

71591-7

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NO. 71591-7

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

VANTAGE CAPITAL, L.L.C.,

Appellant,

vs.

P.H.T.S., LLC,

Respondent.

APPELLANT'S BRIEF

Submitted By:

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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## **A. INTRODUCTION**

The parties to this case, Appellant Vantage Capital, L.L.C. and Respondent P.H.T.S., LLC, will be referenced as Vantage and PHTS respectively. This case involves the application of RCW 6.23.120 which is reproduced in Appendix I.

## **B. ASSIGNMENTS OF ERROR**

### **I. Assignments of Error.**

1. The trial court erred by finding that the offer made by PHTS to Vantage was a qualifying offer under RCW 6.23.120.
2. The trial court erred by rejecting Vantage's unclean hands affirmative defense.
2. The trial court erred by granting PHTS's motion for summary judgment.
3. The trial court erred by denying Vantage's motion for summary judgment.

### **II. Issues Pertaining to Assignment of Error.**

1. Does the listing required in RCW 6.23.120 need to be substantively related to the offer process established in the statute in order for an offer made pursuant thereto to be a qualifying offer under the statute? (Assignments of Error Nos. 1-4).

2. Did the listing posted in this case satisfy the requirements of RCW 6.23.120? (Assignments of Error Nos. 1-4).

3. If the listing posted in this case satisfied the requirements of RCW 6.23.120, does the conduct of the listing broker nevertheless preclude recovery in favor of the Offeror who is owned and managed by the broker? (Assignments of Error Nos. 1-4).

### **C. STATEMENT OF THE CASE**

Under Snohomish County Superior Court Case No. 12-2-06757-9 (the “Foreclosure Action”), Rosemount Heights Condominium Homeowners Association obtained a default judgment and decree of foreclosure against Vitaliy Glinsky (“Glinsky”) and Bank of America, foreclosing a homeowners’ association lien on a condominium unit (the “Unit”). (CP 54) At the ensuing Sheriff’s Sale on December 14, 2012, Vantage outbid the other participants in the public auction and purchased the Unit for \$45,500.00, subject to a one year redemption period which expired on December 16, 2013. (CP 72, 74 ). On December 9, 2013, Viktor Klimenko (“Klimenko”), acting under an assignment of redemption rights from Glinsky, redeemed the property and received a Sheriff’s Deed dated December 16, 2013. (CP 92-97).

On December 15, 2013 (one day prior to the expiration of the redemption period above referenced) Thomas J. Sullivan, a real estate

broker conducting business under Glacier Investments, LLC (CP 112), posted a for-sale advertisement for the Unit on the Zillow.com website (the “Zillow Listing”). (CP 22, 38, 112, 114-117). Implicit from the record as a whole, Mr. Sullivan posted this advertisement under the authority of RCW 6.23.120 as the record does not reflect, and PHTS does not argue, that Mr. Sullivan had a listing agreement with the then owner of the Unit. The Zillow Listing advertises the Unit as for sale by Owner at a price of \$170,000 (CP 114-117) although the minimum qualifying offer price under the statute was \$64,859.18 (CP 108). The Zillow Listing makes no reference to RCW 6.23.120 by statutory number or narrative explanation, and makes no reference to offer process under the statute. (CP 114-117). The record contains no explanation of the derivation of the list price of \$170,000.00.

On December 16, 2013, at 3:00 pm, Mr. Sullivan delivered to Vantage’s registered agent an Offer to Purchase (the “Offer”), which provides, *inter alia* that PHTS offers to buy the Unit pursuant to RCW 6.23.120 from Vantage for the price of \$70,000.00 (CP 112). The offer is dated December 16, 2013 and is signed by Thomas J. Sullivan as Manager of PHTS. (CP 118) PHTS and Glacier Investments, LLC have the same membership structure. (CP 39, 69, 113).

