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No. ~~71729-4-I~~

COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION ONE

AUXIER FINANCIAL GROUP LLC, Appellant

v.

JOSEPH T. SELLARS and GREGORY GREENE, Respondents

BRIEF OF RESPONDENT GREENE

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COURT OF APPEALS
DIVISION ONE

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I. INTRODUCTION

Mr. Greene is not a party to the promissory note (Note) that was signed by Mr. Sellars. Mr. Greene never had personal liability to Washington Mutual, nor to Chase, or Auxier Financial Group (AFG) who both are successors under said Note. Mr. Greene has claimed and through uncontroverted evidence shown that he is not a signatory on the Deed of Trust associated with the Note.

Mr. Greene obtained summary judgment based on his defense and not the potential claims of AFG. His defense relies solely on the fact that he did not sign the writing that supposedly conveys an interest in land. Under Washington law, the use of the Statute of Frauds has been codified and such was plead against the claims of AFG seeking liabilities for monies due under the disputed Deed of Trust.

Mr. Greene advanced that defense at a hearing for Summary Judgment in November 2013, but the trial court gave AFG additional time for it to come up with a way around the defense. At the eventual hearing on February 3, 2014, AFG could not provide a single piece of evidence that would raise a question as to a material fact revolving around the defense of the Statute of Frauds. Consequently, Mr. Greene was granted

summary judgment dismissing the claim with prejudice and awarding conditional attorney's fees.

AFG brought this appeal and has rehearsed the same tired arguments that it lost upon in the trial court. The reason it lost is that all of its material facts revolve around its potential claims and not the claim as plead and the defense that defeats that claim. Mr. Greene urges the court to review the pleadings as they exist and not as AFG would like to contort them and remind the court that AFG was granted leave to amend its complaint which it has done.

The court did not err in finding for Mr. Greene, or in awarding the conditional attorney's fees. The evidence that was presented was clear, cogent, and uncontroverted by AFG and its claim for liability under a Deed of Trust that Mr. Greene did not sign was properly dismissed with prejudice.

II. ASSIGNMENT OF ERROR

Mr. Greene does not assign any error on behalf of the Trial court and will address AFG's contentions as presented regarding Mr. Greene's Motion for Summary Judgment.

III. STATEMENT OF THE CASE

Mr. Greene has reviewed AFG's statement of the case and has no issue with the rendition of facts and procedural history.

IV. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment, as with all questions of law are reviewed de novo. *Greaves v. Medical Imaging Systems, Inc.* 124 Wn2d 389, 392 (1994) The appellate court will affirm summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.* Certainly all facts and reasonable inferences are to be considered in the light most favorable to the moving party. *Id.*

If the moving party meets the initial showing of an absence of a material fact, then the inquiry shifts to the party with the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989) If the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the that party will bear the burden of proof at trial," then the trial court should grant the motion. *Id* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986)).

B. Ratification or Tacit Assent do not Meet Statute of Frauds

Under RCW 19.36.010 the state of Washington has codified the Statute of Frauds and requires that "... any agreement, and promise shall be void, unless such agreement ... be in writing, and signed by the party to be charged therewith..." Auxier Financial Group (AFG) spends considerable effort in attempting to establish a material fact that is in question as to its claims against Defendant Greene. However, it has inappropriately placed its time and effort in shoring up its claims rather than attacking the primary defense that was plead and that was the subject of Greene's Motion for Summary Judgment, primarily Mr. Greene did not sign the Deed of Trust and that the Statute of Frauds is a complete defense to the action brought against Mr. Greene and was supported by direct and uncontroverted evidence.

AFG asserts that Mr. Greene is liable for claims arising from a Deed of Trust which has a signature bock including Mr. Greene's name. Mr. Greene, through his declaration attached to the Motion for Summary Judgment (CP 525-529) and its exhibits showing that the signature on the Deed of Trust at issue do not match his signature on his driver's license, or on numerous other documents notarized and entered into the County Record, or even two other documents that were actually notarized by Ms.

Cathy Haage. (See Declaration of Greg Greene accompanying the Reply In Support of MSJ.)

