IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM B. STANCHFIELD, Respondent, v. IRVING B. JONES and SHIRLEY E. JONES, husband and wife, and the marital community of them composed, Appellants.	No. 39445-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Irving and Shirley Jones appeal the trial court's order granting summary judgment to William Stanchfield on a promissory note and deed of trust. The trial court ordered the Joneses to deed the real property securing a promissory note to Stanchfield and also to fully satisfy the promissory note secured by the property. The Joneses argue that the trial court's order resulted in a nonjudicial foreclosure, thus, Stanchfield cannot recover on the note because such a deficiency judgment requires a judicial foreclosure and sale of the property. They also appeal the award of attorney fees to Stanchfield. We affirm the trial court's order requiring the Joneses to convey the property to Stanchfield according to the terms in Stanchfield's promissory note, but we reverse the trial court's award of future payments as they become due on the promissory note and its award of attorney fees to Stanchfield.

FACTS

On July 17, 2007, the Joneses borrowed $250,00.00 from Stanchfield to purchase a home. Stanchfield drafted the promissory note—signed by the Joneses—that called for monthly payments of $2,249.33 for 20 years with an interest rate of nine percent per annum. The promissory note included a provision entitled "Acceleration" that stated,

> If [the Joneses] fail[ ] to make any payment under this Note, or if [the Joneses] default[ ] under any Deed of Trust or any other instruments securing repayment of this Note, and such default is not cured within 90 . . . days of such default, then [the Joneses][1] Automatically relinquish[ ] all rights to [the] property.

Clerk's Papers (CP) at 24. The promissory note also included a provision governing conflicts with other agreements, including the deed of trust: "In the event of any conflict between the terms of this Note and terms of any Deed of Trust or other instruments securing this Note, the terms of this Note shall prevail." CP at 24.

Stanchfield used a standard short form deed of trust, incorporating the master form deed of trust by reference, to secure the note. The master form deed of trust included provisions for acceleration of payment, nonjudicial foreclosure, judicial foreclosure as a mortgage with the right to seek a deficiency judgment, and cumulative remedies. Neither the promissory note nor the deed of trust included the relief ordered by the trial court, i.e., automatic relinquishment of the property followed by deficiency judgments as payments became due on the promissory note.

On January 2, 2008, the Tacoma Police Department special weapons and tactics team

[1] The provision includes a scrivener's error because it referred to the "Holder," which would be Stanchfield, and not the Joneses who were the "Maker." Clerk's Papers (CP) at 24 ("[I]f Maker defaults . . . , then Holder Automatically relinquishes all rights to property."). Divesting the note holder of all rights to the property, when the note maker defaults, would create an absurd result that neither party intended.

damaged the Joneses' house with tear gas and caused an accidental fire when responding to an incident at the house. The Joneses received an insurance check for the repairs, but Stanchfield refused to release his interest in the insurance check, thereby preventing the Joneses from repairing the property to make the house habitable. The Joneses stopped making payments on the promissory note after February 18, 2008, and they did not pay insurance and property taxes. Stanchfield later argued that the Joneses neglected the property and that the property "require[d] extensive repairs, including a new furnace, windows, doors and other repairs." CP at 40.

On August 12, 2008, Stanchfield sued the Joneses for breach of the promissory note, asking for a judgment for the outstanding balance due on the note, for a declaration of his interest in the property after the breach without any cure, for attorney fees, and for any other equitable relief. On September 18, 2008, an appraiser estimated that the property had a market value of $274,000 and an "'[a]s-is'" value of $214,000. CP at 107. Stanchfield later joined Evergreen National Indemnity Company as a defendant and amended his complaint,[2] changing his request for relief to effectively seek acceleration of the amount due under the promissory note and deed of trust, foreclosure of the "mortgage," and award of a deficiency judgment following a foreclosure sale. CP at 15.

Stanchfield then moved for summary judgment,[3] asking for (1) a judgment for the balance due on the promissory note—$273,840.64 plus interest, monies spent on taxes and repairs, and attorney fees; (2) judicial foreclosure of the deed of trust as a mortgage; and (3) a deficiency

[2] Stanchfield changed his strategy "[a]fter determining the appraised value of the house was nearly $50,000.00 less than the amount due." CP at 122.

