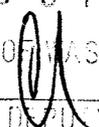


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37795-1-II
COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

ANDREW P. DICKINSON,

Appellant,

v.

KARI N. WINTHER,

Respondent.

APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

A. The Summary Judgment Standard.

As the Court knows, this is an appeal from summary judgment. The standard for summary judgment is high and is appropriate *only* if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c)(emphasis added).

Summary judgment should be granted only when the moving party is entitled to judgment as a matter of law, when it is quite clear what the truth is, and when no genuine issue remains for trial. *Washington Civil Procedure Deskbook*, Vol. 3 at 56-53 (WSBA 2002 and Supp. 2006). It is not the purpose of the rule to cut litigants off from their right of trial by jury if they really have issues to try. *Id.* (citation omitted).

Although Winther would like the court to adopt her version of the “facts”, the law requires that all facts and reasonable

inferences from the evidence be construed in favor of the nonmoving party – which is Dickinson. *Id.*; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26 (2005); *Schaaf v. Highfield*, 127 Wn.2d 17 (1995). The non-moving party’s factual allegations must be taken as true for purposes of summary judgment. *State ex rel. Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963). “If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility [or question of fact], and summary judgment will be denied.” Tegland, Vol. 14A, Washington Practice, § 25.16 (2003)(citations omitted).

Finally, the trial court is not permitted to weigh the evidence in ruling on a motion for summary judgment. The only matter before the court is whether the moving party is entitled to judgment as a matter of law upon the undisputed material facts. *Washington Civil Procedure Deskbook*, Vol. 3 *supra*, at 56-53 (citation omitted). If reasonable people might reach different conclusions, summary judgment should be denied. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993).

Based on these well-settled standards for summary judgment, the court erred in granting defendant's motion. The judgment must be vacated and the case remanded for trial – preferably to a different trial judge.

B. Factual Issues Abound.

Based upon Dickinson's declaration of the "facts" and accompanying exhibits, numerous genuine factual issues were presented which precluded the entry of summary judgment, including, but not limited to, the following:

The Parties' Intentions:

- * What was the intent of the parties with respect to putting Winther on title to Dickinson's home?
- * Was Winther put on title solely to help Dickinson qualify for a larger mortgage loan, the proceeds of which would be used to pay off Winther's debts? Or was Winther being given a 50% ownership interest in Dickinson's home purely as a gift?
- * Was Winther to share in any increase in Dickinson's home value for being on title? If so, what?

Contract Issues:

- * Did Winther and Dickinson enter into a contractual arrangement? If so, what were the terms?

* Did Winther breach her contractual obligations to Dickinson? Or was Winther free to “walk away” from her promised financial contributions and obligations at any time?

* Did Winther breach the implied covenant of good faith and fair dealing by her actions?

Duress and Winther’s Misconduct:

* Did Winther engage in wrongful or oppressive conduct that created a serious financial crisis for Dickinson?

* Did Winther use that financial crisis to exact or extort a “release” from Dickinson?

* Did Winther make an “improper threat” to Dickinson as defined by WPI 301.10?

* Did Dickinson have a “reasonable alternative” to signing the releases in light of Winther’s past and continuing misconduct? If so, what?

* How and why would the “alternative” have been reasonable under the circumstances Dickinson faced at that time?

* Did Winther have a “legal right” to refuse to execute a quitclaim deed?

II.

ARGUMENT

The following is a brief rebuttal to Winther’s “facts” and “arguments” set forth in her responsive brief. All of Winther’s

arguments only underscore the existence of genuine factual issues, precluding summary judgment.

1. The Parties' Intent as to the Purpose for the Quitclaim Deed that put Winther on Title to Dickinson's Home is a Question of Fact.

Winther's first argument – albeit specious – is that she owned a “one-half” interest in Dickinson's home and, therefore, she had a “legal right” not to quitclaim her interest back to Dickinson unless he signed a release. (Respondent's Brief at 17-19). Winther falsely asserts that: “There is no dispute that Winter was a joint owner of the Battleground property pursuant to the quitclaim deed executed by Dickinson in June 2005.” (Respondent's Brief at 19). Not true.