AFG makes no claim in its brief that the signatures on the Deed of Trust are actually Mr. Greene's. Rather, it seeks to institute the depositions of Cathy Haage, Brandon Shimizu, and Jacqueline Kimzey as evidence that there is a prima facie proof that Greene personally appeared before them on the disputed Deed of Trust. The disingenuous usage of parsed quotations forgets to provide the key responses of each of these individuals.

Page 8 of Ms. Kimzey's deposition, line 21 under Exhibit EM-11, the question is asked, "Do you know whether or not Mr. Greene signed that deed of trust?" The reply is "I believe so; however, I wasn't in the room with him at that time."

Page 13 and 14 of Ms. Kimzey's deposition asked whether she was present at the time of the file, on the date of the signatures and her response was that she could not remember. She could not produce any notary logs and could not confirm every signature on the file other than that copies of driver's licenses were obtained for the file. Exhibit EM-9 includes a copy of Mr. Greene's license that was supposedly taken at the time of signature, it is noted that the signature on the license is consistent with Mr. Greene's declaration in regard to signatures as to which signature

is his true signature. Specifically, the license signature does not match the signature on the Deed of Trust.

Ms. Haage, on page 12 of her deposition starting on line 13, “I will say that when, as ... we had a... a lot of times, a daily contact with these individuals. And I ... they could have come in and signed, but not necessarily when I was in the room with them.” (emphasis added). On page 14 line 23, the question was asked of Ms. Haage, “And there were occasions in your office where signatures were taken outside of your presence, and then notarized after the fact?” Her reply on page 15 line 1, “Correct.”

In Mr. Brandon Shimizu’s deposition contained in Exhibit EM-6, on page 18 line 4, the question is asked, “Do you usually fill out the “is/are persons” if we’re dealing with more than one individual?” The answer was “Yes.” On page 12, starting on line 5, Mr. Shimizu stated, “I’m a little remiss in the fact that I did not properly fill out the notary block, it doesn’t say whose signature I was notarizing, so I’m not sure if I was notarizing one of them, both of them, I’m not sure, so – I don’t recall notarizing this document.”

The testimony submitted both in this appeal and at the Summary Judgment have not changed. Each was presented to support AFG’s claims rather than create an issue of material fact regarding the defense of the

Statute of Frauds. Each person quoted failed to provide proof that they were in the room with Mr. Greene at time of notary or that they even notarized his signature. If Ms. Haage had even bothered to look at the signature on file or the driver's license when she notarized a stale signature she would have seen the obvious discrepancy.

Plaintiff offers *Whalen v. Lanier*, 29 Wn.2d 299, 308, 186 P.2d 919 (1947), RCW 42.44.080(1) and RCW 64.08.050 as the standard that a notary's signature is *prima facie* evidence that the signature is that of the signor. However, in careful reading of *Whalen*, it is clear that the Ms. Whalen, who was attempting to avoid a notarized document, presented no evidence beyond her statement that she had not signed the document. The Court, in a minor portion of the case, stated that the standard for overcoming properly accomplished notarial or other certificate of acknowledgment can be done only by evidence that is clear and convincing. *Whalen* at 29 Wn.2d 308.

It is not clear from the evidence presented by the Plaintiff that the Deed of Trust was "properly accomplished," due to the fact that Ms. Haage stated that she notarized documents without Mr. Greene being present. Unlike the plaintiff in *Whalen*, Mr. Greene has presented copies of his signature that have been notarized by others, Plaintiff has presented his driver's license, and Plaintiff has even presented properly

accomplished notaries from Ms. Haage that do not match the signature on the disputed Deed of Trust. This is clear and cogent evidence overcoming the *prima facie* result.

Mr. Greene's' presentation of evidence showed that the signature on the Deed of Trust did not belong to him and there is no disputed material fact in record. The burden, as stated in *Young*, shifted to AFG to present similarly clear and cogent evidence that Mr. Green signed the document, not mere inferences, and it is clear from the evidence and record that AFG failed to meet its burden to overcome the primary fact that Mr. Greene did not sign the writing with which he is being charged by virtue of the Statute of Frauds, codified under RCW 19.36.010.

