Supreme Court No. 97057-2
Court of Appeals No. 34678-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

GEORGIY BULKHAK,

Petitioner,

v.

JOHN SCANNELL,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. Introduction

Appellant John Scannell has petitioned this court to review the Court of Appeals decision in *Bulkhak v. Scannell*, WL 211115 (2019).

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Scannell argues that this court should accept review of the Court of Appeals' decision under all four criteria listed in RAP 13.4(b).[1] However, Mr. Scannell fails to present a persuasive argument as to why review is appropriate under any of the four criteria.

For purposes of this Response, Respondent Bulkhak adopts and incorporates the facts as set forth in the decision of the Court of Appeals.

II. Response

Pages 3-11 of Mr. Scannell's Petition for Review are a virtual

word-for-word repetition of pages 4-6 and 8-12 of Mr. Scannell's Opening Brief filed in the Court of Appeals and of pages 6-7 of Mr. Scannell's Reply Brief filed in the Court of Appeals. The Court of Appeals declined to address the majority of the arguments made by Mr. Scannell due to the fact that Mr. Scannell failed both to provide a sufficient record to permit review of those issues and to provide citations to authority and/or the record that would support his arguments. The record on appeal has not changed since the Court of Appeals issued its decision and remains insufficient to permit review of the majority of issues Mr. Scannell attempts to raise.

Pages 11-18 of Mr. Scannell's Petition for Review do contain new arguments that specifically addresses why the Court of Appeals decision was in error and why this court should accept review of this case. However, these arguments are predicated on the same unsupported and incorrect arguments rejected by the Court of Appeals.

All of Mr. Scannell's arguments are predicated on his incorrect assertions that (a) both Mr. Scannell and Mr. King (a non-party) claim superior title because the tax sale was invalid due to insufficient notice of the sale being given to Scannell and King; and (b) because Mr. Scannell's lease and option to purchase the property at issue survived the tax lien sale

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[1] Petition for Review, p. 18.

conducted pursuant to Chapter 84.64 RCW. Under Mr. Scannell's theory, because Mr. Bulkhak was never in actual possession of the property, his demands for rent from Mr. Bulkhak could not establish an implied tenancy by sufferance. Mr. Scannell argues that, because there was no implied tenancy by sufferance, and therefore, no landlord-tenant relationship, Mr. Bulkhak's unlawful detainer action brought under chapter 59.12 RCW was improper. Mr. Scannell concludes that the trial court and Court of Appeals did not have subject matter jurisdiction to hear this case, and it was improper to permit Mr. Bulkhak to litigate title.

As held by the Court of Appeals, Mr. Scannell's arguments lack both legal and factual support and were properly dismissed by the Court of Appeals.

1. Mr. Scannell's lease and option to purchase the property did not survive the tax sale held pursuant to chapter 84.64 RCW.

    a. *Mr. Scannell failed to present evidence to establish that the lease was still in effect at the time of the tax sale.*

As an initial matter, Mr. Scannell failed to present any evidence in the record that his lease with option to purchase was still in effect at the time of the tax sale. The evidence in the record establishes that on December 28, 1999, Mr. Scannell signed as "Tenant" a 10-year Lease "of

the property located at 543 6th St., Bremerton, Washington."[2] The Lease is also signed by Paul King, named therein as "Landlord." The lease was renewable at the option of Mr. Scannell "for two subsequent terms of 10 years at the end of the initial term at the same terms as the original term."[3] The Lease included the following provision:

> The parties hereto covenant and agree that John Scannell shall have an exclusive right to exercise an Option to Purchase the unit for $27,500, plus 7 percent interest upon written notice of the exercise thereof to Paul King at any time prior to the expiration of the Lease terms.[4]

This lease was recorded on June 16, 2003.[5]

Mr. Scannell presented no evidence that he had renewed the lease in 2009 at the end of the first ten-year term so that the lease was still in effect at the time of the tax sale in 2015. If the lease was no longer in effect then there was nothing to survive the tax sale.

b. Even if it is presumed the lease had been renewed in 2009, the lease and option to purchase did not survive the 2015 tax lien sale.

