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NO. 35171-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants

vs.

**COWLITZ COUNTY and RYDERWOOD IMPROVEMENT AND
SERVICES ASSOCIATION, INC.,**

Respondents.

APPELLANTS' BRIEF

SLOAN BOBRICK OLDFIELD & HELSDON, P.S.
By: Jeffrey P. Helsdon WSBA #17479
Attorneys for Respondent
7610 - 40th Street West
University Place, WA 98466
(253) 759-9500

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- Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist.*, 14 Wn.App. 838, 545 P.2d 42 (1976)
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- Kofmehl v. Steelman*, 80 Wn.App. 279, 908 P.2d 391 (1996)
- Meltzer v. Wendell-West*, 7 Wn.App. 90, 497 P.2d 1348 (1972)

STATUTES

- RCW 36.70C.040
- RCW 36.70C.080
- RCW 56.20.010-56.20.030

OTHER

- Washington Real Property Deskbook, 3d. ed. Vol. III, § 45.3(3)(a)
- 3 American Law of Property § 11.25

ASSIGNMENTS OF ERROR

1. Appellants Bichler and Southworth appeal the ruling of the Cowlitz County Superior Court dismissing their Land Use Petition filed pursuant to Chapter 36.70C RCW on the basis of lack of jurisdiction for Appellants' failure to name as a defendant the seller of the property who held bare legal title under an existing Real Estate Contract, as well as denying their Motion for reconsideration on the same grounds.

ISSUES

1. Whether the trial court committed error when it ruled that a Real Estate Contract vendor is an indispensable party under RCW 36.70C.040(2)(b), when Mr. Goro, the contract vendor, only retained an interest that is the equivalent of a mortgagee?
2. Whether the trial court erred in dismissing the Bichlers' LUPA Petition when the parties had waived the alleged defect of failure to join persons needed for just adjudication, and the trial court itself had ordered that such objections were waived?
3. Whether the trial court erred in dismissing the Bichlers' LUPA Petition on the basis that Mr. Goro was the taxpayer of record, when he was not the taxpayer of record as a matter of law?

STATEMENT OF THE CASE

On May 23, 2001, Appellants Bichler and Southworth (hereafter “Bichler”)¹ purchased a 6.28 acre parcel of real property in Cowlitz County, Washington (hereafter the “Bichler lot”) from Gabriel Goro. The purchase price was \$40,000.00, of which \$25,000.00 was seller-financed with Mr. Goro through the execution of a Real Estate Contract CP 113-117.

In approximately 2002-2003, a dispute arose between the Bichlers and several residents of a plat that bordered the plat in which the Bichler lot was situate. The neighboring residents objected to the use the Bichlers had made of the Bichler lot as a place for the Bichlers and their friends to bow hunt. They expressed objection to the Bichlers’ allowing their friends to park their recreational vehicles on the property during hunting season. CP 125.

After consultation with the Cowlitz County Planning Department, the Bichlers applied for a Special Use Permit to enable them to allow their friends’ motor homes to stay on the 6.28 acre Bichler lot. The Special Use Permit application was denied by the Hearing Examiner on August 22, 2005. CP 138.

¹ Ms. Southworth passed away in September, 2006, after this appeal had been filed.

As a result of the denial, Appellants filed a Petition under Chapter 36.70C, the Land Use Petition Act (hereafter “LUPA”) on September 9, 2005, asking the Cowlitz County Superior Court to reverse the decision of the Hearing Examiner and approve Appellants’ Special Use Permit application for a campground. In the LUPA petition, Appellants Bichler named Cowlitz County as the defendant. Ryderwood Improvement and Services Association, Inc intervened. CP 1 -37.

On October 17, 2005, the parties to the LUPA proceedings executed a stipulation in which they waived the defenses enumerated under RCW 36.70C.080(3), including the defense of “untimely filing or service of the petition, and failure to join persons needed for just adjudication. . .” CP 215-216.

Based upon the stipulation described above, the Cowlitz County Superior Court entered an order on October 17, 2005 in which the court ordered, in part:

“ . . .

5. The Defenses enumerated in RCW 36.70C.080(3) are hereby waived and may not be raised hereafter by any party;

6. There are no jurisdictional or procedural issues that require a hearing as contemplated by RCW 36.70C.080(1).” CP 217.