[3] Stanchfield did not include Evergreen National Indemnity Company in his motion for summary judgment.

judgment "enforced against any other property of [the Joneses] not exempt from execution." CP at 49. Even though he drafted the promissory note acceleration provision calling for automatic relinquishment, Stanchfield argued at trial that the note could not result in automatic relinquishment of the Joneses' right to the property because the provision violated RCW 7.28.230.[4]

The Joneses contended that Stanchfield's original request for forfeiture of the property was an appropriate remedy for the trial court to grant: "It was agreed that if we went into default, and did not cure that default within three months, that we would automatically turn the property over to him. He had made the same arrangement with other people to whom he had loaned money." CP at 55. The Joneses understood that "in the event we were unable to pay the note . . . Stanchfield's only remedy was to take the property back, and that we were obligated to give it back to him." CP at 55. Shirley Jones also declared, "We never would have borrowed the $250,000 if Stanchfield had the option to sue us for the balance of the note because we did not want to risk losing our commercial property where my husband has his auto repair shop, and I have my beauty shop." CP at 56. In response to the Joneses' argument, Stanchfield declared that "[t]he Joneses and I never agreed that the sole remedy for failure to pay the note was a return of the property. More importantly, the Joneses have never deeded the property back to me, and

[4] RCW 7.28.230(1) states: "A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law." Although the facial invalidity of the automatic relinquishment provision would prohibit Stanchfield from seeking to eject the Joneses and take possession without foreclosure, the Joneses could consent to relinquishment of their rights to the property. *State ex rel. Gwinn, Inc. v. Superior Court for King County*, 170 Wash. 463, 470-71, 16 P.2d 831 (1932); *State ex rel. Allen v. Superior Court forKing County*, 164 Wash. 515, 522-23, 2 P.2d 1095 (1931); *Snyder v. Parker*, 19 Wash. 276, 278, 53 P. 59 (1898).

have never conveyed the property in any manner back to me." CP at 97.

The Joneses produced evidence at the trial court that the terms of the 2007 Stanchfield/Jones note resembled the terms of a 2005 loan[5] from Stanchfield to the Joneses for a different property. In a 2006 letter relating to the 2005 loan, Stanchfield wrote to the Joneses when they owed back property taxes and stated, "If the taxes are not up to date in the 90 day time frame required in paragraph 7 of the promis[s]ory note . . . I intend to take over the property." CP at 77 (emphasis omitted).

The trial court granted summary judgment to Stanchfield, ordered the Joneses to deed the property to Stanchfield, and ordered them to endorse the insurance check to Stanchfield. CP at 137. The trial court also awarded Stanchfield (1) "$35,426.70 for installment payments and penalties due [on the promissory note] through May 20, 2009," (2) $4,444.23 for property taxes, and (3) attorney fees and costs of $13,686.90. CP at 138. In addition, the trial court determined that the Joneses owed the $240,323.20 balance on the promissory note and that Stanchfield could reduce each future installment payment due under the promissory note to judgment as it became due because the note did not include an acceleration provision for the payments.

Following the trial court's ruling, on May 14, 2009, the Joneses conveyed the property to Stanchfield in a "quit claim deed in lieu of foreclosure."[6] Br. of Appellant at App. A-1. On June

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[5] The 2005 loan included a promissory note with a similar "acceleration" provision:

> If Maker fails to make any payment under this Note, or if Maker defaults under any Deed of Trust or any other instruments securing repayment of this Note, and such default is not cured within 90 (ninety) days of such default, the owners of said property . . . Automatically relinquish[ ] any and all rights to said property described in this note as Exhibit A to the Holder of this Note.

CP at 75.

[6] Although not part of the record before the trial court, we take judicial notice of these documents and of the fact that the parties recorded the quit claim deed and filed the excise tax document.

3, 2009, the parties filed a real estate excise tax affidavit that requested an exemption under WAC 458-61A-208(3)(a) with the reason listed as: "Deed in lieu of foreclosure of Promissory Note." Br. of Appellant at App. A-2.

The Joneses appeal the trial court's rulings.

ANALYSIS

I. Deed of Trust and Promissory Note

The Joneses argue that, after the trial court ordered them to return the property to Stanchfield, the trial court erred when it awarded Stanchfield the unpaid balance on the note. We agree.

A. Standard of Review

We review legal questions and an order of summary judgment de novo, performing the same inquiry as the trial court. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We consider the facts and all reasonable inferences from them "in the light most favorable to the nonmoving party." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002); CR 56(c).

B. Note and Deed of Trust Do Not Create a Real Estate Contract

The Joneses argue that the promissory note is actually a real estate contract or that this

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See ER 201.

court should treat the note as a real estate contract. We disagree.