Mr. Scannell makes the bold claim that, "As a holder of a valid option to purchase, and lease, his option to purchase and lease survive any tax sale, because as tenant and the holder of an option, he is not

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[2] CP 40.
[3] CP 40.
[4] CP 41.
[5] CP 40-41.

responsible for the taxes."[6] In support of this argument, Mr. Scannell cites *Coy v. Raabe*, 69 Wn.2d 346, 418 P.2d 728 (1966) and *Graham v. Raabe*, 62 Wn.2d 753, 384 P.2d 629 (1963). Mr. Scannell misrepresents the holding of the *Raabe* cases when he claims they stand for the proposition that a tenant's lease and option to purchase will always survive a tax lien sale since the tenant is not responsible for paying the taxes.

The *Raabe* cases arises from a convoluted fact pattern that is best summarized in *Graham*, 62 Wn.2d at 754-758.[7] An extremely simplified summary is as follows: McClellan owned property but failed to pay Federal taxes, State taxes, and a water district assessment. Coy leased the property and had an option to purchase the property. This lease and option to purchase were recorded. The IRS levied on the property, seized it, and brokered a sale of the property from McClellan to Raabe. The sale was for $50,000 and the IRS agreed that it would accept roughly $31,000 from the sale price as payment in full for the Federal taxes owed. Raabe obtained a mortgage from Metropolitan to purchase the property.

A title insurance company prepared a title report that failed to discover that the recorded lease and option to purchase was still valid. All parties relied on the title report. The sale completed and Coy brought suit against Raabe to maintain possession of the property.

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[6] Petition for Review, p. 9.

The issue before the court in *Graham* was whether the purchaser of a property and the purchaser's mortgage holder had any right of subrogation in relation to the IRS and King County for the tax liens. The *Graham* court noted that the determination of whether subrogation is an equitable matter requiring the court to "weigh and balance the equities of the parties, having due regard to the legal and equitable rights of others."[8] In weighing the equities of the facts of that case, the *Graham* court noted that the Raabes were put on constructive notice of Coy's interest in the property since the lease was a matter of record, and noted that Coy had no obligation to pay the federal tax liens or the county tax and assessment liens.[9]

Mr. Scannell's reliance on the *Raabe* cases is misplaced. First, *Graham*'s discussion of the purchaser being on constructive notice and the lessee not being responsible for paying taxes was done in the context of examining the equities of subrogation in that case. The instant case does not involve any issues of subrogation or equity.

Second, and most importantly, Raabe did not purchase the property at issue via a tax lien sale under chapter 84.64 RCW. The sale of the property in *Graham* was brokered by the IRS for purposes of payment of

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[7] *See* Graham, attached hereto.
[8] *Graham*, 62 Wn.2d at 758, 384 P.2d 629.
[9] *Graham*, 62 Wn.2d at 759-760, 384 P.2d 629.

back taxes and resulted in a transfer of title from McClellan to Raabe. This is markedly different from the transfer of title in this case that resulted in Mr. Bulkhak obtaining title to the subject property.

A tax deed is a new and independent title granted by the state and bars all inquiry as to objections to the title or encumbrances made or existing before the tax deed was issued.[10] A foreclosure of property under a tax lien "vests in a purchaser at a sale held under such foreclosure a new title independent of all previous titles or claims of title to the property (*Hanson v. Carr*, 66 Wn. 81, 118 Pac. 927). Manifestly, both record and possessory title are equally absolutely destroyed by such a foreclosure."[11]

> We have held...that a tax deed, under our statutes, institutes a new and complete title, subject to defeasance only, by a suit by the former owner which must be brought within three years. It is said in *Sparks v. Standard Lumber Co.,* 92 Wn. 584, 586, 159 P. 812, 814:
>
> > To this purpose the courts have given liberal response. So that, with the passing of the old rule, it may fairly be said that a tax title is no longer nullius filius, **but is equivalent to a decree quieting the title in the purchaser as a grant from the sovereign state.**[12]

Any claim to title to the property possessed by Mr. Scannell was destroyed by the tax foreclosure. As the purchaser of the property at a lawful tax sale, Mr. Bulkhak possesses valid title to the property that is

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[10] *Wilson v. Korte*, 91 Wn. 30, 33, 157 P. 47 (1916).
[11] *Id.*

superior to any other claims to title for the property.

