

FILED
December 28, 2015
Court of Appeals
Division I
State of Washington

Case # 73457-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

VAN NHU HUYNH, *Respondent*,

v.

LEUNG HING LI, *Appellant*,

REPLY BRIEF OF APPELLANT

GLYN E. LEWIS
Attorney for Appellant

Glyn E. Lewis
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com

TABLE OF CONTENTS

I. Huynh cannot use the disputed facts to support her adverse possession claim. - 1 -

II. Huynh Admits that the Court applied the lower, and incorrect, standard of proof for adverse possession set forth *Chaplin* and *Nicholas*. - 3 -

III. The undisputed facts that Huynh was in possession, paid taxes and collected rent do not show clear and unequivocal acts of adverse possession - 4 -

IV. Huynh cannot cite any statute or case requiring Li to claim Real Properties on his Federal Income Tax Returns - 5 -

V. Li's Failure to report real property expenses on his Federal Tax Return does not "help" to establish the hostility element of adverse possession. - 6 -

VI. Li's Counterclaim is not time barred because Li and Huynh were in a co-tenancy relationship - 7 -

VII. The undisputed facts are that Huynh never expressly revoked her power of attorney for Li and that Huynh was directly participating in Li's financial affairs as of 1998. - 8 -

VIII. The Court abused its discretion by failing to grant a continuance of the hearing - 9 -

IV. Conclusion..... - 12 -

TABLE OF AUTHORITIES

Cases

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984) - 3 -

Hicks v. Hicks, 69 Wash. 627 (Wash. 1912) - 6 -

Hisle v. Todd Pac. Shipyards, 2004 Wash. LEXIS 448, 151 Wn.2d 853, 93 P.3d 108 (2004)..... - 1 -

Hotchkin v. McNaught-Collins Improv. Co., 102 Wash. 161, 172 P. 864..... - 7 -

McKnight v. Basilides, 19 Wn.2d 391 (Wash. 1943) - 7 -

Nicholas v. Cousins, 1 Wn. App. 133, 459 P.2d 970 (1969)..... - 3 -

Graves v. Graves, 48 Wash. 664, 94 P. 481, (1908) - 5 -

Silver Surprise v. Sunshine Mining Co., 15 Wn. App. 1, 21 (1976 Wash.)..... - 3 -

Rules

CR 56(c) - 1 -

I. Huynh cannot use the disputed facts to support her adverse possession claim.

In the statement of facts in Respondent Van Nhu Huynh ("Huynh")'s Opening Brief at pages 1 to 7 Huynh references numerous disputed facts. Huynh cannot use these disputed facts to support her claim for adverse possession. Summary judgment is proper under CR 56(c) where there is no genuine issue of material fact, the moving party is entitled to summary judgment as a matter of law, and a material fact is one upon which the outcome of the litigation depends, in whole or in part. *Hisle v. Todd Pac. Shipyards*, 2004 Wash. LEXIS 448, 151 Wn.2d 853, 93 P.3d 108 (2004).

Although it is not entirely apparent in Huynh's Opening Brief what undisputed facts Huynh is relying on to support her claim of adverse possession it bears worth noting which facts are disputed by the parties. In her Opening Brief at page 2 Huynh states that she "let Li stay in her home" ... and Li "treated her home like a free hotel". It is undisputed that Li and Huynh were on joint title to their home as husband and wife. Therefore, Huynh could not have let Li stay in "her home" and Li could not have treated his home "like a free hotel".

In her Opening Brief at page 3 Huynh alleges that in 1990 Huynh and Li agreed that Huynh would own and operate their joint business Asia Discount Center and that Li would own and operate their other joint business, United Imports. Li never agreed that Huynh could own and operate Asia Discount Center. Huynh has provided no document signed by Li agreeing to any such arrangement. The undisputed fact is that in 1987 Huynh and Li agreed in writing that Asia Discount Center would be sold and the proceeds divided between Li and Huynh half-half. See Divorce Decree attached as Exhibit "2" to the Li Dec, CP 66-70.