On March 29, 2006, the Cowlitz County Superior Court issued a letter ruling in which it dismissed the Bichlers' LUPA Petition ruling that "it does not have jurisdiction to hear the appeal." CP 210-211. The court ruled that Mr. Goro, the outstanding Real Estate Contract vendor, was a necessary party required to be served with the Land Use Petition under RCW 36.70C.040 (2)(a) and (c). Similarly, the Bichlers' Motion for Reconsideration was denied on July 7, 2006, the court finding in pertinent part that "the Court reaffirms its prior conclusions that RCW 36.70C.040(2) is jurisdictional and failure to serve Gabriel Goro as an identified owner of the subject property bars review of the land use petition." CP 227-228.

ARGUMENT

1. The Trial Court committed error when it ruled that a Real Estate Contract vendor is a necessary party under RCW 36.70C.040(2)(b), because Mr. Goro, the contract vendor, only retained an interest that is the equivalent of a mortgagee.

When an owner of real property enters into an executory contract for the sale of the land and the purchaser enters into possession, the interest retained by the seller is personal property and the seller's right is to payment under the contract. *Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist.* 14 Wn.App. 838, 545 P.2d 42 (1976) citing

Meltzer v. Wendell-West, 7 Wn.App. 90, 497 P.2d 1348 (1972), and cases cited therein.

Washington courts have continuously held that the Bichlers' vendee's interest in a real estate contract makes them the owner of the real property. In Cascade Sec. Bank v. Butler, 88 Wn.2d 777, 781-82, 567 P.2d 631 (1977), the court held that a real estate contract vendee's interest is "real estate" within the meaning of the judgment lien statute.² See also Freeborn v. Seattle Trust & Sav. Bank, 94 Wn.2d 336, 340, 617 P.2d 424 (1980) (characterizing vendee's interest as real property and vendor's interest as personal property); Bays v. Haven, 55 Wn.App. 324, 328, 777 P.2d 562 (1989) (purchaser under executory real estate contract has substantial rights and is beneficial owner of real property); Chelan County v. Wilson, 49 Wn.App. 628, 632, 744 P.2d 1106 (1987) (real estate contracts are transfers of an equitable interest in property).

In Thorndyke the court held that when a real estate contract is of record in the "office of county auditor, only vendees under contract are "owners" entitled to protest formation of local improvement district under statute." Committee of Protesting Citizens, Thorndyke Area v. Val Vue

² The court in Terry further stated that "a vendee to an executory contract should have the same opportunity to enjoy the protection of bona fide purchaser status as someone financing the transaction in some other way, such as through a deed." *Id* at 831.

Sewer Dist. 14 Wn.App. 838, 545 P.2d 42 (1976) citing RCW 56.20.010-56.20.030. (While applying the local improvement district statute).

The Bichler are the owners of the Bichler lot for purposes of the LUPA statute and had no duty to serve Mr. Goro under RCW 36.70C.040(2)(b). Mr. Goro's only interest in the real property was a personal property interest, not a real property interest entitling him to notice.

2. The Trial Court erred in dismissing the Bichlers's LUPA Petition because the parties had waived the alleged defect of failure to join persons needed for just adjudication, and the trial court itself had ordered that such objections were waived.

The Washington Land Use Petition Act is a streamlined procedure designed to expedite review of land use decision. As part of the statutory scheme, the parties to the appeal before the Superior Court are permitted to narrow the issues on appeal. RCW 36.70C.080 provides, in relevant part:

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

RCW 36.70C.080.

Pursuant to such statutory authority the parties specifically entered into a stipulation which, among other things, waived the defenses enumerated in RCW 36.70C.080(3). A stipulation was filed with the Court on October 17, 2005. The parties agreed that Gabriel Goro was not a necessary party for purposes of the appeal.

3. The Trial Court erred in dismissing the Bichlers' LUPA Petition on the basis that Mr. Goro was the taxpayer, because he was not the taxpayer as a matter of law.

The trial court incorrectly stated that Mr. Goro was a taxpayer for the Bichler lot. Mr. Goro was not the taxpayer, nor did the Bichlers allege so. The Bichlers purchased the Bichler lot on a Real Estate Contract from Mr. Goro in 2001. The contract required Mr. Bichler to pay all taxes on the property:

12. TAXES, ASSESSMENTS AND UTILITY LIENS.
Buyer agrees to pay by the date due all taxes and assessments becoming a lien against the property after the date of this Contract, Buyer may in good faith contest any such taxes and assessments so long as no forfeiture or sale of the property is threatened as the result of such contest. .
. CP 115.

The Land Use Petition filed by the Bichlers did not allege that Mr. Goro was the legal taxpayer of the Bichler property. It merely stated that the "written decision of the Hearing Examiner identified Gabriel D. Goro as the taxpayer of record." CP 2. The Petition goes on to state that the

property was sold by Mr. Goro to Mr. Bichler in 2001, and that “Mr. Goro has made no appearance whatsoever in this action” CP 2. Such statements are neither admissions nor allegations that Mr. Goro is the taxpayer.

RCW 36.70C.040(2)(c) provides that “[i]f no person is identified in a written decision as provided for in (b) of this subsection (i.e., as the owner of the property at issue),” then the taxpayer identified by the county assessor should be served with the petition. The Hearing Examiner, in three places in its Findings, Conclusions and Decisions, identified the owners of the Bichler lot. In Finding of Fact No. 5, he found that:

“As noted in the Staff Report, the applicants (the Bichlers) have been coming to the area for years to camp and hunt. *After purchasing the subject property in 2001*, the applicants began developing the campground. . . (Emphasis added)” CP 125.

In Finding of Fact No. 15, the Hearing Examiner makes note of the mistake, as a matter of law, made on the Cowlitz County Assessor’s website which lists Mr. Goro as the taxpayer, and makes a finding of fact that the Bichlers are the owners:

“ Richard Shaffer testified describing himself as the actual owner –rather than John Bichler. According to Cowlitz County Assessor records, the property owner is Gabriel D. Goro. John Bichler and Marianne Southworth *are the contract purchasers*. (Emphasis added).” CP 127.

In Conclusion of Law No. 4, in describing the legal effect of covenants, conditions and restrictions that affect the title to the Bichler lot, the Hearing Examiner made the following conclusion:

“The Applicant in this case (the Bichlers) purchased the property without those property rights represented by the CC&R’s.” CP 133.

Mr. Goro was not the taxpayer and the assessor’s records, which incorrectly listed him as the taxpayer, are not a valid source for the requirement that Mr. Goro be served, because the Hearing Examiner identified the Bichlers as the owners of the Bichler lot.

The obligation to pay taxes rests with the party in possession and receiving the use and income of the property. *Kofmehl v. Steelman* 80 Wn.App. 279, 908 P.2d 391 (1996) citing 3 American Law of Property § 11.25, also in support of this proposition is the WASHINGTON REAL PROPERTY DESKBOOK, 3d. ed. Vol. III, § 45.3(3)(a).

Since the Bichlers were in “possession and receiving the use and income of the property,” and the real estate contract between Mr. Goro and the Bichlers provided that the Bichlers were to pay the taxes, they were the “taxpayers of record.” Mr. Goro was not entitled to notice under RCW 36.70C.040(2)(c).

CONCLUSION

All necessary parties to the action had been joined. Mr. Goro is not a necessary party, as he was not the owner of the subject property at the time of the application. Mr. Goro's only interest in the property was a personal property interest in entitlement to the contract payments. Mr. Goro's position was nothing more than that held by any lender secured in the performance of their loan in the real property. Notice is not required of such lenders nor is it required of Mr. Goro as he lacked a present possessory interest the land.

Respectfully submitted,
Sloan Bobrick Oldfield and Helsdon, P.S.
Attorneys for Appellants



By: Jeffrey P. Helsdon, WSBA #17479

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing Appellants' Brief to be served on the following:

Frank F. Randolph
Walstead Mertsching P.S.
P.O. Box 1549
Longview, WA 98632
Fax: (360) 423-1478

Ronald S. Marshall
Chief Civil Deputy
Hall of Justice
312 SW 1st Street
Kelso, WA 98626
Fax: (360) 414-9121

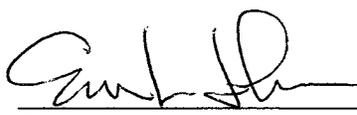
by the following indicated method(s):

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by causing full, true and correct copies thereof to be hand-delivered to the attorney(s) at the addresses shown above, the last known addresses of the attorney(s), via ABC Legal Messenger, on the ____ day of November, 2006.

DATED this 13th day of November, 2006, at University Place, Washington.



Erica L. Johnson
Legal Assistant to Jeffrey P. Helsdon