C. Estoppel is not Appropriate Against Statute of Frauds

AFG claims that there is some reliance aspect afforded to it because it relied on the Deed of Trust and thus should find Mr. Greene liable. The Statute of Frauds has been examined in terms of reliance and promissory estoppel on numerous occasions and the Court has declined to extend the theory of promissory estoppel or its kind as an exception to the Statute of Frauds. *Greaves v. Medical Imaging Systems, Inc.* 124 Wn2d 389, 879 P.2d 276 (1994) (the employment contract that exceeded one year duration was not removed from Statute of Frauds and rendered

unenforceable by employee in his action against employer under theory of promissory estoppel; explicitly declined to adopt Section 139 of Restatement (second) of Contracts.); see also *Lige Dickson Co. v. Union Oil Co. of California*, 96 Wn2d 291, 635 P.2d 103(1981); *Lectus, Inc. v. Rainier Nat. Bank*, 97 Wn2d 584, 647 P.2d 1001 (1982). The Washington Supreme Court has also explicitly stated that alternate theories like equitable estoppel is available only as a shield or defense *Cowlitz Bank v. Leonard*, 162 Wn.App. 250, 254 P.3d 194 (Div 1 2011). Also that equitable estoppel is not available as an “offensive” use by plaintiffs. *Greaves v. Medical Imaging Systems, Inc.* 124 Wn2d 389, 879 P.2d 276 (1994).

Despite the clear statements from our Appellate Courts and the Washington Supreme Court, AFG insists that there is some matter of reliance that should be extended as a sword in the direction of Mr. Greene. This is clearly not the law and the failure to identify the case law that is explicitly contradictory to AFG’s position is reckless. Each of these cases was cited explicitly to AFG in the Reply on the Motion for Summary Judgment.

D. Estoppel is not Appropriate Based on Superfluous Signature

AFG furthers its line of argument under the estoppel theory by bringing up the Quit Claim Deed notarized by Brandon Shimizu. AFG has mischaracterized Mr. Greene's statements and submitted that Mr. Greene challenged a quit claim deed and then in a conflicting statement stated that Mr. Greene has relied upon that quit claim deed. Mr. Greene does rely on that quit claim deed, there is nothing to challenge on it. There is a superfluous signature that is claimed to be Mr. Greene's, but it in no way would negate the effect of Mr. Sellars' signature as a duly authorized agent of Land Barons. What AFG claims is that there is some reliance aspect afforded to it because it relied on the document and thus should find Mr. Greene liable. The Statute of Frauds has been examined in terms of reliance and promissory estoppel on numerous occasions and the Court has declined to extend the theory of promissory estoppel or its kind as an exception to the Statute of Frauds. *Greaves v. Medical Imaging Systems, Inc.* 124 Wn2d 389, 879 P.2d 276,

AFG proposes that equitable estoppel as found in *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734 (1993) has some application to this case. The cases have nothing to do with each other as *Colonial Imports* deals with determining who should bear a loss

after a bankruptcy between two entities, rather than whether a lender can rely on a notarized signature. Despite this, it is important to look at the reliance prong of the test presented.

AFG contends that Washington Mutual, the originator of the Note, relied upon the signature of Mr. Greene. This claim is false. If Washington Mutual (WAMU) relied upon Mr. Greene's signature, then it would not have required that the signature be made in front of a Notary. Clearly, because of the Statute of Frauds in regard to real estate transactions, WAMU required the signature be made in front of a Notary because it could not trust a signatory to not afterward claim it had not actually signed. WAMU's reliance, and the reliance of its assignees, is properly upon the Notary's signature and not Mr. Greene's. Mr. Greene has proven that the signature on the Deed of Trust is not his. AFG is thus left with an action against whoever actually signed the Deed of Trust and the notary for negligently acknowledging that signature.

