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IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION I

KARNAIL JOHAL, YEVGENI OSTROVSKI and GRIGORY YELKIN

Appellants,

and

CITY OF SEATTLE

Respondent.

APPELLANTS' REPLY BRIEF

Rodgers Deutsch & Turner, P.L.L.C.
By: Daryl A. Deutsch
Attorney for Appellants

Three Lake Bellevue Drive
Suite 100
Bellevue, WA 98005
(425) 455-1110

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ARGUMENT

Reply to City's Issue A. Standard of Review. The City asserts at page 6 of its brief that the appellants (hereafter the "plaintiffs") have "misleadingly suggested" that their appeal only presents issues of law. Notwithstanding that assertion, the plaintiffs' assignments of error only challenge the court's conclusions of law. The appellate court reviews a trial court's conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P. 3d 369 (2003).

Reply to City's Issue B. An exception to the Bona Fide Purchaser rule does not exist for easements created by part performance. The City maintains that the plaintiffs have failed to make a distinction between written but unrecorded conveyances (which the City acknowledges are subject to the bona fide purchaser ("BFP") rule), and non-documentary conveyances which are not capable of recording and therefore should not be subject to the rule. The plaintiffs respond to this contention as follows:

(a) A BFP is one who acquires real property "without notice of another's claim of right to, or equity in" the property. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984). There is nothing in this rule that makes a distinction between documentary and non-documentary

conveyances.

(b) The City has not cited any law or rule of law that grants a blanket exemption to the BFP rule for non-documentary claims or interests. The fact that such an exemption does not exist is not surprising given the importance and purpose of the BFP rule as noted in *Tomlinson v. Clarke*, 118 Wn.2d 498, 825 P.2d 406 (1992) at 508, wherein the court quoted 8 G. Thompson, Real Property §4290, at 222-23 (1963 repl.):

. . . The law has long recognized that the massive public policy in favor of stimulation of commerce **demands the fullest possible protection to a good faith purchaser for value**. The bona fide purchaser for value without notice is the favored creature of the law. (Emphasis Added)

(c) A few exceptions to the BFP rule have been recognized by the Washington courts. The common denominator to these exceptions is that they involve interests that arise after application of a statutory period of limitations. See *Mugaas v. Smith*, 33 Wn.2d 429, 206 P.2d 332 (1949) (adverse possession after 10 years), *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 753 P. 2d 555 (1988) (prescriptive easement after 10 years), and *Williams v. Striker*, 29 Wn.App. 132, 627 P.2d 590 (1981) (title under the vacant land statute after seven years). By way of comparison, an easement by part performance arises not from compliance with statutory law,

but only after a claimant asks the court to excuse compliance with applicable law, i.e., the statute of frauds. See *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995), at 556.

(d) It is clear from the cases that a claimant who has failed to comply with the statute of frauds is not entitled to any special protection from the BFP rule:

(i) In *Berg v. Ting*, supra, the issue of whether an easement agreement that did not comply with the statute of frauds could be specifically enforced under the doctrine of part performance was addressed. The court stated that the agreement could not be enforced against the subsequent purchasers if they were bona fide purchasers. *Id.*, at 555. The City maintains that the court's commentary was dicta. However, the court's comment was supported with a citation to *Baird v. Knutzen*, 49 Wn.2d 308, 311, 301 P. 2d 375 (1956) for the proposition that part performance could only be granted if the subsequent purchasers had notice of the prior claim. Therefore, the court in *Bing* was not suggesting a new rule of law, but simply re-affirming that which already existed.

(ii) In *Kirk v. Tomulty*, 66 Wn.App. 231, 831 P.2d 792 (1992), a party claimed an easement by part performance. The owners claimed that the easement could not be enforced against them as bona fide purchasers. After

discussing the issue at 239 - 241, the court concluded that the owners were not bona fide purchasers since they had notice of the easement at the time of their acquisition. The court could have avoided this analysis and summarily dismissed the BFP defense if easements claimed by part performance, as a matter of law, were not subject to the BFP rule.

The plaintiffs have also made an extensive search of out of state law. In doing so not a single case was found that supports the City's proposition that an unrecorded easement claimed by part performance is superior to the interest of a BFP.