On December 17, 2013 PHTS filed a show cause proceeding in the Foreclosure Action challenging the redemption by Klimenko and alleging that PHTS had made a purchase offer to Vantage under RCW 6.23.120. (CP 81). PHTS and Glinsky/Klimenko settled on undisclosed terms and an agreed order was entered voiding the redemption and the Sheriff's Deed to Klimenko.(CP 98-102) . Vantage ultimately received a Sheriff's Deed. (CP 36)

PHTS filed the action in Snohomish County Superior Court from which this appeal is taken on January 21, 2014 seeking declaratory relief that the Offer was a qualifying offer under RCW 6.23.120 and an order of specific performance forcing Vantage to convey the Unit to PHTS. (CP 125-128) Both parties moved for summary judgment (CP 80, 103). The trial court granted PHTS's motion and denied Vantage's motion. (CP 6-9; Appendix II) Vantage timely appeal to this Court.(CP 1-5 ).

#### **D. STANDARD OF REVIEW**

The appellate court engages in the same inquiry as the trial court when reviewing a summary judgment order. *Jones v. Allstate Ins. Co.* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Statutory construction is a question of law reviewed de novo. *Plemmons v. Pierce County*, 134 Wn. App. 449, 140 P.3d 601 (2006)

## E. ARGUMENT

Vantage contends on appeal that the Zillow Listing is so deficient as to either disqualify the Offer as a qualifying offer, or disqualify the offeror (who is the alter ego of the listing broker) preferentially benefitted thereby.

**I. The Zillow Listing was Substantively Insufficient to Comply with RCW 6.23.120.** RCW 6.23.120 is “a relatively unique upset process”, the gist of which is that, “if a real estate broker lists the property on an open listing, a third party can make a ‘qualifying offer’ through a real estate broker”. *Graham v. Findahl* 122 Wn App 461, 463, 93 P.3d 977 (2004). The language of the statute evidences an intent to generate a series of offers during the redemption period; the highest qualifying offer becomes the winning bid if the offeror tenders full cash payment within two banking days of notice that his/her/its offer is first in line. If that offeror does not perform, then the next highest offer moves to first position and the process of notice and opportunity to perform repeats. The listing is the foundation of the process; the statute will only operate in the manner intended if the listing is sufficiently informative to ignite the process.

The statute does not provide any substantive guidance on the requirements of the listing, and there is no relevant legislative history.

Axiomatic to statutory construction however is the notion that the spirit and intent of a statute should prevail over the literal letter of the law, and a statute should be interpreted in the manner that best advances the perceived legislative purpose. *Wichert v. Cardwell* 117 Wn.2d 148, 151, 812 P.2d 858 (1991).

"A court's objective in construing a statute is to determine the legislature's intent." *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* (alteration in original) (internal quotation marks omitted) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* If the statutory language remains susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Id.*

*Udall v. T.D. Escrow Services*, 159 Wn.2d 903, 909 154 P.3d 882 (2007).

Guidance in this case also comes from the general statutory obligations of a real estate broker, which include good faith (*RCW 18.86.030 (1)(b)*), refraining from any action detrimental to the buyer or seller's interest, (*RCW 18.86.040(1)(a), 050(1)(a)*) and full and timely disclosure of conflicts of interest (*RCW 18.86.040(1)(b), 050(1)(b)*).

The Zillow Listing (i) sets an asking price of \$170,000.00, when the minimum qualifying offer under the statute would have been at least \$100,000.00 less; (ii) does not describe the offer and acceptance process of RCW 6.23.120 in any manner; (iii) was posted only one day before the expiration of the redemption period; and (iv) does not indicate the deadline for offers (which would have been one day after the listing was published). The Zillow Listing could not conceivably have generated the activity contemplated by the statute. There can be no doubt that the real estate broker initiated the process with the intent of purchasing the Unit himself through his affiliated entity, and that the Zillow Listing was generated to minimally comply with the statute but avoid generating any competition against PHTS for the Unit. There is a total absence of any relation between the Zillow Listing and the statutory process it was intended to initiate and advance. The advertised price alone is misinformation enough to disqualify the Zillow Listing.