Here, Stanchfield transferred title to the real property to the Joneses by statutory warranty deed, and that transfer takes the note outside the definition of a real estate contract.[7] The Real Estate Contract Forfeiture Act (RECFA), chapter 61.30 RCW, does not contemplate its application to mortgages, deeds of trust, and related promissory notes.[8] *See* RCW 61.30.010(1). And we decline to extend the provisions of RECFA to the willing transfer of title to property under a promissory note secured by a mortgage or deed of trust. Stanchfield, in drafting his own promissory note containing his choice of remedy and then combining it with a form deed of trust, took this transaction outside a real estate contract as defined in our statutes.

C. Notes, Mortgages, and Deeds of Trust

The Joneses also argue that Stanchfield cannot have return of the real property and a judgment for the unpaid balance on the note, because the trial court did not judicially foreclose the deed of trust, arguing that the Deeds of Trust Act, chapter 61.24 RCW, and its anti-deficiency provisions, bar recovery for the unpaid balance on the note. We agree and hold that, because Stanchfield received reconveyance of the property in the court proceeding but did not judicially foreclose the deed of trust as a mortgage, he is not entitled to a deficiency judgment.

"In transactions involving both notes and mortgages,[9] the notes represent the debts, the

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[7] "'Contract' or 'real estate contract' means any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price." RCW 61.30.010(1).

[8] RECFA does, however, contemplate judicial foreclosure of a real estate contract as a mortgage: "A judicial foreclosure of a real estate contract as a mortgage shall not be considered a forfeiture under this chapter." RCW 61.30.010(4).

[9] As a security interest, "a deed of trust is similar to a mortgage." *Metro. Mortgage & Sec. Co., Inc. v. Becker*, 64 Wn. App. 626, 631, 825 P.2d 360 (1992).

mortgages security for payment of the debts. Either may be the basis of an action." *Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey*, 107 Wn.2d 181, 189, 728 P.2d 155 (1986). The note holder/mortgagee[10] may (1) "sue and obtain a judgment upon the notes and enforce it by levy upon any property of the debtor"[11] or (2) "foreclose on the mortgaged property and obtain a deficiency judgment." *McCaffrey*, 107 Wn.2d at 189. Under a deed of trust, a beneficiary who chooses nonjudicial foreclosure is limited to the remedy of foreclosure alone and may not seek a deficiency judgment, except under certain circumstances not relevant here. RCW 61.24.100; *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 624, 724 P.2d 356 (1986).

By operation of law, a mortgage will not create a personal obligation unless it or a separate instrument provides otherwise.[12] RCW 61.12.050. Parties may agree to a mortgage and a note that create no "personal liability of the mortgagor, and, so far as we are aware, it has never before been questioned that such instruments were mortgages." *Weikel v. Davis*, 109 Wash. 97, 101, 186 P. 323 (1919). Similarly, parties can contract so that "[p]ayment of a mortgage obligation discharges the property from the encumbrance and also the debt" and "payment need not be of the amount due; it can occur where something else is given to and accepted by the mortgagee in satisfaction of the mortgage obligation." *Kvame v. Patrick*, 57 Wn.2d 343, 345-46, 357 P.2d 167 (1960).

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[10] In the instant case, Stanchfield is a note holder/beneficiary who can pursue the same remedies as a mortgagee.

[11] "If the judgment is not satisfied in this manner, the mortgagee still can foreclose on the mortgaged property to collect the balance." *McCaffrey*, 107 Wn.2d at 189.

[12] For purposes of our discussion, all of the characteristics of a mortgage apply to a deed of trust. *See* RCW 61.24.120.

Although the Joneses analogize to real estate contracts and forfeiture,[13] what they are ultimately contending is that Stanchfield created a "dry mortgage,"[14] that is, a "mortgage that creates a lien on the property but does not impose on the mortgagor any personal liability for any amount that exceeds the value of the premises." Black's Law Dictionary 1102 (9th ed. 2009). This concept can be effectuated through a deed in lieu of foreclosure being used to extinguish liability on a promissory note secured by a deed of trust. *See*, *e.g.*, *Thompson v. Smith*, 58 Wn. App. 361, 366, 793 P.2d 449 (1990). But a note holder who takes title and possession of the property through self help—outside chapter 61.24 RCW's remedies of judicial and nonjudicial foreclosure—may not also receive a deficiency judgment on the note. *See* RCW 61.24.100(1); *Thompson*, 58 Wn. App. at 366.

