

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In re the Trustee's Sale of the	)	
Real Property of	)	No. 66567-7-I
	)	
MARGARET ANN BOSSIE,	)	DIVISION ONE
	)	
Appellant.	)	UNPUBLISHED
	)	
	)	FILED: <u>July 23, 2012</u>
	)	

COX, J. — Margaret Bossie appeals from the superior court order granting Bank of America's motion to revise the commissioner's order disbursing to her surplus funds from a trustee's nonjudicial foreclosure sale. Because the bank is entitled to the funds under the controlling statutes, we affirm.

Bossie owned real property in Bothell, Washington. Two of her obligations were secured by liens on the property. The obligation to JPMorgan Chase Bank, N.A. (Chase), successor in interest to Washington Mutual Bank, was in the amount of \$147,000 and was secured by a senior deed of trust dated August 7, 2003. Another obligation was in favor of Bank of America, N.A. (BOA), in the amount of \$100,000 and secured by a junior deed of trust dated February 18, 2005.

In 2010, Bossie defaulted on her obligation to Chase. Chase directed the successor trustee under the deed of trust that it held, Northwest Trustee Services, Inc., to sell the property at a trustee's sale. On October 8, 2010, the

property was sold at a non-judicial foreclosure sale for \$229,500. The sale yielded \$77,614.73 in surplus proceeds. The successor trustee, after deducting the filing fee and attorney fees and costs, deposited the net surplus funds into the registry of the King County Superior Court on November 4.

On November 29, Bossie filed a motion for disbursement of surplus funds to her. She set the hearing date for 21 days later, on December 20. She sent notice by mail to BOA and others who had previously received notice of the deposit of surplus funds from the successor trustee.

On December 9, BOA filed a separate motion to disburse the surplus proceeds to it. BOA served Bossie with its motion by mail. Bossie signed the return receipt for the mail on December 11. On December 16, BOA sent a copy of its motion to Bossie's counsel.

Significantly, the record also reflects that BOA filed its notice of appearance in the court file on December 10. BOA's motion to disburse funds was also on file prior to the commissioner's hearing that followed.

On December 20, a commissioner of the King County Superior Court heard Bossie's motion for disbursement. The commissioner granted Bossie's motion and entered an order disbursing the surplus funds to her. The order states that the court "examined the motion . . . and the court record," among other things. There is no mention of the previously filed notice of appearance of BOA in the order. Likewise, there is no mention in that order of BOA's then pending motion for disbursement of the sales proceeds to it. Finally, BOA was

not at this hearing to assert its claim of interest in the funds.

BOA timely moved for revision of the commissioner's December 20 order disbursing funds to Bossie. The revision court granted BOA's motion, concluding that "good cause" existed to vacate the commissioner's order disbursing funds to Bossie. The revision court ordered Bossie to return the surplus funds to the county registry within 10 days, and provided that if she failed to do so, BOA was entitled to judgment against her in the full amount of the disbursed surplus funds.

Bossie did not return the funds to the court registry as ordered. On March 3, 2011, the trial court signed BOA's findings of fact, conclusions of law, and judgment in the amount of \$77,614.73.

Bossie appeals from the January 14, 2011 order of the revision court, but did not appeal the later judgment.

### **TRUSTEE'S SALE SURPLUS FUNDS**

We review de novo questions of legal interpretation of the Deeds of Trust Act.<sup>1</sup> A court's primary duty in interpreting any statute is to discern and implement the intent of the legislature.<sup>2</sup> A court will look to the statute's plain language.<sup>3</sup> If the statute is unambiguous, the inquiry ends.<sup>4</sup> A statute is

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<sup>1</sup> Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 547, 167 P.3d 555 (2007).

<sup>2</sup> State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).

<sup>3</sup> HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)).

<sup>4</sup> State v. Bunker, 169 Wn.2d 571, 582–83, 238 P.3d 487 (2010) (quoting Armendariz, 160 Wn.2d at 110).

unambiguous when it is not susceptible to two or more reasonable interpretations.<sup>5</sup>

We may affirm the lower court on any basis supported by the record, whether or not the trial court considered that basis.<sup>6</sup>

Bossie argues that we should review the lower court's decision for abuse of discretion. She is mistaken.<sup>7</sup>

Bossie cites to our decision in Wilson v. Henkle.<sup>8</sup> That case is distinguishable. In Wilson, funds held in a court registry were awarded to the plaintiffs in an unlawful detainer action.<sup>9</sup> Prior to the actual disbursement of these funds, the defendant's attorney brought a separate action to garnish the same funds.<sup>1</sup> A commissioner then signed an order vacating the prior judgment, based on the order requiring garnishment in the attorney's favor.<sup>11</sup> Thus, in a case where there were two different and contradictory judgments and orders, we held that “[a] motion to vacate a judgment is addressed to the sound discretion of the trial court, whose judgment will be undisturbed absent a showing of a manifest abuse of discretion.”<sup>12</sup>

Here, there is no dispute that the BOA deed of trust against Bossie's

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<sup>5</sup> State v. Delgado, 148 Wn.2d 723, 726–27, 63 P.3d 792 (2003) (citing State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993)).

<sup>6</sup> Amy v. Kmart of Washington, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

<sup>7</sup> Boeing Employees' Credit Union v. Burns, 167 Wn. App. 265, 271, 272 P.3d 908 (2012).

<sup>8</sup> 45 Wn. App. 162, 724 P.2d 1069 (1986).