In response to Vantage's arguments on statutory compliance, PHTS first argued that no listing is required under the statute. *Plaintiff's Response to Defendant's Motion for Summary Judgment*, p.5 (CP 32). This is clearly an untenable argument which PHTS apparently realized in its *Plaintiff's Reply* which it filed less than a week later (CP 19) in which it argues that “[t]he listing strictly satisfies the requirement of RCW

6.23.120". *Id.*, p. 4. PHTS argues that the statute specifies "no content or duration for the listing", and the court should not interfere. *Id.* p. 3. This is the letter-of-the-law approach to statutory construction which the authorities above cited reject. Apparently, according to PHTS, the content of the listing is irrelevant, as PHTS does not even attempt to justify or explain listing the Unit for \$170,000.00 when the minimum qualifying bid under the statute was under \$65,000.00. Vantage submits that the Zillow Listing was so inconsistent with the spirit and intent of the law as to preclude statutory compliance. Under RCW 6.23.120(1) "[a]n offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property . . .", and given the lack of an effective listing, the Offer cannot be a qualifying offer.

**II. The Broker's Actions Preclude Recovery for PHTS.** Vantage further submits that PHTS should have been denied relief on the basis of Vantage's affirmative defense of unclean hands. Specific performance is an equitable remedy. *Crafts v. Pitts*, 161 Wn.2d 16, 162 P.3d 382 (2007). "[T]he well-known equitable defenses of estoppel, laches, and unclean hands are available to any defendant against whom performance is sought." *Id.*, *fn*te 4, citing *Cascade Timber Co. v. N.Pac. Ry. Co.* 28 Wn 2d 684, 711, 184 P.2d 90 (1947). "Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction

in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.” *Portion Pack, Inc. v. Bond* 44 Wn. 2d. 161, 170, 265 P.2d 1045 (1954) citing *Income Investors, Inc. v. Shelton*, 3 Wash.2d 599, 101 P.2d 973, 974 (1940).

PHTS, being owned and managed by the listing broker, cannot escape the taint of the broker’s conduct. The broker’s conduct was clearly self-serving and opportunistic. PHTS had two opportunities in the trial court to explain the broker’s actions (in response to Vantage’s motion, and in the reply in support of its own motion), but offered no additional declaration testimony beyond its letter-of-the-law compliance testimony in support of its motion. In its briefing, PHTS argued that the timing of the Zillow Listing (one day before the expiration of the redemption period) was reasonable because a potential offeror would not be interested in the property unless redemption was no longer a possibility. *Plaintiff’s Reply*, p.4 (CP 22). However, in virtually every judicial foreclosure or execution sale, parties are called upon to bid and actually deposit the full purchase price knowing that redemption is possible for up to one year; PHTS’s timing argument makes no logical sense. PHTS offers no explanation for the listing price of \$170,000.00 and no justification for the listing’s failure to explain the offer process under RCW 6.23.120. In the end, PHTS does not argue that the broker’s conduct was without fault, but rather argues

that it just was not as bad as the conduct in the cases cited by Vantage.

*Plaintiff's Reply*, p. 6 (CP 24)

#### **F. CONCLUSION**

Vantage participated in the foreclosure process in good faith as it was designed to occur – it bid competitively for the Unit at a statutorily governed foreclosure sale conducted by a public official and put its money at risk; in contrast, the real estate broker and PHTS, in common enterprise, manipulated RCW 6.23.120 in obvious contravention of its intended purpose to secure the prize for itself. The integrity of the process established by RCW 6.23.120 is fundamentally at issue here. Other issues raised by Vantage in the trial court have been intentionally disregarded in this appeal in favor of focusing on the intentional misuse of the statute. If the statute is allowed to be used in the manner employed by PHTS and its principal, the statute will lose any semblance of its original design and become an instrument of self-dealing. PHTS's actions should be rejected, not condoned. Vantage respectfully requests that the decision of the trial

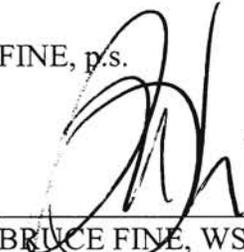
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court be reversed, and that the case be remanded for entry of an order granting Vantage's motion for summary judgment of dismissal.