In her Opening Brief at page 3 Huynh alleges that in 1993 she had her lawyer, Sue Chang, write up documents transferring title to the Subject Properties to Huynh and that Huynh provided these documents to Li. Huynh has not provided any documents supporting this allegation, such as a declaration by Sue Chang or the purported title transfer documents provided to Li. Li has never spoken to attorney named Sue Chang and denies ever receiving any documents from Huynh in 1993 transferring title to the Subject Properties. The first time that Huynh requested Li to transfer the Subject Properties to Huynh in writing was in 2011. See letter from Huynh's attorney, dated September 30, 2011, Ex. 8 to Li Dec., CP 83.

In her Opening Brief at page 4 Huynh alleges that she has refused to let Li stay in her home since 1997. Li denies that he was "kicked out of the house" by Huynh in 1997 but instead voluntarily left Washington State to start a new business with his brother-in-law, as well as to start a family with his new wife. In 1995 Li married his current wife in China. Although Li was married to another woman he continued living with Huynh because his new wife did not yet have authorization to immigrate to the United States. In 1996 Li sold his interest in United Imports for \$70,000 and began looking for other business opportunities. See Li Dec. at paragraph 12, CP 57. Soon after Li sold his interest in United Imports, Li's brother-in-law invited him to come to California to join his furniture business. Li agreed and moved to California in 1997 to join his brother-in-law's business. See Li Dec. at paragraph 13, CP 57.

In her Opening Brief at page 4 and 5, Huynh again argues that Li admitted in his deposition that Huynh was adversely possessing the Subject Properties. Huynh selectively cites portions of Li's deposition testimony where he states he was upset with Huynh for taking the Subject Properties. The portions of Li's deposition testimony not cited by Huynh is where Huynh's counsel asks when Li became upset with Huynh for taking the Subject Properties. Li

testified at his deposition that he trusted Huynh to handle his financial affairs until Huynh filed the above captioned lawsuit against him to quiet title in August 2012. See Li Deposition Transcript at page 75, lines 6-8- "up until the point when she served me with the complaint, then her true self started to show. Because, before that, I still thought she was helping me.", attached as Exhibit "2" to the Declaration of Glyn E. Lewis, CP 140. It is undisputed that between 1998, when Huynh sent Li the Property Expense Breakdown for the Subject Properties, and 2011, when Huynh sent Li a letter requesting transfer of the Properties, the parties never discussed the Subject real properties. See Huynh Depo. at page 54, line 8 to page 57, line 10, Ex. "1" to Lewis Dec., CP 125-128, and Li Dec. at paragraph 14, CP 57. Based on the foregoing, the point in time at which Li became aware that Huynh was adversely possessing the Subject Properties is a disputed fact.

II. Huynh Admits that the Court applied the lower, and incorrect, standard of proof for adverse possession set forth *Chaplin* and *Nicholas*.

In Respondent Van Nhu Huynh ("Huynh")'s Opening Brief at page 9, Huynh argues that the standard for adverse possession set forth in *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) and *Nicholas v. Cousins*, 1 Wn. App. 133, 459 P.2d 970 (1969) was the correct standard of proof for adverse possession to apply in the instant case. Therefore, Respondent does not dispute that the trial court applied the standard for adverse possession set forth in *Chaplin* and *Nicholas* to Huynh's claim of adverse possession against Li.

As set forth in the Appellant Li's Opening Brief the court must apply a higher standard of proof for adverse possession where one co-tenant is claiming adverse possession against another co-tenant. A co-tenant must prove clear and unequivocal acts showing adverse possession. *Silver Surprise v. Sunshine Mining Co.*, 15 Wn. App. 1, 21 (1976 Wash.) The courts in *Nicholas* and

Chaplin did not apply the higher standard of proof, clear and unequivocal acts, showing adverse possession because those cases did not involve claim of adverse possession by one co-tenant against another. *Nicholas* involved a claim of adverse possession against persons who were not aware of the alleged co-tenancy relationship and the clear and unequivocal acts standard of proof was not applied. *Chaplin* didn't involve a claim of adverse possession between co-tenants, but instead was a boundary dispute between neighbors. Respondent conclusively argues, without any discussion of the facts whatsoever, that the factual differences between *Chaplin* and *Nicholas*, on one hand, the instant case, on the other, are "irrelevant". The factual differences are patently relevant because the courts in *Chaplin* and *Nicholas* did not apply the higher standard of proof for co tenancies to the adverse possession claims of the respective claimants.