Dickinson has always disputed Winther's ownership claim to his property. In Paragraphs 35-36 of Dickinson's declaration, Dickinson states, in pertinent part:

35. I contacted several different mortgage brokers in a desperate attempt to refinance my home again, if possible, solely in an effort to buy time to avoid foreclosure. I was told that I had one late mortgage payment and that I could not have any more if I stood any chance of refinancing. I also had to get Winther off title to my home or get her to pay me back. Without her cooperation, I would be unable to refinance the US Bank loan and could not pay the

monthly mortgage payments.

36. I called Winther again to seek her cooperation. I told her that I would reduce the amount of money that I believed she owed me. She asked me how much money I thought would be fair. I told her to pay me \$100,000 and quit claim my home back to me. The \$100,000 figure was extremely generous since I had paid off \$123,000 of her debts only two years previously and she had made only 18 or 19 monthly payments towards the US Bank loan in the interim. She refused and hung up.

Id. (emphasis added). The only reasonable inference to be drawn from Dickinson's testimony is that HE certainly did not think Winther was a "joint owner" of his Battleground home.

Moreover, no consideration was given for the conveyance in the first place (only "love and affection" is recited). Winther wants to ignore the fact that she was put on title SOLELY so that Dickinson could obtain a larger mortgage loan to PAY OFF HER DEBTS! There is no evidence that Dickinson did not or could not qualify for the original loan amount he planned to borrow without her. He obviously was able to refinance without her after she extracted the "release" from him. It was only after Winther approached him with her financial proposal – requiring Dickinson to borrow \$123,000 or

more to pay off her debts – that Dickinson was told he did not qualify for the loan on his income alone. Winther urged Dickinson to proceed with the loan by putting her on title with him. The transaction was to benefit Winther.

In *Pearson v. Gray*, 90 Wn. App. 911, 915, 954 P.2d 343 (1998), the Court of Appeals reversed the trial court’s grant of summary judgment with respect to execution of a quitclaim deed by the property owner in favor of Gray. The court reasoned that where there are circumstances that “calls into question the circumstances surrounding the granting of the deed, summary judgment must be denied.” Id. at 913. The court further stated that, “[b]ecause the quitclaim deed, standing alone, is not dispositive of the parties’ intent, we must reverse.” Id. at 915. When construing a deed, the intent of the parties “is of paramount importance and the court’s duty to ascertain and enforce.” *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996).

2. The Trial Court Cannot determine “reasonableness” or whether a “reasonable alternative” existed because such determinations are, by their nature, questions of fact.

Some issues are commonly regarded as issues of fact sufficient to preclude summary judgment. Reasonableness and/or

whether a “reasonable alternative” existed are just two examples. As Karl Tegland aptly noted in Washington Practice, summary judgment “has often been precluded because the trier of fact needed to determine whether something was reasonable, or whether a person acted reasonably.” Tegland, Washington Practice, Vol. 14A “Civil Procedure” § 25.17 at 106 (2003).

While Winther asserts that Dickinson had time to consult with an attorney prior to signing the releases, Winther does not state how or why such a course of action would have been a “reasonable alternative” under the circumstances – particularly in light of the urgent and desperate financial circumstances that Winther had placed Dickinson in. Winther admitted in her deposition that she would not execute a quitclaim UNLESS Dickinson signed a written release. What alternative did Dickinson have other than to sign the “release”, get his home refinanced and then seek redress in the court system for Winther’s misconduct? Dickinson took the only “reasonable” course he could take. In any event, this is not an issue that can be decided as a matter of law. It is for the jury to decide.

3. Winther Wrongfully Stopped Paying her Share of the Monthly Mortgage Payment – Not Dickinson.

In another attempt to turn fiction into fact, Winther claims that she stopped paying her share of the monthly mortgage payment because Dickinson wasn't paying his share – forcing Winther “to cover both parties’ share of the mortgage payments for a period of months”, which she no longer could afford to do. (Respondent’s Brief at 25). Even if such were true, Winther is not relieved of 30 years’ of monthly mortgage payments to Dickinson and have her home and credit card debts paid off in full simply because Dickinson failed to pay his share of the mortgage payment for a month or two.