<sup>9</sup> Id. at 164.

<sup>1</sup> Id. at 164-65.

<sup>11</sup> Id. at 165.

<sup>12</sup> Id. at 166.

residence was eliminated by the trustee's sale directed by Chase. Likewise, there is no dispute that BOA has a first priority lien against those surplus funds.

Wilson is inapposite.<sup>13</sup>

RCW 61.24.080(3) provides in relevant part that surplus funds from a trustee's sale shall be deposited into the court's registry and that:

Interests in, or liens or claims of liens against the property eliminated by sale under this section **shall attach to the surplus in the order of priority that it had attached to the property.**<sup>[14]</sup>

Bossie's claim that she has a right to the surplus funds does not challenge the plain language of this statute. The statute makes clear that the lien of BOA's deed of trust attached by operation of law to the surplus funds after the trustee's sale in first order of priority. Rather, she makes procedural and other arguments that have no merit. We consider each, in turn.

Bossie first asserts that the revision court erred in applying CR 6(e) to the notice requirements of RCW 61.24.080(3) and in concluding that her 21 calendar day notice was not timely. We need not decide that issue in this case.

It is axiomatic that one having a claim or interest in property has the right to notice and a hearing before being deprived of that property.<sup>15</sup> Here, BOA has a claim to the surplus sale proceeds by virtue of RCW 61.24.080(3), the statute discussed earlier in this opinion. It is also undisputed that a notice of

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<sup>13</sup> Burns, 167 Wn. App. at 271.

<sup>14</sup> (Emphasis added.)

<sup>15</sup> Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

appearance from BOA was in the court file at the time of the hearing on Bossie's motion for disbursement of proceeds. Likewise, there was a pending motion by BOA to disburse the proceeds to it. While the order disbursing funds to her recites that the commissioner had examined the court file, there is nothing to show why a disbursement of proceeds without some resolution of BOA's claim was appropriate at that time. Accordingly, the revision court properly decided that good cause existed to vacate the commissioner's order.

Bossie next contends that the revision court abused its discretion by considering additional evidence not in the record before the commissioner. She fails to demonstrate any abuse of trial court discretion.

On a revision motion, the trial court reviews a court commissioner's ruling de novo based on the evidence and issues presented to the commissioner.<sup>16</sup>

As a preliminary matter, Bossie fails to identify what new evidence the revision court purportedly considered. The commissioner's order indicates that the commissioner reviewed Bossie's motion, "exhibits, and the court record." The revision order indicates that the trial court reviewed BOA's motions and pleadings, responsive pleadings by Bossie, "and the files, pleadings and records herein." By failing to identify with particularity what new evidence the revision court considered, Bossie fails to demonstrate any abuse of discretion. In any event, the notice of appearance and motion for disbursement of funds of BOA were both parts of the record available to both the commissioner and the

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<sup>16</sup> RCW 26.12.215; RCW 2.24.050; Williams v. Williams, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

superior court at their respective hearings.

Bossie argues that because BOA, “as junior lien holder, was the successful bidder at the trustee sale,” the trial court’s award of the surplus funds to BOA constituted a deficiency judgment. We disagree.

There was no deficiency judgment in this case. RCW 61.24.100(1) states:

Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale ***under that deed of trust.***<sup>17]</sup>

The plain language of RCW 61.24.100(1) prohibits such a judgment where there is “a trustee's sale under that deed of trust.” The relevant deed of trust for purposes of this provision is that securing the obligation of Chase, not BOA.

Here, there was never a trustee's sale under the deed of trust securing the note to BOA. The only trustee's sale was that directed by Chase under its deed of trust. Moreover, there never will be a trustee's sale under the BOA deed of trust. The trustee's sale directed by Chase eliminated the lien of the BOA deed of trust against the real property sold at sale. The lien of the BOA deed of trust then attached by operation of law to the surplus funds from the Chase trustee's sale. In sum, there has not been and never will be any violation of the “anti-deficiency” provisions of RCW 61.24.100(1) on which Bossie relies to avoid BOA's claim to the surplus funds.<sup>18</sup>

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<sup>17</sup> (Emphasis added.)

<sup>18</sup> Burns, 167 Wn. App. at 282.

Finally, Bossie contends that the revision court erred by entering judgment in favor of BOA because she previously received a discharge of her debt in a Chapter 7 Bankruptcy.<sup>19</sup> This argument is without merit.

Personal discharge of an obligation in bankruptcy does not discharge the lien securing that obligation.<sup>2</sup> Thus, Bossie's order of discharge in a Chapter 7 Bankruptcy did not discharge the lien of the BOA deed of trust on either the real property or the sales proceeds.<sup>21</sup> BOA was entitled to seek disbursement of those funds to it, regardless of Bossie's discharge of the personal obligation secured by the BOA lien.

To summarize, BOA had a lien, by operation of law, against the surplus sales proceeds from the trustee's sale. The lien was first in priority. Bossie obtained those proceeds without affording BOA an opportunity to contest her claim. She retained the proceeds in violation of the superior court's order to return them.

We affirm the order on revision.

Cox, J.

WE CONCUR:

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<sup>19</sup> Bossie obtained an order of discharge in a Chapter 7 Bankruptcy on August 25, 2010.

<sup>2</sup> Johnson v. Home State Bank, 501 U.S. 78, 82-83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991).

<sup>21</sup> “[A] bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor in personam – while leaving intact another – namely, an action against the debtor in rem.” Johnson, 501 U.S. at 84.



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