Huynh does not dispute the fact in her Opening Brief that Li and Huynh were in a co-tenant relationship for the Subject Real Properties and that the higher standard of proof applies to Huynh's adverse possession claim. See Huynh's Opening Brief at page 11 - "stronger evidence is required to show adverse possession by a tenant in common than by a stranger.". Huynh incongruously states in the same sentence that although stronger evidence is required the evidence need not differ "in kind". By definition stronger evidence differs "in kind" from weaker evidence. As set forth below the undisputed facts used by Huynh to support her claim of adverse possession do not constitute clear and unequivocal acts of adverse possession as a matter of law.

III. The undisputed facts that Huynh was in possession, paid taxes and collected rent do not show clear and unequivocal acts of adverse possession

In her Opening Brief at page 16, Huynh argues that the "way [she] treated the properties since 1998 put Li on notice ... about her adverse possession". Huynh is presumably referring to the fact that she paid the property taxes and collected rent on one of the Subject Properties.

Washington State case law has established what evidence does not constitute clear and unequivocal acts of adverse possession by a co-tenant. Possession, receipt of rents and payments of taxes do not constitute unequivocal acts of adverse possession against a co-tenant. See *Graves v. Graves*, 48 Wash. 664, 94 P. 481, (1908) The court in *Graves* stated that:

"The mere receipt and retention by one cotenant in possession of all the rents and profits does not of itself constitute an adverse possession, and will not ripen into title as against the others, though continued for the statutory period."

In her Opening Brief at page 13 Huynh conclusively argues that the claimant in *Graves* lacked the "outward act of exclusive ownership", implying that the facts in *Graves* are somehow distinguishable from instant case. The facts in *Graves* are not distinguishable in a material way from the instant case. The claimant in *Graves* claimed he was adversely possessing the real property jointly owned by the parties because he was in actual possession, and paid taxes and collected rent. The only undisputed facts that Respondent has offered to support her adverse possession claim are possession, payment of taxes and receipt of rent. Respondent was not even in actual possession of two of the three real properties she claims to have adversely possessed. Based on the foregoing, Huynh cannot establish adverse possession by "the way she treated the properties", namely paying taxes and collecting rent.

IV. Huynh cannot cite any statute or case requiring Li to claim Real Properties on his Federal Income Tax Returns

In her Opening Brief at page 13 Huynh again argues that Li should somehow be "estopped" from claiming that the Subject Real Properties are his because he did not claim the real properties on his federal tax returns after 1998. There is no requirement that a person "claim real properties" on their federal income tax returns and Huynh cites no statute or case law

requiring the same. If Li had incurred out of pocket expenses for the Subject Real Properties he could have claimed deductions on his federal tax returns. Li did not incur any out of pocket expenses after 1998 so there was no requirement for him to claim any real property expense deductions on his tax return.

V. Li's Failure to report real property expenses on his Federal Tax Return does not "help" to establish the hostility element of adverse possession.

Huynh fails to expressly state what other undisputed facts, besides possession, paying taxes and collecting rent, she is relying on to establish clear and unequivocal acts demonstrating adverse possession. In her Opening Brief at page 15, Huynh argues that the fact the Li failed to claim real property expenses on his tax return after 1998 "helps" establish the hostility element of adverse possession. There was no evidence presented at the hearing on the motion for summary judgment that Li ever requested the expenses for the Subject Real Properties after 1998 and that Huynh refused to provide them.

As stated above Li was under no obligation to report any real property expenses because he was not paying any real property expenses out of his own pocket. There was no clear and unequivocal overt act by Huynh refusing to provide the property expense break down, such as a letter or phone call to Li. Therefore, the fact that Li did not report any real property expenses on his federal income tax return after 1998 does not "help" establish the hostility element of adverse possession in any way, shape or form.

VI. Li's Counterclaims are not time barred because Li and Huynh were in a co-tenancy relationship

In her Opening Brief at page 16 Huynh argues that Li's counterclaims for a partition and accounting are time barred by the statutes of limitations. As stated in Li's Opening Brief the statute of limitations does not run in an action for accounting and division of joint real property where a co-tenant cannot show title by adverse possession because possession by one co-tenant is the possession of both. See *Hicks v. Hicks*, 69 Wash. 627 (Wash. 1912) . Huynh's Opening Brief contains no discussion of the cases stating the exception to the statute of limitations where real property is held as a co-tenancy and adverse possession cannot be shown. In *Hicks* the ex-wife sought division of the real property more than 10 years after being out of actual possession. The court in *Hicks* stated:

"The statute of limitations has no application to this phase of the case. During the coverture, the husband was entitled to the possession of the community property which he held, in a sense, as trustee for the community. When, by the dissolution of the marriage, the community property became property held in common, the possession of one was the possession of both."