Mr. Scannell's argument that he somehow has a lease or option to purchase that survived the tax sale is unsupported by the law or by the facts of the case. Unlike the transfer of title in *Graham*, the transfer of title to Mr. Bulkhak in this case involved the creation of a new title independent of any encumbrances.

All arguments made by Mr. Scannell that are premised on his retaining a lese and/or option to purchase that survived the tax sale fail. Washington law clearly establishes that the title issued following the tax sale is a new title granted independent of all previous titles or claims of title to the property by the state, free from any prior encumbrances, and which bars all inquiry as to objections to the title or encumbrances made or existing before the tax deed was issued.

2. The Court of Appeals' holding that this action was commenced under chapter 59.12 RCW was correct.

Mr. Scannell asserts that the Court of Appeals erred in finding that this action was brought under chapter 59.12 RCW. Mr. Scannell argues that chapter 59.12 RCW does not apply to this case because his possession of the property does not satisfy the definition of unlawful detainer set out in RCW 59.12.030.[13] Again, this argument lacks both factual and legal

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[12] *Eagles v. Gen. Elec. Co.,* 5 Wn.2d 20, 35, 104 P.2d 912, 918 (1940) (emphasis added).
[13] Petition for Review, p. 13-17.

support.

First, the amended complaint for unlawful detainer clearly states that it is being brought pursuant to RCW 59.12.[14]

Second, Mr. Scannell ignores the fact that he never paid rent to Mr. Bulkhak after the tax sale despite Mr. Bulkhak's repeated requests he do so.

Where an individual possesses a piece of property without the consent of the property owner, but the property owner then demands rent, Washington law recognizes an "implied tenancy by sufferance."[15] This principle has been codified by the Legislature at RCW 59.04.050:

> Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he or she shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he or she occupied the premises, and shall forthwith on demand surrender his or her said possession to the owner or person who had the right of possession before said entry, and all his or her right to possession of said premises shall terminate immediately upon said demand.

This implied landlord-tenant relationship is sufficient to support an action for unlawful detainer by the property owner against the individual in possession of the premises.[16]

On March 30, 2015, the Treasurer of Kitsap County granted and

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[14] CP 55.
[15] *Williamson v. Hallett*, 108 Wn. 176, 178–79, 182 P. 940 (1919).

conveyed the subject real property to Mr. Bulkhak by Tax Deed number 2316.[17] On April 4, 2015, and November 28, 2016, Mr. Bulkhak ordered Mr. Scannell to vacate the premises.[18] Thus, as soon as a week after title in the property vested in Mr. Bulkhak, but no later than November 28, 2016, Mr. Scannell was given notice that he was occupying the property without Mr. Bulkhak's consent. On January 25, 2017, Mr. Bulkhak filed a Complaint for Unlawful Detainer in which he asserted that Mr. Scannell was unlawfully holding over, trespassing, and owed reasonable rent for the months of April 2015 through January 2017.[19]

Mr. Bulkhak's demand that Mr. Scannell pay rent in the January 2017 complaint created an implied tenancy of sufferance under RCW 59.04.050. Accordingly, no later than January 25, 2017, Mr. Scannell became liable for rental payment to Mr. Bulkhak and was required by RCW 59.04.050 to surrender possession of the property to Mr. Bulkhak upon Mr. Bulkhak's demand.

Under RCW 59.12.030, a tenant of real property for a term less than life is guilty of unlawful detainer:

> (1) When he...continues in possession...of the property or any part thereof after the expiration of the term for which it is let to him or her. When real property is leased for a specified term or period by

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[16] *See Williamson v. Hallett*, 108 Wn. 176, 182 P. 940 (1919).
[17] *Id.*
[18] CP 10.
[19] CP 5.