In *Thompson*, Division One of this court barred Thompson's action on Smith's promissory note securing a second deed of trust. 58 Wn. App. at 362, 366. Smith financed a house purchase

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[13] A drafter has a limited ability to change the nature of an instrument: "'Once a mortgage, always a mortgage' is a doctrine universally recognized." *Plaza Farmers Union Warehouse & Elevator Co. v. Tomlinson*, 176 Wash. 178, 182, 28 P.2d 299 (1934) (internal quotation marks omitted) (quoting *Plummer v. Ilse*, 41 Wash. 5, 9, 82 P. 1009 (1905)).

[14] The concept is not new:

> [T]here may be a lien for the security of money, without any absolute personal liability beyond the value of the property, as in the case of what is sometimes called a "dry mortgage," and other similar instances. But in all these cases there can be no foreclosure until a breach of condition by the failure of the party to exercise the option to pay the debt or to perform the act in the manner and at the time expressly or impliedly agreed upon. There is, in such cases, an existing liability, which a party must either meet, or allow the property charged to be taken, and thus escape personal responsibility.

Frowenfeld v. Hastings, 134 Cal. 128, 132, 66 P. 178 (1901). The *Frowenfeld* court, 134 Cal. at 132, supported its position by pointing to a quote from an earlier New York Chancery case: "It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt [with regard to] the redemption, but not in respect to the personal remedy." *Holmes v. Grant*, 8 Paige Ch. 243, 251, 4 N.Y. Ch. Ann. 415 (1840) (Denio, V.C.).

from Thompson through a loan secured by a first deed of trust and through a promissory note to Thompson secured by a second deed of trust. *Thompson*, 58 Wn. App. at 362. When Smith sold the home to a third party, Smith remained liable on the debts secured by the deeds of trust. *Thompson*, 58 Wn. App. at 363. The third party defaulted and eventually conveyed the house back to Thompson by statutory warranty deed that recited it was "'for and in consideration of Deed in lieu of foreclosure' and subject to two deeds of trust." *Thompson*, 58 Wn. App. at 363. Thompson then resold the property, paid off the debt secured by the underlying first deed of trust, and sued Smith on the original promissory note that was secured by the second deed of trust. *Thompson*, 58 Wn. App. at 364.

The court in *Thompson* observed that a beneficiary under a deed of trust may elect one of three remedies upon default: "'(1) where the trust deed secures a note, sue on the note; (2) foreclose under the existing mortgage foreclosure proceedings; or (3) foreclose pursuant to [RCW 61.24].'" 58 Wn. App. at 366 (alterations in original) (quoting John A. Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 97 (1966)). Thus, when Thompson accepted the deed in lieu of foreclosure from the third party and then sold the property, "Thompson essentially carried out a nonjudicial foreclosure without having to follow the statutory procedures of RCW 61.24." *Thompson*, 58 Wn. App at 366. This action by Thompson protected Smith from any further obligation: "[W]e can find no authority for permitting Thompson to obtain through self-help that which he could not accomplish pursuant to RCW 61.24." *Thompson*, 58 Wn. App. at 366. Thompson's argument, that chapter 61.24 RCW did not apply because he accepted the deed in lieu of foreclosure from a third party, failed to persuade the court that Thompson could also recover on the promissory note from Smith. *Thompson*, 58 Wn. App. at 366.

Other authority supports Division One's conclusion that a deed in lieu of foreclosure extinguishes the underlying debt. A mortgagor can avoid normal foreclosure procedures by conveying the "secured property to the mortgagee as a substitute for foreclosure." 4 Powell on Real Property § 37.44, at 37–305 (Michael Allan Wolf ed., 2009). "In turn, the mortgagor in default is completely excused from the underlying obligation." 4 Powell on Real Property § 37.44, at 37–305 (Michael Allan Wolf ed., 2009). One advantage to the mortgagor is that such a deed can be used as a method to "default without incurring personal liability on the note." 4 Powell on Real Property § 37.44, at 37–305 (Michael Allan Wolf ed., 2009). And another commentator emphasizes that the usual consideration for a deed in lieu of foreclosure is a release of the borrower's personal liability or indebtedness. John C. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Considerations*, 26 Real Prop. Prob. & Tr. J. 459, 469 (1991). We agree with Division One's conclusion and these authorities.

Here, the trial court ordered the Joneses to convey the real property back to Stanchfield but required that the Joneses also remain personally liable for the full debt on the promissory note.[15] Under the reasoning in *Thompson*, full recovery on the note was not available to Stanchfield. 58 Wn. App. at 366. The language Stanchfield inserted in his promissory note vested ownership of the real property in him when the Joneses defaulted and, thus, contemplated use of a deed in lieu of foreclosure to (1) transfer title back to Stanchfield, (2) resolve nonpayment by the Joneses without resort to chapter 61.24 RCW, and (3) extinguish the Joneses' obligation on the note. This result is consistent with *Thompson* and other authorities.