In *Luloff v. Blackburn*, 274 Mont. 64, 906 P.2d 189 (1995), the respondents filed suit to take possession of a parcel that was claimed by the appellants although the appellants had no interest of record therein. The court granted the respondents summary judgment. On appeal the appellants argued that the issue of whether they had an interest in the property by "part performance" of an oral agreement with the respondents' predecessor-in-title must first be decided. The court responded at 191 by stating that the lower court did not address the part performance issue since the respondents were bona fide purchasers:

Contrary to the appellants' assertions, however, the District Court did not rule on the existence or validity of an earlier contract between the Manweilers and the

appellants. **Instead, the court found the respondents' claim to the land to be superior to any claim or right the appellants might have, because the respondents were subsequent good faith purchasers without notice.** (Emphasis Added)

In *Ortiz v. Jacquez*, 77 N.M. 155, 420 P.2d 305 (1966), Gomez claimed superior title as a BFP. The appellant claimed superior title by way of part performance of an oral agreement with Gomez's predecessor. The court affirmed the decision of the trial court in favor of Gomez, and in doing so stated at 307 that it is "fundamental" that the interest of a BFP is superior to an interest claimed by way of an oral agreement:

It is **fundamental** that if Gomez was a bona fide purchaser for value without notice of appellants' claimed interest that the oral agreement would be of no effect as to him even if it be treated as an enforceable agreement as between appellant and Ortiz. . . . (Emphasis Added)

Also see, *Walker v. Mackey*, 197 Or. 197, 253 P.2d 280 (1953). (In *Walker* the court affirmed the trial court's decision that the State Highway Commission, as a BFP, had an interest in the real property that was superior to the interest claimed by plaintiffs by part performance of an oral agreement with the Commissions' predecessor.)

Reply to City's Issue C. The City's unwritten easement is subject to RCW 65.08.070 and is void. The City maintains that the recording statute (RCW 65.08.070) and the BFP rule should not apply in this case since the City has a non-documentary easement by part performance. Therefore, it had nothing to record to put subsequent purchasers on notice.¹ In essence, the City is taking the position that a party who fails to comply with the statute of frauds is entitled to an exemption from the application of the BFP rule. This contention is essentially identical to the argument that the City made in its Issue B. Again, the City has not cited any statutory or case law that establishes that an unrecorded claim of an easement by part performance is exempt from application of the BFP rule.

Reply to City's Issue D: The City is *not* a third party beneficiary of the provisions in the real estate contract between the plaintiffs and the State.

The City notes at page 19 that the Real Estate Contract between the State and the plaintiffs provides that it is "subject to all existing encumbrances, . . .

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The only reason that the City did not have an easement agreement to record is that it inexplicably dropped the ball in what otherwise had been ongoing efforts to obtain one. (CP 34, FF 14, 15 & 16) The City would apparently like to have the plaintiffs, as the only innocent party in this matter, suffer the consequences of the City's inattention if not negligence in failing to properly document and then record the claimed easement.

." The City therefore argues that the plaintiffs acquired the Subject Property subject to the City's easement. The City further argues that the State could only convey to plaintiffs the interest that the State held in the Subject Property, and that said property was subject to the "pre-existing easement" in favor of the City. The City's contentions are without merit for reasons including the following:

(a) The City is not a party to the contract between the State and the plaintiffs, and therefore cannot claim for its benefit the terms therein:

"The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." . . . The test of intent is an objective one. The key is whether performance of the contract would necessarily and directly benefit the party claiming to be a third party beneficiary. . . .

See *Ramos v. Arnold*, 141 Wn.App. 11, 169 P.3d 482 (2007), at 21.

(b) There was no lawful encumbrance, documented or otherwise, in favor of the City at the time of the 2005 Real Estate Contract between the State and the plaintiffs. At that time there was nothing more than a not yet asserted judicial claim that the City should be excused from the requirements of the statute of frauds, and that the court should exercise its equitable powers to grant an easement by part performance.