> express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of the specified term or period; [or]
>
> (2) When he...having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof...after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period; [or]
>
> (3) When he...continues in possession in person...after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;[20]

Mr. Scannell's actions satisfy the definition of unlawful detainer under subsections (1), (2), and (3) of RCW 59.12.030. The Court of Appeals correctly found that this case was brought under RCW 59.12.030.

3. The Court of Appeals' holding that Mr. Scannell could therefore not contest title in this action was correct.

> Unlawful detainer is a summary proceeding for obtaining possession of real property...The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent....Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title.[21]

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[20] RCW 59.12.030.

[21] *Federal Nat. Mortf. Ass'n v. Ndiaye*, 188 Wn.App.376, 382, 353 P.3d 644 (2015) (internal citations omitted).

The Court of Appeals correctly found that this case is an unlawful detainer action brought under chapter 59.12 RCW. Accordingly, the Court of Appeals was correct in finding that Mr. Scannell could not raise issues of title in this action. Mr. Scannell's argument that the Court of Appeals erred in finding he could not raise issues of title is based on his incorrect argument that he retained a lease interest or option to purchase following the tax sale. As discussed above, these arguments lack support in fact or law and fail.

III. CONCLUSION

The bulk of Mr. Scannell's Petition for Review is made up of arguments that the Court of Appeals rejected as not being supported by the record, or not being supported by the law, or both. The few new arguments made by Mr. Scannell about how the Court of Appeals decision was in error are based on the incorrect argument that Mr. Scannell retained a lease interest and or an option to purchase the property after the tax sale. Mr. Scannell did not retain any interest or option, of any kind, after the tax sale.

The Court of Appeals did not err in affirming the trial court's issuance of a writ of restitution. The Court of Appeals' decision is not contrary to any decision of the Court of Appeals or Superior Court, and presents no issue requiring review by this court. Mr. Scannell's Petition

for Review is frivolous and presents no colorable issues of why review should be accepted.

For the reasons stated above, this court should deny Mr. Scannell's petition and affirm the opinion of the Court of Appeals.

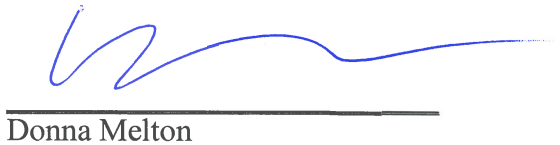
DATED this 17th day of April 2019.

Respectfully submitted,

RICHARD PATRICK, WSBA No. 36770
Counsel for Respondent Bulkhak

CERTIFICATION

I Hereby certify that on April 17, 2019 I delivered via email to zamboni_john@hotmail.com a true and correct copy of the document to which this certificate is attached for delivery to John Scannell.



Donna Melton

62 Wash.2d 753
Supreme Court of Washington, Department 1.

Walter F. GRAHAM, as Guardian ad Litem for Gary Guy Coy, a minor, Appellant,
v.
Buford W. RAABE and Josephine Raabe, his wife, Metropolitan Federal Savings and Loan Association of Seattle, a corporation, Respondents.

No. 36440.
|
Aug. 15, 1963.
|
Rehearing Denied Sept. 24, 1963.

Synopsis
Proceeding by lessee against purchasers of theater property and their mortgagee for possession of property under lease containing an option to purchase. The Superior Court, King County, Ward W. Roney, J., decreed that lessee was entitled to possession but that purchasers and their mortgagee should be subrogated to federal and county tax liens and lessee appealed. The Supreme Court, Hill, J., held that where decree against lessee in unlawful detainer action had been paid within five days and lease of theater property with option to purchase for $7,000 had been restored, fact that purchasers of lessor's interest had paid $31,157.87 out of $50,000 purchase price to secure release of federal tax liens which had been levied against former owner of property did not entitle purchasers and their mortgagee to subrogation to federal tax lien to defeat leasehold interest.

Portion of decree granting subrogation reversed.

West Headnotes (8)

[1] **Internal Revenue**⇨Rights resulting from payment by third persons or by fewer than all persons liable

Where decree against lessee in unlawful detainer action had been paid within five days and lease of theater property with option to purchase for $7,000 had been restored, fact that purchasers of lessor's interest had paid $31,157.87 out of $50,000 purchase price to secure release of federal tax liens which had been levied against former owner of property did not entitle purchasers and their mortgagee to subrogation to federal tax lien to defeat leasehold interest. RCWA 59.12.170.