In *Meyers v. Meyers*, the Court addressed the issues of prima facie evidence and negligence on the part of the notary. 81 Wn.2d 533 (1972). The Court stated that the notary is in a sense, a public officer, required to perform their statutory function in the same manner as any other public official. *Id* at 535 Specifically, there is an imposition of a positive duty

on the part of the notary to “ascertain the identity, or least exercise reasonable care in that regard.” *Id.*

The Court is quoted that “in the instant case, respondents’ evidence established that the Notary’s certificate was false, in that the person executing the deed had forged the names of the grantors. Presumably then, the Notary had failed to identify the person seeking the acknowledgement.” *Id.* at 536. The Court held that “if it is established that notarized signature is forged, the burden of persuasion shifts to the notary to prove by a preponderance of the evidence that he exercised reasonable care in ascertaining the identity of the person whose signature he notarized.” *Id.* At 538.

It is proposed that AFG stands in the position of the notary as it is trying to establish that it took reasonable care in obtaining the signatures for reliance by the lender. The shift of burden is greater than mere inference and AFG failed to provide any proof sufficient to overcome Summary Judgment.

E. Attorney’s Fees are Appropriate for Greene

AFG offers no legal or factual reason for not awarding attorney’s fees to Greene. Consequently, Greene relies on the determination made by the finder of fact that reviewed the deed of trust and found the conditional

award based upon equity and reciprocity for AFG pressing for an award of Attorney's fees based on the language of the Deed of Trust.

F. Reconsideration Was Properly Denied

AFG offers no legal or factual reason for the error assigned to the denial of the Motion for Reconsideration. Consequently, Greene relies on the determination made by the finder of fact that reviewed the pleadings and evidence and determined that denial was proper.

G. Inferences Do Not Make Genuine Issues of Material Fact

AFG seeks on page 36 of its brief to assign error based upon inferences that should have been taken from the Escrow Record. AFG again institutes the prima facie evidence of RCW 65.08.050, but it fails to apply the correct standards under summary judgment where the trier of fact has the ability to weigh those inferences against uncontroverted fact. The trial court did not error because it found the inferences lacking in substance to overcome an uncontroverted material fact that Mr. Greene did not sign the Deed of Trust. Mr. Greene rests on the above analysis regarding the inferences and application in matters of reliance, ratification, or tacit assent.

H. The Split Action is Not Implicated

AFG looks into *Sprague v. Adams*, 139 Wn. 510 (1926) regarding the splitting of a cause of action. Greene submits that there is no split of a cause of action because AFG does not have a cause of action against Greene. Mr. Greene is not a party to the Note held by AFG. WAMU made the lending to Mr. Sellars as an individual; consequently, there is no privity between AFG and Greene regarding the note. Secondly, Mr. Greene is not a signatory to the Deed of Trust and was consequently released from such action by way of his affirmative defense under the Statute of Frauds.

Regardless, the Trial Court allows AFG to file an amended complaint which is continuing in the lower Court and has included new causes of action against Ms. Haage and Ms. Kimzey. If the effect of the dismissal of the cause of action under the Deed of Trust poses no negative impact on AFG and its pursuit of the Notary.

V. CONCLUSION

Mr. Greene never signed a note with WAMU or any of its assignees. Mr. Greene did not sign the disputed Deed of Trust. The Statute of Frauds provides a direct defense to AFG's claims under the complaint. Mr. Greene provided clear and cogent evidence that is unrefuted and

uncontroverted by AFG that his signature is not on the Deed of Trust. AFG failed to meet its burden under the Summary Judgment standards and the trial court did not error in ruling in favor of Mr. Greene when it weighed the evidence available on the Summary Judgment. Mr. Greene respectfully requests that the Trial Court's decision be affirmed.

Dated December 20, 2014

Respectfully Submitted,



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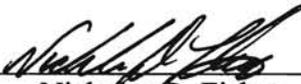
I Nicholas D. Fisher, under penalty of perjury under the laws of state of Washington, certifies and states as follows:

I Certify that I am over 18 years of age, not a party hereto, and competent to be a witness herein. On December 22, 2014 I hand delivered to each of the individuals below and placed for delivery with the United States Postal Service in Everett, Washington, first class mail postage prepaid, a copy of this document to the following and sent via email:

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