A review of the Declaration of James Morrell at iQ Credit Union (CP 150) shows that only in one month – February 2007 – was there insufficient money in the parties’ joint account to cover the full US Bank mortgage payment. The March 2007 mortgage payment was electronically paid as usual the next month and then Winther closed the account – taking the remaining \$1325.93 in that account.

Whether Dickinson did or did not miss paying his share of the monthly mortgage payments for a brief time is a factual question. It

is also not relevant to the determination of Dickinson's defense of economic duress.

Furthermore, even if Dickinson had failed to pay his share of the mortgage payments for a "few months" as Winther claims, by June 2007, Dickinson had paid 4 months' of mortgage payments on his own (March, April, May and June – US Bank applied the monies taken in March to the missed February payment) by combining his income and proceeds from the sale of personal property to make up for Winther's missed payments.

It is also a factual question as to whether Winther was entitled to cease making any payments at any time, knowing that she was contractually obligated to continue paying to both Dickinson and to US Bank. Winther had nothing to lose, however, by defaulting since her home was paid for and it was Dickinson who stood to lose everything if Winther continued her refusal to contribute her share of the mortgage payments, which she did.

- 4. Whether gave Dickinson the "take-it-leave-it" release ultimatum on June 26, 2007 – less than 1 day prior to the execution of the "release" and at a time when Dickinson had no money left to pay Winther's share of the mortgage payments.**

Winther claims that Dickinson had 4 months to sue her, which she claims would have been a “reasonable alternative” to signing the releases. Again, how would a lawsuit against Winther have been a “reasonable alternative” at any time prior to getting Winther off his title? Dickinson was forced to refinance due to Winther’s misconduct. He could only refinance with Winther’s cooperation. If the instant lawsuit is any indication of reaching a “speedy” judicial resolution, Dickinson would have been bankrupt and homeless by now.

Dickinson filed the instant case in July 2007 – nearly 18 months ago. Dickinson could not afford to risk Winther’s continued refusal to cooperate by filing a lawsuit against her. He had had enough of her bad faith conduct by that time to last a lifetime. Dickinson had no other reasonable alternative than signing the “releases”, refinancing his mortgage loan to take out additional equity, and then sue Winther for her misconduct. Any other option was simply not reasonable under the circumstances.

5. The Trial Court Abused her Discretion with Respect to the refusal to allow Supplementation of the

Record with Winther's Deposition Testimony and Exhibits, the denial of the Motion for Reconsideration, and Cancellation of the Lis Pendens.

These issues were adequately briefed in Dickinson's Opening Brief and in the Clerk's Papers. Only the following few comments and arguments will be made.

Supplementation of the Record was necessitated by counsel's documented illness that led to an inadvertent omission of the deposition transcript and exhibits from the court record. (CP 491). At that time, no hearing date for the summary judgment motion was set and no possible prejudice could occur – since Dickinson only sought to supplement the record with Winther's own deposition testimony and exhibits. The court was supplied with case law and WSBA Deskbook references allowing such supplementation. Judge Woolard's decision to refuse consideration of Winther's testimony was and is inexcusable and a clear abuse of discretion – particularly in light of the facts of this case. Most people spend their entire working lives to pay off their own home mortgage, let alone paying off the home of someone they are merely dating.

Motion for Reconsideration. Judge Woolard

was supplied with a detailed legal memorandum, but, again, refused oral argument and gave no reasons for her decision to deny the motion.

Cancellation of the Lis Pendens. A Lis Pendens is only a procedural mechanism used to give notice of a potential claim against the property at issue. It does not create substantive rights in the property. Keeping the Lis Pendens in place posed no prejudice to Winther. It was an abuse of discretion to cancel it since the trial court was apprised that an appeal was pending or would be shortly filed.

CONCLUSION

For all the foregoing reasons, appellant Dickinson asks the Court to reverse and vacate the trial court's order granting summary judgment and the subsequent monetary judgment entered against Dickinson; for reinstatement of the Lis Pendens retroactive to the date of its original filing; and for reversal of the trial court's decisions regarding supplementation of the record and reconsideration.

RESPECTFULLY SUBMITTED this 5th day of December,

2008.


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