1 Cases that cite this headnote

[2] **Subrogation**⇨Nature and theory of right

In ascertaining whether subrogation is appropriate, court must weigh and balance equities of parties, having due regard to legal and equitable rights of others.

1 Cases that cite this headnote

[3] **Vendor and Purchaser**⇨Record as notice of unrecorded instrument

Where lease of theater property with option to purchase and decree against lessee in lessor's unlawful detainer action were matters of record, purchasers of lessor's interest and their mortgagee had constructive notice of lessee's interest in property and satisfaction of decree by payment into court within five days, notwithstanding satisfaction had not been entered of record until after title examination. RCWA 59.12.170.

Cases that cite this headnote

[4] **Landlord and Tenant**⇨Liabilities for taxes and assessments

In absence of a contractual obligation to pay taxes and assessments, duty to pay them rests on lessor and not lessee.

1 Cases that cite this headnote

[5] **Taxation**⇨Rights, as Against Persons or Property Liable, of Other Persons Making Payment

Subrogation to tax liens and assessments is denied to party primarily liable.

Cases that cite this headnote

[6] **Landlord and Tenant**⇨Liabilities for taxes and assessments
Taxation⇨Rights, as Against Persons or Property Liable, of Other Persons Making Payment

Where county taxes and assessments had been levied after lessor had acquired theater property at mortgage foreclosure sale and lease did not provide for payment of taxes or assessments, lessor was obligated to pay taxes and assessments and neither he nor purchasers of property from lessor or their mortgagee were entitled to subrogation to lien of taxes or assessments as against lessee.

2 Cases that cite this headnote

[7] **Covenants**⇨Defenses

Fact that outstanding lease with option to purchase theater property covered only seven of eight lots conveyed did not preclude breach of warranty suit by purchasers, who had received warranty deed to theater property.

Cases that cite this headnote

[8] **Action**⇨Moot, hypothetical or abstract questions

Where title insurance company had failed to note satisfaction of decree against lessee in unlawful detainer action and restoration of lease with option to purchase theater property for $7,000, question whether equities justified subrogating lessor or title insurance company, assuming their ultimate liability to make purchasers and their mortgagee whole, to federal lien rights because purchasers had paid $31,157.87 out of $50,000 purchase price for release of federal tax liens filed against former theater owner was premature since unconscionable circumstances would not arise until there was attempt to exercise option. RCWA 59.12.170.

2 Cases that cite this headnote

Attorneys and Law Firms

***753 ****630** Raymond A. Reiser, Seattle, for appellant.

Taylor & Taylor, Seattle, for respondents.

Opinion

***754 ****631** HILL, Judge.

The issue presented here is whether certain of the defendants have a right of subrogation to certain county and federal tax liens.

The plaintiff, Gary Guy Coy, has secured a judgment establishing his right to possession of certain property as a lessee, and from this portion of the judgment no appeal has been taken. It is an option to purchase, contained in that lease, which brings the case to this court.

The trial court has attempted to make Gary Coy's exercise of that option subject to the rights of subrogation to county and federal tax liens claimed by certain defendants; and from this portion of the judgment the plaintiff appeals.

A chronological statement is necessary: March 8, 1948, Walter T. Coy, the then owner of the Hi-Line Theatre,[1] mortgaged it to the Reconstruction Finance Corporation (hereinafter called RFC).

January 12, 1953, RFC assigned the mortgage to Frank McClellan.

January 15, 1953, the United States filed two liens against Walter T. Coy for unpaid and delinquent income taxes in the sums of $139,285.82 (vault file No. 2919841) and $52,021.71 (vault file No. 2919842).

February 4, 1953, and April 16, 1953, the United States filed liens against Walter T. Coy for unpaid and delinquent income and admission taxes in the sums of $3,049.64 (vault file No. 2925758) and $148,414 (vault file No. 2948281).