[15] This result, perhaps inadvertently, places Stanchfield within the bounds of usury. *See* RCW 19.52.020(1); *see also Phillips v. Blaser*, 13 Wn.2d 439, 445-46, 448, 125 P.2d 291 (1942).

Using its equitable powers, the trial court could properly order the Joneses to deed the property to Stanchfield and it did not err in doing so.[16] *See*, *e.g.*, *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wn. App. 443, 451-52, 459, 158 P.3d 1183 (2007), *review denied*, 163 Wn.2d 1013 (2008). On the other hand, the trial court erred when it also ordered the Joneses to pay the balance of the promissory note after transferring the real property back to Stanchfield—even though it did not explicitly refer to transfer of the title by a deed in lieu of foreclosure. Thus, we hold that chapter 61.24 RCW governs the transfer of the real property back to Stanchfield, discharging the Joneses from any remaining obligation on the promissory note. This result is consistent with the documents that the parties recorded and filed,[17] reciting that the Joneses gave Stanchfield a "deed in lieu of foreclosure." Br. of Appellant at Apps. A-1, A-2. We affirm in part the trial court's order requiring the Joneses to deed the property to

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[16] If the Joneses did not wish to lose the property or desired that Stanchfield properly foreclose the deed, they could have turned to the equity of redemption or the right of redemption to protect their interest in the property:

> [A] mortgagor cannot through any device bargain away his right of redemption at the time of giving the mortgage; [and] while a mortgagor may release his equity of redemption to the mortgagee by subsequent agreement, the courts look upon such agreements with distrust, and, if it appear that the mortgagee took advantage of the necessities of the mortgagor, or that the consideration for such release of the mortgagor's equity of redemption is grossly inadequate, the release will be disregarded and the original relationship of the parties held to continue.

Phillips, 13 Wn.2d at 445; *see* 4 Powell on Real Property § 37.44, at 37–305 (Michael Allan Wolf ed., 2009); *see also Tomlinson*, 176 Wash. at 182. But, the Joneses implored the trial court to hold that the acceleration clause worked a forfeiture that cut off Stanchfield's ability to judicially foreclose on the deed of trust. The trial court was not bound to grant this relief, but Stanchfield does not appeal the trial court's decision or assign any error to the trial court's decision that amounted to a nonjudicial foreclosure.

[17] The real estate excise tax document's reference to WAC 458-61A-208(3) further supports our holding: "The real estate excise tax does not apply to [a] transfer by deed in lieu of foreclosure to satisfy a mortgage or deed of trust."

Stanchfield[18] but we reverse the order requiring the Joneses to pay the remaining $240,323.20 due on the promissory note.

II. Attorney Fees

The Joneses argue that the trial court erred when it ordered the Joneses to pay Stanchfield's attorney fees and costs because the promissory note and the deed of trust do not contain a relevant attorney fees provision.

We review whether a trial court may award attorney fees de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993). "Under the American rule compensation for attorney fees and costs may be awarded only if authorized by contract, statute, or a recognized ground in equity." *In re Impoundment of Chevrolet Truck, Wash. License No. A00125A*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002).

Here, neither the promissory note nor the deed of trust provided for attorney fees. Although the master form deed of trust authorizes "costs of suit, cost of evidence of title and a reasonable attorney's fee in any proceeding or suit brought by Beneficiary to foreclose this Deed of Trust," the trial court did not foreclose the deed of trust. CP at 29. Furthermore, the trial court did not cite its basis for awarding attorney fees, there appears to be no basis for the trial court to have awarded attorney fees, and Stanchfield cites no authority to support the trial court's award. Because the trial court did not judicially foreclose the deed of trust, we can find no

[18] The Joneses do not challenge the trial court's award of back installment payments and penalties, the order that they sign over the insurance check, or the order that they pay the back taxes owed on the property. The trial court's order did not address whether Stanchfield was entitled to damages for any waste that the Joneses may have committed, perhaps because Stanchfield secured a double recovery. We do not address whether Stanchfield may still recover against the Joneses for waste.

provision that entitles Stanchfield to attorney fees. Thus, we reverse the trial court's award of $13,686.90 to Stanchfield for attorney fees and costs.

We affirm the trial court's order requiring the Joneses to convey the property to Stanchfield but reverse the trial court's order determining that the Joneses owe the balance of the promissory note and its award of attorney fees to Stanchfield.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Hunt, J.

Penoyar, J.