

68034-0-1

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' OPENING 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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A. ASSIGNMENTS OF ERROR

1. The trial court erred in its Conclusion of Law No. 2:

The City Utilities have remained undisturbed in their present locations since 1987, and there has been no act by the City that would constitute a taking of the Subject Property or any portion of it since Plaintiffs and WSDOT executed the 2005 Real Estate Contract.

2. The trial court erred in its Conclusion of Law No. 3:

The Plaintiffs are subsequent purchasers of the Subject Property and have no valid claim for inverse condemnation against the City for the Subject Property or any portion thereof.

3. The trial court erred in its Conclusion of Law No. 6:

The Permit establishes a continuing right for the City to locate, operate and maintain the City Utilities on the Subject Property and all other City facilities on other WSDOT properties related to the Master Agreement until a permanent easement is executed and recorded for the City Utilities and for all other City facilities pursuant to the Master Agreement.

4. The trial court erred in its Conclusion of Law No. 11:

The City has easement rights on the Subject Property acknowledged by WSDOT and created by part performance of WSDOT and the City under the Master Agreement, Task Orders, Permit, and draft Easement Agreements.

5. The trial court erred in its Conclusion of Law No. 12:

Because part performance on the part of WSDOT and the City has been established, any alleged non-compliance with the Statute of Frauds on the part of the City is excused, and the City's easement interest in the Subject Property for the City Utilities is pre-existing and superior to Plaintiffs' claimed equitable interest in the Subject Property.

6. The trial court erred in its Conclusion of Law No. 13:

The court shall enter a Judgment and Decree quieting title to the Subject Property and to adjacent WSDOT property in favor of the City for a permanent easement for the City Utilities as described in the attached Exhibit A.

Issues Pertaining to Assignments of Error

1. Does a bona fide purchaser have an interest that is superior to a party who claims an easement by part performance against the bona fide purchaser's predecessor?

2. Pursuant to RCW 65.08.070, did the unrecorded interest of the City in the subject real property become void at the moment the conveyance to the plaintiffs, as bona fide purchasers, was recorded?

3. If an easement interest in real property claimed by a governmental entity is void as against the interest acquired by a bona fide purchaser, does the bona fide purchaser have an inverse condemnation claim if the governmental entity elects to remain in possession of the property?

B. STATEMENT OF THE CASE

1. In the mid 1980's the City of Seattle installed an underground 230kV power line, an underground sewer line, and an underground storm water line (the "Underground Utilities") on property owned by the State (the "Subject Property"). (CP 34 - FF 1) The Underground Utilities were placed on the Subject Property pursuant to an agreement with the State related to the State's I-90 project. (CP 34 - FF 2 and 3)

2. From the mid-1980's into the 1990's, the State and the City exchanged drafts of an easement granting the City the right to maintain the Underground Utilities on the Subject Property. (CP 34 - FF 14) The easement was never finalized or recorded. (CP 34 - FF No. 16)

3. In October 2005 plaintiffs Johal and Ostrovski purchased the Subject Property from the State pursuant to the provisions of a real estate contract. (CP 34 - FF 19) The contract was recorded in King County on October 24, 2005. (Ex. 5)

4. The plaintiffs had no knowledge of the Underground Utilities at the time of their acquisition of the Subject Property, and "had no reason to make any further inquiry" to determine whether any utilities might be buried thereon. (CP 34 - FF 22A)

5. The plaintiffs, subsequent to the acquisition of the Subject Property, discovered the existence of the Underground Utilities. (CP 34 - FF 26)

6. The plaintiffs filed an inverse condemnation action against the City in 2010. (CP 34 - FF 30).

7. The court concluded that the plaintiffs were "bona fide purchasers" having "acquired the Subject Property without constructive or actual knowledge" of the Underground Utilities. (CP 34 - CL 4). However, the court also concluded that the City's prior course of conduct with the State had established an easement in favor of the City by part performance, and that said easement was superior to the interest of the plaintiffs. (CP 34 - CL 11 and 12) Therefore, the court dismissed plaintiffs' complaint. (CP 29)

C. ARGUMENT

Issue No. 1. Does a bona fide purchaser have an interest that is superior to a party who claims an easement by part performance against the bona fide purchaser's predecessor?

The court concluded that the plaintiffs were bona fide purchasers. (CP 34 - CL 4) Notwithstanding that conclusion, the court also concluded that the City had an easement by part performance as a result of its course of conduct with the plaintiffs' predecessor (the State), and that said easement was

superior to the plaintiffs' interest as a bona fide purchaser. (CP 34 - CL11 and 12) The court's conclusions were contrary to well established law.

A bona fide purchaser is a purchaser who acquires for value an interest in property without actual or constructive notice of the interest of another.¹ In doing so the bona fide purchaser acquires the superior interest. *Tomlinson v. Clarke*, 118 Wn.2d 498, 825 P.2d 406 (1992), at 500. The court in *Ellingsen v. Franklin County*, 117 Wn.2d 24, 28 - 29, 810 P. 2d 910 (1991) stated that "this clear rule started with *Ritchie v. Griffiths*, 1 Wash. 429, 25 P. 341 (1890)".

The bona fide purchaser rule applies to easements:

. . . A bona fide purchaser of land who has no actual or constructive knowledge of an easement generally takes title free of the burden of the easement. (Citations omitted)
(Emphasis Added)

See *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (2000), at 846. Since a written easement that has not been recorded is void as against a bona fide purchaser, then certainly an unrecorded and not yet asserted claim of an easement by part performance (as with the case of the City at bar) would also be void. An analogous situation arose in *Berg v. Ting*, 125 Wn.2d 544, 886

¹Constructive notice is given if the prior interest is recorded. *Tomlinson v. Clarke*, supra at 500.