September 23, 1955, Frank McClellan purchased the theatre property at sheriff's sale, he having foreclosed the RFC mortgage. (There is no indication as to whether or not the United States was joined as a party defendant in the foreclosure proceeding. We shall assume that it was not.)

August 14, 1957, the period of redemption having long since expired, a sheriff's deed issued to McClellan.

In 1957, Walter T. Coy made two offers in compromise to pay a reduced sum in full satisfaction of the federal tax liens, but at the time of trial they had not been acted upon. ***755** The effect of these offers of compromise, by their terms, was to extend the statute of limitations throughout the period in which the offer was pending and one year thereafter.

July 9, 1958, McClellan executed a lease for a ten-year period (to begin August 11, 1958)[2] to Walter T. Coy and his son, Gary Guy Coy (the plaintiff in this action), as co-lessees with an option to purchase the property after 5 years from the date of the lease for $7,000. This option was joint and several. (Gary Coy was then a minor, as he was at the time this action was commenced by his guardian ad litem; however, he had attained his majority before trial and was substituted as party plaintiff.) Walter T. Coy has disclaimed any interest in this lease, and the trial court and the parties on this appeal have proceeded on the assumption that Gary Coy is the only lessee. The $7,000 purchase price is understandable in view of the fact that McClellan had invested only the amount paid the RFC for the assignment of the mortgage he had foreclosed, and that amount might well be the extent of his investment in the property which had originally belonged to Walter T. Coy, one of the lessees.

July 13, 1959, the United States filed a fifth lien against Walter T. Coy for unpaid and delinquent withholding taxes in the sum of $1,264.22 (vault file No. 3689497). He had at that time only the leasehold interest in the property.

April 25, 1960, a judgment was entered in an unlawful detainer action brought by ****632** McClellan, terminating the leasehold interest[3] of Walter T. Coy and Gary Coy for nonpayment of rent.

Within 5 days (April 28, 1960) the amount of the judgment ($2,032.90) was paid into court; and, pursuant to RCW 59.12.170[4] the lease was automatically reinstated and the lessees continued to operate the theatre.

***756** August 23, 1960[5] the judgment was satisfied of record, on which date the money paid into court was received by McClellan.

July, 1960, the Internal Revenue Service levied upon the property and took possession; it then made an attempt to interest a purchaser in the property. A transaction was worked out whereby Buford W. Raabe and Josephine, his wife, agreed to purchase the property from McClellan for $50,000. The Internal Revenue Service agreed to release all federal tax liens against the property for $31,157.87[6] to be paid out of the purchase price. The Metropolitan Federal Savings and Loan Association (hereinafter referred to as Metropolitan) was to loan the Raabes $25,000 of the purchase price, and all taxes and other liens were to be paid from the purchase price.

The parties all acted in reliance on a report of a title insurance company, dated August 9, 1960 at 8:30 a. m., which showed title in McClellan subject to delinquent general taxes, water district assessments, and liens for federal taxes, but which did not disclose the existence of the lease of July 9, 1958, which contained the option to purchase.

Apparently, the examiner for the title insurance company ***757** had noted the entry of the decree in the unlawful detainer action cancelling the lease and option to purchase, but had failed to note the payment of the judgment and the restoration of the lease to good standing, as provided by RCW 59.12.170, on April 28, 1960. A satisfaction of the judgment would have immediately challenged the attention of the examiner, but when he made his examination the satisfaction had not been entered and was not entered, as we have seen, until August 23, 1960, the same day that the deed from McClellan to the Raabes was recorded.

The Raabes and McClellans signed escrow instructions describing the transaction: 'Terms of Sale: Sales price $50,000.00, payable as follows: All cash to seller at time of closing.'

The escrow company paid the Commissioner of Internal Revenue $31,157.87 (see note 6) for 'Certificate of Discharge of Property from Federal Tax Liens,'[7] but other than the property described, the tax liens remained in full force and effect on all property and interests of W. T. Coy.

****633** Real and personal property taxes, in excess of $5,000, due or delinquent, were paid as was a water district assessment of $305.20. After all expenses of the sale, including a $5,000 real estate commission, were paid, McClellan received $7,250 out of the $50,000.