Respectfully Submitted May 12, 2014

FINE, p.s.



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BRUCE FINE, WSBA# 758  
Attorney for Appellant

## G. APPENDIX

### I. RCW 6.23.120

#### **RCW 6.23.120**

#### **Listing of property for sale during redemption period — Acceptance of qualifying offer if property unredeemed and deed issued — Procedure — Disposition of proceeds.**

(1) Except as provided in subsection (4) of this section, during the period of redemption for any property that a person would be entitled to claim as a homestead, any licensed real estate broker within the county in which the property is located may nonexclusively list the property for sale whether or not there is a listing contract. If the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then the property owner shall accept the highest current qualifying offer upon tender of full cash payment within two banking days after notice of the pending acceptance is received by the offeror. If timely tender is not made, such offer shall no longer be deemed to be current and the opportunity shall pass to the next highest current qualifying offer, if any. Notice of pending acceptance shall be given for the first highest current qualifying offer within five days after delivery of the sheriff's deed under RCW 6.21.120 and for each subsequent highest current qualifying offer within five days after the offer becoming the highest current qualifying offer. An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property and is at least equal to the sum of: (a) One hundred twenty percent greater than the redemption amount determined under RCW 6.23.020 and (b) the normal commission of the real estate broker or agent handling the offer.

(2) The proceeds shall be divided at the time of closing with: (a) One hundred twenty percent of the redemption amount determined under RCW 6.23.020 paid to the property owner, (b) the real estate broker's or agent's normal commission paid, and (c) any excess paid to the judgment debtor.

(3) Notice, tender, payment, and closing shall be made through the real estate broker or agent handling the offer.

(4) This section shall not apply to mortgage or deed of trust foreclosures under chapter 61.12 or 61.24 RCW.

[1987 c 442 § 712; 1981 c 329 § 23. Formerly RCW 6.24.230.]

Notes:

**Severability -- 1981 c 329:** See note following RCW 6.21.020.

**II.** Order of Summary Judgment [Attached].

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In the Superior Court for the State of Washington  
in and for the County of Snohomish

P.H.T.S., LLC,  
Plaintiff,  
v.  
Vantage Capital, LLC,  
Defendant.

No. 14-2-01985-6

Order of Summary Judgment

The real property that is the subject of this action is the condominium unit located at 2802  
143rd St SW, #1-C, Lynnwood, WA 98087, legally described as:

Unit C, Bldg 1, of the Rosemount Heights, a condominium recorded October 24,  
2002, under Snohomish County recording number 200210245005, according to  
the declaration thereof recorded under Snohomish County Recording No.  
200210240526, and any amendments thereto.

("the subject property"). The unit was sold at a sheriff's sale to Vantage Capital, LLC under  
Case No. 12-2-06757-9. Prior to the end of the one year redemption period, P.H.T.S., LLC  
made an offer to Vantage Capital, LLC under the terms of RCW 6.23.120, through Thomas J.  
Sullivan, a licensed real estate broker. The Sheriff of Snohomish County delivered his sheriff's  
deed to Vantage Capital, LLC on February <sup>19</sup>~~10~~, 2014.