In *McKnight v. Basilides*, 19 Wn.2d 391 (Wash. 1943) the court ordered an accounting of the co-tenant's use of the real properties for thirteen years and a partition of the real properties where the other co-tenant had alleged he had been in adverse possession of the real properties for over ten years. The court in *McKnight* stated that "The statute of limitations does not begin to run in cases of this character until notice has been made of an adverse holding or claim on the part of one seeking title by adverse possession, and there has been an ouster." citing *Hicks*.

An exception to the ten year statute of limitations for partition also exists where a property is held in trust. See *Hotchkin v. McNaught-Collins Improv. Co.*, 102 Wash. 161, 172 P.

864. As described below, Huynh and Li were also in an express trust relationship due to the power of attorney held by Huynh for Li.

VII. The undisputed facts are that Huynh never expressly revoked her power of attorney for Li and that Huynh was directly participating in Li's financial affairs as of 1998.

In her Opening Brief at page 17 Huynh argues that no trust relationship existed between Huynh and Li despite the existence of the general power of attorney Huynh had for Li and the co-tenancy relationship between Li and Huynh. In her Opening Brief Huynh does not dispute that she acquired a general power of attorney to manage Li's financial affairs in 1987. Huynh does also not dispute that in 2012, her former attorney, Mr. Tall, specifically referenced the general power of attorney as being in effect in a letter to Li. See letter from Mr. Tall, Ex. 9 to LI Dec, CP 85-86. Huynh argues in her opening brief that she never used the general power of attorney. This is a disputed fact which Li was never able to complete discovery on. However, it is undisputed that Huynh and Li never expressly revoked the power of attorney. See Li Dec at paragraph 25, CP 60-61, and Huynh Depo at page 134, lines 7-10, Ex. "1" to Lewis Dec., CP 136.

In her Opening Brief at page 18, Huynh argues that the evidence "conclusively shows a repudiation of any alleged express trust as of 1998". Huynh fails to expressly state what this "conclusive" evidence in 1998 is, and Li cannot imagine what evidence Huynh is referring to. Regardless of what "conclusive" evidence Huynh is trying to refer to, the undisputed facts in 1998 demonstrate the exact opposite. In April 1998 Huynh provided Li with the property expenses breakdown so he could report the expenses on his Tax Return. See Declaration of Li in support of this Reply at paragraph 2, CP 54-55, and Property expense Breakdown attached as

Exhibit "16" to the Li Dec., CP 107-108. Li also gave Huynh a special power of attorney in June 1998 to sell one of their jointly owned properties. See Special Power of Attorney, dated June 25 1998, signed by Li for Huynh attached to the Li Dec as Exhibits "12", CP 93. These foregoing undisputed facts show that Huynh was in fact managing and participating in Li's financial affairs as of 1998.

Based on the foregoing, there are disputed facts as to whether Li and Huynh were in a trust relationship due to the power of attorney and whether this trust relationship tolled the statute of limitations.

VIII. The Court abused its discretion by failing to grant a continuance of the hearing

In her Opening Brief at page 19 Huynh argues that Li's request for a continuance of the hearing on the motion for summary judgment under CR 56(f) was "untimely". CR 56(f) does contain any express time limitation on making the request for a continuance of the hearing. Li requested a continuance three times , at the beginning and end of oral argument at the hearing on the motion for summary judgment and in the motion for reconsideration of the court's ruling. In her Opening Brief Huynh does not cite any statute or case that prohibits Huynh from a making a request for a continuance of the hearing in a motion for reconsideration.

In her opening Brief at page 20 Huynh argues that Li did not provide a good reason for continuing the hearing. Li specifically informed the court in the opposition to motion for summary judgment and in the motion for reconsideration that there were two sets of outstanding discovery propounded by Li that Huynh had not responded to. See Motion for Reconsideration, CP 183-192.