The trial court decreed that the Raabes, as the purchasers, and Metropolitan, as the mortgagee, should be subrogated to the lien rights of King County for the real and personal property taxes and for the water district assessment in the amount of $5,952.29 paid to King County on August 23, 1960, in satisfaction of the taxes and assessments which were then liens against the Hi-Line Theatre property.

The trial court further decreed that they should be subrogated to
'* * * the lien rights of the United States Government * * * for the amount paid to release the said real property from said tax liens in the amount of $31,157.87 paid on the 23rd day of August, 1960, * * *'

***758** The trial court then directed the sale of the Hi-Line Theatre, as is, complete with all equipment and rugs, located on Lots 8 through 14, Block 2, Cedarhurst Division No. 1,
'* * * in the manner provided by the laws of the State of Washington for the sale of real estate upon levy of sale and for the sale of personal property and to make return of sale to the Clerk of this Court. The sale may be bid by the bidder assuming the mortgage, now an encumbrance on said real property, wherein the Metropolitan Federal Savings and Loan Association is mortgagee and paying the remainder of the bid price in cash, or the bidder may bid the entire purchase for cash. Other than said mortgage, the real property to be free and clear of all liens and encumbrances. At the sale, one-tenth of the bid price shall be paid in cash and the remainder upon confirmation of the sale. There may be redemption from the Sheriff's sale as allowed by law of the State of Washington.

'The proceeds of the sale for cash shall be disbursed first in payment of the unpaid balance of the mortgage to Metropolitan Federal Savings and Loan Association at the date of payment and the balance to Buford W. Raabe and Josephine Raabe, his wife, and where the mortgage is assumed as part of the bid price, the amount bid above the mortgage shall be disbursed to Buford W. Raabe and Josephine Raabe, his wife.'

From this portion of the judgment, relative to subrogation, the plaintiff (Gary Coy) appeals.

The basic issue is: Did the Raabes and Metropolitan have any right of subrogation?

Although the trial court's decree purports to recognize the validity of plaintiff's leasehold interest, it has, by subrogating the Raabes and Metropolitan to the lien rights of the county and federal government, effectively cut plaintiff off from any further interest in the property.
[1] [2] The purchasers and their mortgagee are not entitled to subrogation for the purpose of defeating plaintiff's leasehold interest. In ascertaining whether subrogation is appropriate, as in other cases of equitable relief, the court must weigh and balance the equities of the parties, having due regard to the legal and equitable rights of others. As the United States Court of Appeals stated in a recent case, subrogation
***759** '* * * 'will not be enforced to the prejudice of other rights of equal or higher rank, or to displace an intervening right or title, or to overthrow the equity of another person.' * * *'

Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co. (C.A. 5th 1962), 303 F.2d 692, 697. See also ****634** Germo v. Zion's Ben Bldg. Soc. (1934), 85 Utah 227, 237, 39 P.2d 312, 316; Obici v. Furcron (1933), 160 Va. 351, 360, 168 S.E. 340, 343, 91 A.L.R. 848; 50 Am.Jur., Subrogation § 13 (1944).

[3] What are the comparative equities? The purchasers and their mortgagee were placed on constructive notice of plaintiff's interest in the property. The lease was a matter of record, as was the unlawful detainer action and the payment of the judgment into court within five days pursuant to RCW 59.12.170. It is conceded that it was a valid and subsisting lease and that the interest of the purchasers is subject to it; however, the effect of the court's decree was to grant priority to the mortgage and wipe out the lease.

[4] [5] [6] Plaintiff had no obligation to pay either the federal tax liens[8] or the county tax and assessment liens.[9] The most that ***760** can be said is that if, and when, the plaintiff seeks to exercise his option to purchase for $7,000, he will secure a windfall; but it remains to be seen at whose expense, if anyone's.

The trial court, however, in its desire to protect the Raabes in their purchase of the property and the Metropolitan in its financing of such purchase, confused Gary Coy's right to the occupancy of the property with the consequences of the exercise of the option to purchase. It is his possible acquisition of property probably worth more than $50,000 for $7,000 which offended the conscience of the court.

Gary Coy, under his lease, is entitled to the possession of the premises; and not until an attempt by him to enforce his option would the claimed unconscionable circumstance arise which could conceivably justify the setting aside of the legal rights of these parties by the intervention of the equitable doctrine of subrogation. Gary Coy has 5 years in which to exercise his option, and he may never exercise it.
[7] On the other hand, the Raabes received exactly what their escrow instructions called for—a warranty deed from McClellan and a policy of title insurance. The fact that Gary Coy has a leasehold interest in seven of the eight lots conveyed by McClellan to the Raabes does not leave them without an adequate remedy at law, i. e., a suit for breach of warranty. They are also in position to put the onus of over-looking the legal significance of RCW 59.12.170 on the title insurance company. Risks of this kind

are precisely the reason why premiums are paid for title insurance.

[8] That portion of the trial court's decree granting subrogation is reversed.

FINLEY, ROSELLINI, HUNTER and HALE, JJ., concur.

All Citations

62 Wash.2d 753, 384 P.2d 629

Footnotes

1 Lots 8 through 15, Block 2, Cedarhurst Division No. 1. These 8 lots are described in all conveyances, mortgages, lien claims, title insurance policies, etc., except as hereinafter indicated.

2 The lease and option, however, cover only Lots 8 through 14, Block 2 of Cedarhurst Division No. 1. This excludes Lot 15 which, as indicated in note 1, is included in the various conveyances, mortgages, lien claims, and title insurance policies appearing in the record.

3 The property is here again described as Lots 8 through 15, Block 2, Cedarhurst Division No. 1.

4 'If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement or tenancy. * * * When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate; * * *'

5 This delay of almost four months by McClellan in 'taking down' the money paid is of particular significance, as explained later in this opinion.

6 This is the amount which appears in the trial court's findings and decree and in all briefs; we find only evidence to substantiate a payment of $30,940.66.

7 The property described included the HiLine Theatre property (see note 1) and the White Center Theatre property which had also been owned by Walter T. Coy.

8 These were the obligations of Walter T. Coy.

9 These were the obligations of Frank McClellan, the owner of the property when the taxes and assessments were levied. It is true the Coys had a lease during this period, but the lease had no provision for the payment of taxes or assessments on the real and personal property covered by the lease. In the absence of a contractual obligation to pay taxes and assessments, the duty to pay them rests on the lessor and not the lessee. Hammond Lumber Co. v. Los Angeles (1936), 12 Cal.App.2d 277, 55 P.2d 891; Becker v. Little Ferry (Ct.E. & App. 1941), 126 N.J.L. 338 19 A.2d 657; Northern Liberties Gas Co. v. United Gas Improvement Co. (1944), 348 Pa. 433. 35 A.2d 284; see Trimble v.

Seattle (1911), 64 Wash. 102, 116 P. 647, aff'd, 231 U.S. 683, 34 S.Ct. 218, 58 L.Ed. 435 (1914). See also annotation: Rights and duties between landlord and tenant in respect of taxes or assessments in absence of stipulation in lease in that regard, 73 A.L.R. 824 (1931).

Subrogation is universally denied to the party primarily liable. See, e. g. Michigan Hospital Service v. Sharpe (1954), 339 Mich. 357, 63 N.W.2d 638, 43 A.L.R.2d 1167; Brown v. Sheldon State Bank (1908), 139 Iowa 83, 95, 117 N.W 289, 293; Luikart v. Buck (1936), 131 Neb. 866, 869, 270 N.W. 495, 497. McClellan, the party primarily liable to pay the taxes and assessments, is not entitled to subrogation. Defendants Raabe and Metropolitan, having derived their title through McClellan, stand in his shoes and are likewise not entitled to subrogation to the lien of any taxes or assessments due King County which McClellan was obligated to pay. ****635** The trial court should strike from its decree any provision relating to enforcement of any lien, and direct that Gary Guy Coy be placed in possession under his lease. The right of McClellan (or the title insurance Company), assuming they bear the ultimate burden of making the purchasers and their mortgagee whole, to be ***761** subrogated to the lien rights of the federal government against Walter T. Coy, is a question for another day.

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