Both parties have moved for summary judgment. P.H.T.S., LLC has appeared and  
argued through its attorney, Rodney T. Harmon. Vantage Capital, LLC has appeared and argued

Order of Summary Judgment

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Attorney at Law  
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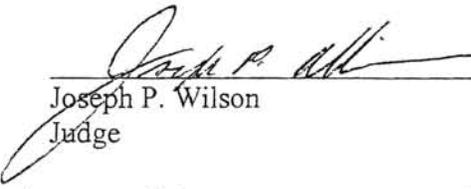
1 through its attorney, Bruce I. Fine of Fine, P.S. The Court has considered the arguments of  
2 counsel and the documents identified in Attachment A to this order. The Court being duly  
3 satisfied that there is no genuine dispute as to any material fact, now therefore:

4 It is hereby ordered, adjudged and decreed as follows:

- 5 (1) P.H.T.S., LLC has made the highest qualifying offer to Vantage Capital, LLC under the  
6 terms of RCW 6.23.120,
- 7 (2) Vantage Capital, LLC is obligated to sell the above-described real property to P.H.T.S.,  
8 LLC under the terms of the offer.
- 9 (3) The motion of Vantage Capital, LLC is denied.
- 10 (4) The duties of the parties in the closing of the transaction, namely the plaintiff's deposit of  
11 the purchase price and the defendant's execution and deposit of the deed, are stayed for  
12 30 days.
- 13 (5) Upon closing, the purchase price shall be distributed in the following amounts:

Vantage Capital, LLC	\$61,187.90
Thomas J. Sullivan	\$3,671.27
Vitaliy Glinsky	\$5,140.83
Total	\$70,000.00

18 Dated this 19th day of February, 2014

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21   
22 Joseph P. Wilson  
Judge

23 (2a) There shall be added to the deed from  
24 Vantage Capital, L.L.C. to P.H.T.S., LLC the following  
25 language: Title conveyed hereby shall not exceed in  
26 scope or quality that which Vantage Capital, L.L.C.  
27 acquired from the Sheriff of Snohomish County  
28 and shall be subject to any all infirmities now or  
29 hereafter pertaining to such sheriff's deed.

Order of Summary Judgment

- 2 -

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Presented by:

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*Rodney T. Harmon*

Rodney T. Harmon, WSBA #11059  
Attorney for P.H.T.S., LLC

*Approved as to form:*  
*RM*  
*See Fine WSBA 758*  
*FINE, P.S. OK Defendant*  
*Attorney*

**Attachment A**

- 1
- 2 1. Plaintiff's Motion for Summary Judgment
- 3 2. Declaration of Thomas J. Sullivan
- 4 3. Plaintiff's Submission of Certified Copies
- 5 4. Plaintiff's Response to Defendant's Motion for Summary Judgment
- 6 5. Plaintiff's Reply Memorandum
- 7 6. Defendant's Motion for Summary Judgment
- 8 7. Declaration of Counsel in Support of Defendant's Motion for Summary Judgment
- 9 8. Second Declaration of Counsel for Vantage Capital, LLC Filed in Response to Plaintiff's
- 10 Motion for Summary Judgment
- 11 9. Declaration of Jeanne Gorder
- 12 10. Declaration of Steve Gorder
- 13 11. Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment
- 14 12. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment
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**COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON  
CASE NO. 71591-7**

Bruce Fine, states as follows:

I am the attorney for the Appellant herein, On the 12<sup>th</sup> day of May, 2014, I sent via Halo Messenger Service the Original and one copy of Appellant's Brief to the Court as follows:

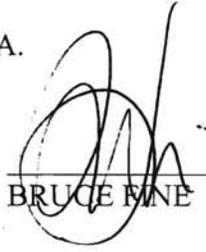
Court of Appeals  
Division I  
One Union Square  
600 University St.  
Seattle, WA 98101-1176

I further certify that on May 12, 2014, I send a copy of Appellant's Brief to counsel for Respondent, P.H.T.S., LLC by email in accordance with prior agreed practice as follows:

Rodney Harmon  
rodharmon@msn.com

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED May 12, 2014 at Seattle, WA.

  
\_\_\_\_\_  
BRUCE FINE

FILED  
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STATE OF WASHINGTON  
2014 MAY 12 PM 3:20