Huynh's responses to Li's second set of discovery regarding adverse possession were due on February 27, 2015, the day of the hearing on the motion for summary judgment. A true and correct copy of Defendant's second set of discovery is attached to the declaration of Glyn E. Lewis as Exhibit "1", CP 197-207. Li's interrogatories directed Huynh to set forth the facts supporting her claim for adverse possession, and state the reasons why she agreed to share sales proceeds of a jointly owned real property with Li in 2000 and why she sent Li a property expense breakdown in April 1998. See Li's interrogatory No.s 1, 5 and 6, to Plaintiff, Ex. "1" to Lewis Dec, CP 201 and 203.

In her Opening Brief at page 22, Huynh argues that the reasons why Huynh sent Li a property expense breakdown for subject properties in April 1998 and shared the proceeds of the sale of one of their jointly owned properties in May 2000 are "irrelevant". The reasons why Huynh sent the property expense breakdown for the Subject Properties in 1998 is clearly relevant because Huynh is admitting that Li owns an interest in the Subject Properties after she allegedly "kicked him out of the house" in 1997. The act of sending Li a property expense breakdown after allegedly "kicking Li out" of the house is entirely inconsistent with claiming an adverse interest to the Subject Properties.

Similarly, Huynh's act of sharing the proceeds of one of their jointly owned properties with Li in May 2000 is entirely inconsistent with claiming an adverse interest to their other jointly owned Subject Properties since 1997. If Huynh had shared the proceeds one of their jointly owned real properties in 2000, Li could reasonably expect that Huynh would share the sales proceeds of their other jointly owned properties. Huynh has offered no reasons why she would send the property expense breakdown and share the proceeds of the sale of one of their

jointly owned properties, besides the obvious fact that Huynh believed that Li jointly owned the subject properties with her.

Several days prior to the hearing on the Motion for Summary Judgment, the court had granted Li's motion to compel Huynh to respond to Li's first set of discovery. Huynh never complied with the court's order on the motion to compel due to the granting of summary judgment. Li's first set of discovery was primarily directed toward Huynh's allegation in her complaint for quiet title that she had contributed all the money toward the purchase and maintenance of the Subject Properties. Huynh's further responses to Li's first set of discovery could also refute Huynh's claim of adverse possession. Huynh had already admitted to depositing the rental income in a joint account at East West Bank with Li until March 2014. Li believed that there were more joint account bank accounts in addition to East West Bank that were maintained by Huynh after 1997. Huynh's failure to remove Li from their jointly owned bank accounts after 1997 is evidence that Huynh was not making a hostile claim to the Subject Properties.

In her Opening Brief at page 21, Huynh argues that there had already been plenty of discovery done and that no further discovery was needed. The only allegation in her complaint supporting her claim for quiet title is that Huynh provided all the money for the purchase of the Subject Properties. Huynh has never provided any evidence that she provided all the money for the purchase of the Subject Properties. Li did complete one day of Huynh's deposition but at the time of the deposition Huynh had not produced all the documents requested in the document request prior to the deposition. Li specifically reserved the right to take the deposition again once all the documents were provided. Huynh never produced any of her bank account statements

showing her joint accounts with Li and her allegedly separate bank accounts that she purchased the subject real properties from.

Based on the foregoing the court abused its discretion in failing to continue hearing because Huynh still owed Li responses on two sets of outstanding discovery regarding the key allegation in Huynh's complaint and the un-pled allegations supporting her claim of adverse possession.

IV. Conclusion

Based on the foregoing and in the interest of justice Li respectfully requests that the court reverse the trial court's ruling granting Huynh's motion for summary judgment and permit Li to complete his discovery on Huynh's adverse possession claim.

RESPECTFULLY SUBMITTED this 25th day of December, 2015.

By: /s/ Glyn E. Lewis

Glyn E. Lewis, WSBA No. 45744
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

Via email to:

Vic Lam
Law Offices of Vic S. Lam PS
701 Fifth Avenue, Suite 4200
Seattle, WA 98104-4047

Attorney for Respondent and Plaintiff Van Nhu Huynh
vicslam@gmail.com

DATED this 25th day of December 2015

By: /s/ Glyn E. Lewis

Glyn E. Lewis, WSBA No. 45744
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com