

Res. Cross Appd.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

OPENING BRIEF OF THIRD PARTY DEFENDANTS
AND FOURTH PARTY PLAINTIFFS COMBS

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INTRODUCTION

James Robson (hereinafter referred to as Robson) owned certain Skamania County real estate which he transferred by deed to Lloyd Combs (hereinafter referred to as Combs) in 2003. Subsequently, in 2003, Combs tendered the property by deed to Wayne Chase (hereinafter referred to as Chase). In 2006, Victor Erickson and Larry Erickson (hereinafter referred to as Erickson) sued Chase on a number of claims, including a title claim (adverse possession). Chase tendered defense of the adverse possession claim to Combs, who, in October, 2006, in turn tendered it to Robson. Robson refused to accept tender and Combs sued him as a fourth party defendant in November of 2006. Subsequently, Robson and Combs filed cross-motions for summary judgment. The Superior Court denied Combs' motion, and granted Robson a motion for summary judgment that the six year statute of limitations barred Combs' warranty of title claim against him.

ASSIGNMENT OF ERROR

1. Did the trial court err in ruling that the statute of limitations barred Combs' fourth party complaint for breach of warranty of title?

STATEMENT OF THE CASE

Robson owned 20 acres and sold them all to Mr. And Mrs. Rocha under real estate contract executed October 24, 1997 [CP 35-40]. No warranty of title was made in that contract. Rather, it provided as follows in paragraph 8:

“FULFILLMENT DEED. Upon payment of all amounts due seller, seller agrees to deliver to Buyer a Statutory Warranty Deed in fulfillment of this Contract. The covenant of Warranty in said deed shall not apply to any encumbrance assumed by the Buyer or to defects in the title arising subsequent to the date of this Contract by, through or under persons other than the seller herein. Any personal property included in the sale shall be included in the fulfillment deed.”

Five acres of the twenty acres [those eventually transferred to Chase] were then transferred from the Rochas to the Hoseas in May, 1998 under a real estate contract [CP 42-48]; Simultaneously, the Rochas assigned the seller’s interest in the real estate contract back to Robson. [CP 49-51]. Robson, as grantee assumed the obligations of Rocha, which also had the same form language of paragraph 8, requiring seller to deliver a statutory warranty deed on fulfillment.

On May 20, 2001, the Hoseas transferred the purchaser’s interest in the contract to Combs, the third-party plaintiff and fourth-party defendant. This is the first date that Combs had any interest in the property. [CP 52].

Robson has testified that he gave the Statutory Fulfillment deed to Combs (who had assumed the purchaser's interest). This deed was both signed and delivered on December 5, 2003. [CP 53-54]. Combs then sold to Chase and gave Chase a warranty deed, also in December, 2003.

The lawsuit was filed in June, 2006. Among other things, the Ericksons claim prescriptive easement rights against Chase. When tender of defense of the warranty deed claims was made to Combs, such tender was, in turn, made to Robson. [CP 71]. A fourth party complaint was filed in November 2006. [CP 29-30]. Cross motions for summary judgment were made by Combs and Robson, and the court dismissed the fourth party defendant based on the running of the statute of limitations of any warranty deed claims, finding that the statute of limitations expired October 24, 2003, six years after the October 24, 1997, real estate contract. [CP 72-73].

The case proceeded to a lengthy trial in which Combs had counsel, who, together with Chase opposed the adverse possession claims asserted by Erickson. Despite their efforts, Erickson was partially successful and obtained an easement to the lower road. [CP 209-227]. Subsequently, Chase sought fees against Combs for the breach of warranty of defense. The court awarded judgment in favor of Chase against Combs in the sum

of \$39,405.00 relating to attorney fees to provide a defense to Chase on the title claims. [CP 82-87].

This appeal followed. Combs contends that Robson is liable for the \$39,405.00 in Chase's attorney fees plus any additional title related fees Chase may be awarded. Additionally, Combs incurred fees relating to opposing Erickson's title claims through trial, and Robson should be liable for those fees as well.

ARGUMENT

I. Standard of Review.

This is a review of a summary judgment. As such, all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.* 134 Wash.2d 692, 952 P.2d 590 (1998).

II. The Tendered Claim was for Breach of Warranty of Title.

The nature of the fourth party complaint was breach of warranty of title for failure to assume defense of the adverse possession claim. The statute is RCW 64.04.020.

In relevant part, it states....

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) **That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same;** (2) that the same were then free from all encumbrances; and (3) **that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same,** and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

(Emphasis added.)

By operation of this statute, Robson warranted to Combs title and defense of claims adverse to the title. That is the basis of the fourth party complaint.

III. The Cause of Action Accrued Only After the Deed Was Given In 2003.

It is anticipated that Robson will claim that the relevant date for beginning the statute of limitation is the date of the real estate contract between Rocha and Robson, October 24, 1997, so the statute of limitations expired, six years later, on October 24 2003. That argument is invalid. A cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Eckert v.*

Skagit Corp., 20 Wn.App. 849, 851, 583 P.2d 1239 (1978). No right to apply to the court for relief could be available for breach of warranty of title in a deed until a deed is given, and that did not even occur until 2003.

A breach of warranty claim, which Combs asserts against Robson based on the Statutory Warranty Fulfillment Deed falls under the six year period of RCW 4.16.040. As our Supreme Court stated almost a century ago:

[I]f land conveyed by general warranty is in adverse possession under paramount title at the execution of the deed, the grantee's eviction dates, and **the statute of limitations against an action for breach of warranty runs, from the date of the deed.**

(Emphasis added.) *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724, 725 (1918). Since the deed was given December 8, 2003, any claims could be asserted under it until December 8, 2009, six years later.

The October 24, 1997 real estate contract (to which Combs was not even a party) did not warrant anything regarding title; it simply promised that upon final payoff in the future, the seller would provide the buyer with good title. To hold that a party could bring an action for breach of warranty of title even before the deed was given would be a radical change in established law. Certainly, the statute of limitations for a deed warrant cannot run before the deed is given.

Inasmuch as Combs' fourth-party complaint based on breach of warranty of title in the deed was filed in November 2006, and the deed was given in December, 2003, just over three years earlier, the claim was timely under RCW 4.16.040. It was error for the Superior Court to hold that the claim for breach of warranty in a deed could accrue any earlier than the date the deed was delivered. That ruling should be reversed

CONCLUSION

The court erred in granting Robson's motion for summary judgment and in not granting Combs' cross-motion for summary judgment.

Combs respectfully requests that the court reverse the summary judgment in favor of Robson and grant summary judgment in favor of Combs, substitute Robson for Combs in \$39,405.00 money judgment in favor of Chase and remand to the Superior Court for an award for the fees incurred by Combs to oppose the title claims of Erickson.

RESPECTFULLY SUBMITTED this 5th day of MAY

2009.



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

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SKAMANIA COUNTY SUPERIOR COURT Case No. 06 2 00083 0

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CHARLES W. CHASE & NANCY CHASE,

Defendants & Third Party Plaintiffs

v.

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Third Party Defendants and Fourth Party Plaintiffs.

v.

JAMES ROBSON

Fourth Party Defendant

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I hereby certify that I served Opening Brief of Third Party Defendants and Fourth Party Plaintiffs Combs on the following named person(s) on the date indicated below by mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below:

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