(c) The City's argument that the State could only convey what it held, and that such conveyance would therefore be subject to the City's unrecorded not yet asserted claim of an easement by part performance, neglects to account for the BFP rule and the related recording statute (RCW 65.08.070) which give priority to the interest that is first recorded - even if that interest had been previously conveyed by the same grantor. See generally, *Tomlinson v. Clarke*, supra (1992). (In Tomlinson the seller sold property to Party A. Party A did not record the contract. The seller later sold some of the same property to Party B. Party B recorded its contract. The court had to decide who had superior title. Party B prevailed as a result of the application of the BFP rule and recording statute. Under the City's argument Party A would have prevailed since the seller could not have sold to Party B what had already been conveyed to Party A.)

Reply to City's Issue E: Appellants have an inverse condemnation claim against the City. The City maintains at Page 21 that the "taking" in this case occurred before the plaintiffs acquired the Subject Property, and as subsequent purchasers the plaintiffs do not have an inverse condemnation claim. In support of that contention the City cites *Hoover v. Pierce County*, 79 Wn.App. 427, 903 P.2d 464 (1995). The City's reliance on *Hoover* is

misplaced since the City, unlike the County in *Hoover*, did not "take" or inversely condemn an interest in the Subject Property while it was owned by the plaintiffs' predecessor (the State). Instead, the City entered the property pursuant to an unrecorded agreement with the State. (CP 34 - FF 7, 8, 14, 15 & 16).²

Further distinguishing *Hoover* is the fact that the flooding caused by the County road and culvert which the Hoovers maintained constituted a taking, was "evident well before the Hoovers bought the two lots". See *Hoover* at 434. These facts establish that the Hoovers had actual notice of the County's interest which would have prevented them from making a successful claim as a BFP.

At bar, the "taking" did not occur until the plaintiffs acquired the Subject Property in July 2005 at which moment the City's unrecorded interest in the property was void as against the interest of plaintiffs as bona fide purchasers. RCW 65.08.070. Also see *Tomlinson v. Clarke*, supra at 500. Since that date the City has been occupying the property without any legal or equitable interest therein in violation of the takings clause of both the state

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The City, as a matter of law, could not have "taken" the underground utility easement from the State by inverse condemnation since one of the elements of such an action is that "private property" be taken. See *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871, 876 (1998), at 957.

and federal constitutions. See Wash. State Const., art. I, § 16. (amend.9), and Fifth Amendment to the U.S. Constitution. Since the City failed to commence a condemnation action or take other steps to pay just compensation to the plaintiffs, the plaintiffs exercised their right to commence the process by filing an inverse condemnation action.

CONCLUSION

The City's unrecorded claim of an easement by part performance is void as against the interest of the plaintiffs as bona fide purchasers. Therefore, the City's continued use of the Subject Property for underground utility purposes without any interest therein has triggered an obligation under the takings clause of both the State and Federal constitutions to pay just compensation.

The decision of the trial court dismissing plaintiffs' inverse condemnation should be reversed, and the case remanded for further proceedings.

Respectfully submitted this 11th day of April, 2012.

RODGERS DEUTSCH & TURNER, P.L.L.C.



Daryl A. Deutsch, #11003
Attorney for Plaintiffs

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KARNAIL JOHAL, and YEVGENI)
OSTROVSKI and GRIGORY YELKIN,) **Appeal No. 68034-0-I**
)
Appellants,) **DECLARATION OF**
) **SERVICE**
v.)
)
CITY OF SEATTLE, a Subdivision of the)
STATE OF WASHINGTON)
)
Respondent)

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STATE OF WASHINGTON
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Daryl A. Deutsch declares under penalty of perjury as follows:

On April 11, 2012, I caused to be served a true and correct copy of the Appellants' Reply Brief, and this Declaration of Service, by hand delivery via legal messenger, and by e-mail, to each of the following parties:

Stephen R. Karbowski
Assistant City Attorney, City of Seattle
600 4th Avenue, 4th Floor
Seattle, WA 98124-4769
Also by e-mail: Stephen.Karbowski@seattle.gov

Amanda G. Phily
Assistant Attorney General
State of Washington
7141 Cleanwater Dr. SW
Tumwater, WA 98501-6503
Also by e-mail: Amandap1@atg.wa.gov

SIGNED UNDER PENALTY OF PERJURY under the laws of
the State of Washington, and stating that the foregoing is true and
correct to the best of my knowledge.

Dated this 11th day of April, 2012 at Bellevue, Washington.



Daryl A. Deutsch, Declarant