P.2d 564 (1995), wherein Berg attempted to enforce an easement by part performance across the Ting property. The court stated that since the part performance had occurred between Berg and Ting's predecessor, the easement should not be enforced if Ting was a bona fide purchaser. The court stated at 555:

Another issue exists in this case with regard to whether the agreement may be specifically enforced under the doctrine of part performance. The Tings were not parties to the agreement. However, specific performance may be granted with respect to subsequent purchasers where the subsequent purchasers have notice of the rights of another under a contract conveying an interest in land. *Baird v. Knutzen*, 49 Wash.2d 308, 311, 301 P. 2d 375 (1956). **A significant question in this case, therefore, is whether the Tings are bona fide purchasers for value; if so, specific performance should not be granted.** (Emphasis Added)

The fact that a governmental entity is the party asserting the competing interest is of no consequence to a bona fide purchaser since "The recording statutes apply to municipalities as well as to private individuals, . . .". See *Lind v. City of Bellingham*, 139 Wash. 143, 245 P. 925 (1926), at 147. Also see *Ellingsen v. Franklin County*, supra at 26. In case any doubt exists, the bona fide purchaser doctrine also applies to the benefit of good

faith purchasers of land from the state. See *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010), at 127 -128.

In conclusion, as bona fide purchasers the interest of the plaintiffs in the Subject Property is superior to the unrecorded easement interest claimed by the City. The trial court erred in concluding otherwise.

Issue No. 2. Pursuant to RCW 65.08.070, did the unrecorded interest of the City in the subject real property become void at the moment the conveyance to the plaintiffs, as bona fide purchasers, was recorded?

The controlling statutory authority on this issue is the real property recording statute - RCW 65.08.070. The statute, which is essentially a codification of the bona fide purchaser doctrine, provides as follows:

A conveyance of real property, when acknowledged by the person executing the same . . . may be recorded in the office of the recording officer of the county where the property is situated. **Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.** . . . (Emphasis Added)

The City did not have an interest of record in the Subject Property at the time the plaintiffs acquired and recorded their interest.² (CP 34 - FF 14 and 16). Therefore, pursuant to RCW 65.08.070, the City's interest was void as against the interest of the plaintiffs' unless the plaintiffs had notice of the City's interest at the time of their acquisition. *Levien v. Fiala*, 79 Wn.App. 294, 902 P.2d 170 (1995), at 300. Since the trial court concluded that the plaintiffs were bona fide purchasers having acquired the Subject Property without any actual or constructive notice of the City's interest (CP 34 - CL 4), it should have also concluded that the City's interest was void as of the date the State's conveyance to the plaintiffs' was recorded. The trial court erred in concluding otherwise.

Issue No. 3. If an easement claimed by a governmental entity is void as against the interest acquired by a bona fide purchaser, does the bona fide purchaser have an inverse condemnation claim if the governmental entity elects to remain in possession of the property?

The plaintiffs acquired the Subject Property in the instrument recorded on October 24, 2005. (Ex. 5) At that moment the City's unrecorded

² The term "conveyance" under RCW 65.08.070 is defined as "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned". See RCW 65.08.060(3). Since an easement is an interest in land (See *Berg v. Ting*, supra at 500), such an interest is subject to the provisions of the recording statute - including the risk of being voided if not recorded.

interest in the property, if any, was void as against the interest of plaintiffs as bona fide purchasers. RCW 65.08.070. *Tomlinson v. Clarke*, supra at 500. If the City desired to continue using the property for its Underground Utilities it should have commenced a condemnation action to acquire the right to do so, and to facilitate the payment of just compensation to the plaintiffs, as required under the takings clause of both the state and federal constitutions.³ Since the City failed to do so, the plaintiffs exercised their right to commence the process by filing an inverse condemnation action. (CP 1)

The elements of an inverse condemnation action are

. . . . (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.

Phillips v. King County, 136 Wn.2d 946, 957, 968 P.2d 871. (1998). At bar, since the City is physically in possession of the Subject ("private") Property and using it for public utility purposes, the only remaining issue is the amount of just compensation that it is constitutionally obligated to pay in order to

³ See Wash. State Const., art. I, § 16. (amend.9) (" . . . No private property shall be taken or damaged for public or private use without just compensation having been first made. . . ."). Also see 5th Amend. to the U.S. Constitution.

lawfully maintain that possession and use. The trial court, by dismissing plaintiffs' inverse condemnation claim, denied plaintiffs their only mechanism for enforcing their constitutional right to just compensation. The trial court erred in doing so.

D. CONCLUSION

The trial court concluded that the plaintiffs were bona fide purchasers since they acquired the Subject Property without any actual or constructive notice of the interest therein of the City. Therefore, pursuant to long established law, the City's interest in the Subject Property is inferior as against the interest of the plaintiffs, and said interest is "void" as provided in RCW 65.08.070. The trial court erred in concluding otherwise. Since the City has continued to use the property for utility purposes without having acquired any right from the plaintiffs to do so, the court also erred in dismissing plaintiffs' claim for inverse condemnation.

In conclusion, the plaintiffs respectfully request that the court reverse the decision of the trial court, and remand the case so that a trial can be held on the issue of the amount of just compensation that the City must pay to the plaintiffs in order to constitutionally acquire the lawful right to use the Subject Property for public utility purposes.

Respectfully submitted this 15th day of February, 2012.

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

A handwritten signature in black ink, appearing to read 'D. Deutsch', written over a horizontal line.

Daryl A. Deutsch, #11003
Attorney for Plaintiffs

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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)

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

On February 15, 2012, I caused to be served a true and correct copy of the Appellants' Opening 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

ORIGINAL

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 15th day of February, 2012 at Bellevue,
Washington.



Daryl A. Deutsch, Declarant