.27. Thus, Bekkevold knew the amount of the first deed of trust.

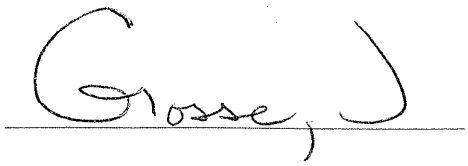
Bekkevold implies that filling in the recording number after she signed altered the agreement. But the closing documents clearly indicate that Bekkevold held a deed of trust in second position. As common practice, the recording number of that first deed of trust was not entered until it was recorded. Bekkevold's lien is junior to Evergreen's.

Waiver

Bekkevold's failure to timely request a preliminary injunction or restraining order enjoining sale of the property pursuant to the deeds of trust act waives her claims.[8] A party waives any claim to invalidate a completed trustee's sale where the party receives notice of the right to enjoin the sale, knows of a defense to foreclosure before the sale, and fails to petition the court to enjoin the sale.[9] In Plein v Lackey, our Supreme Court held that parties claiming security interests superior to the foreclosing party waived those claims by failing to pursue presale remedies.[10] Here, the notice of the trustee's sale gave Bekkevold sufficient notice that grounds for invalidating a trustee's sale may be waived by failing to file a petition under RCW 61.24.130, yet she did not seek to enjoin or restrain the sale. The plain language of RCW 61.24.040(1)(f)(IX) provides that such legal action be made on "any grounds whatsoever."

[8] RCW 61.24.040(1)(f)(IX).
[9] Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003).
[10] 149 Wn.2d 149, 220, 225-29, 67 P.3d 1061 (2003).

In sum, we find that Bekkevold has waived her right to object to the trustee's sale and even if she had not waived, she is a junior lien holder by virtue of the REPSA and the recoding statute. The trial court is affirmed.



WE CONCUR: