

NO. 37760-8-II

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

VICTOR ERICKSON and LARRY ERICKSON,

Plaintiffs/Appellant,

v.

CHARLES W. CHASE and NANCY CHASE, husband and wife,

Defendants and Third Party Plaintiffs/Respondents

LLOYD COMBS and DORIS COMBS

Third Party Defendants and Fourth Party Plaintiffs,

JAMES ROBSON

Fourth Party Defendant

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE E. THOMPSON REYNOLDS

COMBS' REPLY TO ROBSON'S RESPONSIVE BRIEF

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COURT OF APPEALS
DIVISION II

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I. The Argument That Combs Only Had Right Under a Quitclaim Deed Is Meritless.

Robson argues that no guarantees were provided to Combs as he had only obtained a quit claim deed. [Robson Brief pp. 5-6]. This is meritless.

The “quit claim” document [CP 52] is the document by which the Hoseas transferred the purchaser’s interest in the Rocha-Hosea real estate contract. The title to the land still vested in Robson.

In order for Combs to be able to sell to Chase in 2003, he needed to actually have title. To that end, on December 5, 2003 Robson provided him a Statutory Fulfillment on December 5, 2003. [CP 53-54]. It is that deed which provided the warranties under RCW 64.04.020 which are the subject of the tender of defense. To argue that Robson did not warrant title to Combs is a frivolous argument.

II. The statute of limitations could not commence earlier than December 5, 2003.

Robson argues that since a real estate contract buyer is beneficial owner, then the statute of limitations on a warranty claim must begin at the time the real estate contract is executed. The fallacy in Robson’s

argument is that until the fulfillment deed was given, no warranty claim under the deed could have existed.

Turpen v. Johnson, 26 Wn.2d 716, 175 P.2d 495 (1946), does not suggest a different result. In that case, the issue was whether the buyer under a real estate contract had the right to raise the statute of limitations defense in an eviction action. In that case, there was no question as to any warranties provided by deed. Robson points to no authority in Washington or elsewhere in which a claim for breach of warranty of title defense was ever asserted prior to the time a deed was delivered. That is the central issue in this case.

RCW 4.16.040 clearly provides a six year statute of limitations, and the earliest it could have run is December 5, 2009.

Robson complains that unless the statute of limitations period begins to run as of the time to the original real estate contract, he could be exposed to claims for an unreasonable period of time. No doubt, he could have chosen to finance the transaction in a different way, so as to reduce his exposure. He could have sold the land by deed in 1997 and then taken a mortgage or deed of trust back from the buyer as his security. A statute of limitations defense to a breach of warranty in 2006 would certainly be available in that scenario.

That is not how Robson chose to finance the project. By choosing to retain title and settling the land on contract, he made no warranties until the deed was delivered. The first and only time he warranted anything to Combs was in the December 5, 2003 deed. One of those things warranted was that he would defend title. Therefore, when a claim against title was asserted by Erickson, he had a duty to defend them. Combs does not dispute that a different result would not have not have occurred had Robson decided to sell in a different way than he did (i.e. transferring by deed and mortgage in 1997). Under the method he chose, Robson remained legal owner of the property until 2003 and only then warranted a defense to title claims, such as Erickson's.

The statute of limitations had not expired when the tender of defense was made in 2006.

III. Robson Is a Party to the Litigation and Bound By Its Results.

Robson argues that should the court reverse on the issue of tender, then he should not be bound by the result of the underlying case. [Robson Brief pp. 9-10]. First, he ignores the fact that he is, indeed, a party to the case. While it is true that he obtained a summary judgment order in his favor, that order was not final under CR 54(b).

That rule provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54(b)

The summary judgment of October 8, 2007 made no determination that it would be a final judgment as to Robson. Indeed, after a motion for reconsideration of the summary judgment order was filed by Combs, the court ruled quite the opposite regarding finality, stating it was “[N]ot to be considered a final judgment pursuant to CR 54(b).” (CP 81).

Even if the court should reject Combs’ argument, Robson points to no part of the trial which needs relitigation. Robson’s only obligation was to defend title. He rejected that and the case proceeded, with the title claims defended. At least with respect to the upper Bear Prairie road claim, those defenses were successful. He points to nothing in the record

which he would have done differently, and, as he notes, he testified in the trial itself. The argument that reversal on the issue of tender would require a retrial is without merit.

IV Robson Has No Right to Attorney Fees Against Combs.

Robson claims the trial court erred in failing to award him fees. The first point is technical. He did not cross-appeal the denial of fees by the trial court in the summary judgment order. As such, the issue of fees should not be reviewed under RAP 2.4(a).

The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

Even if the issue were preserved for appeal, there are two additional bases for rejecting Robson's fee claim.

First, Combs is not a party to the contract with the fee provision, which is the 1997 Rocha-Hosea contract, and Robson fails to demonstrate how or where Combs undertook the potential fee liability. Even if Combs were a party to the agreement, however, the six year statute of limitations

would have barred any claim under the 1997 contract well before 2006.

The fee claim is time-barred. RCW 4.16.040.

V. Conclusion.

Robson had a duty to defend the Erickson title claim which was tendered to him in 2006. The statute of limitations had not run as the duty arose out of a 2003 deed. As such, all the defense costs incurred by Combs to defend title, plus the judgment which Chase obtained against Combs for his costs are Robson's responsibility. Summary judgment in favor of Robson should be reversed.

RESPECTFULLY SUBMITTED this 16th day of June

2009.



GIDEON CARON, WSB #18707
Of Attorneys for Respondents/Appellants Combs

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Plaintiffs,

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CERTIFICATE OF SERVICE

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