

COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
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DEPUTY

No. 39460-0-II

COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

DAVID CARPENTER, Plaintiff,

Appellant,

v.

DAVID GLENN and REBECCA GLENN, husband and wife, Defendants,

Respondents.

AMENDED BRIEF OF APPELLANT

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pm 10-23-04

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ASSIGNMENTS OF ERROR

1. The trial court erred in granting Glenn's cross motion for summary judgment on April 17, 2009.
2. The trial court erred by not viewing all facts and inferences in favor of the non-moving party.
3. The court erred in granting bona fide purchaser status to a gift transferee.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a court have authority to grant a cross motion for summary judgment on eight days notice over the non-moving party's objection? (Assignment of Error 1.)
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3. Was Plaintiff prejudiced by non-compliance with the notice requirement of CR 56? (Assignment of Error 1.)
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5. Can a grantee under a gift deed be accorded bona fide purchaser status for the purposes of the recording statute (RCW 65.08.070)? (Assignment of Error 3.)

STATEMENT OF THE CASE

This is a quiet title action for residential real property located in Centralia, Washington. It is agreed that Alice Green owned the subject property when she died in July 2000, that she had no Will and that her heirs at law were siblings Gary L. Green and Yvonne Griffith. (*CP 63, CP 77*) Appellant David Carpenter purchased the property from these heirs in 2001, repaired the property and began renting it out later that same year. (*CP 86*) Although the deed to the property vested title to Appellant David Carpenter, his brother Kim Carpenter had physical possession of the deed. Carpenter's deed was not recorded until September 26, 2008.

In late 2004 Respondents Glenn submitted an application to Appellant Carpenter to rent the property. This resulted in the execution of a (1) Residential Rental Agreement, (2) Rules, (3) Landlord-Tenant Checklist, (4) Disclosure of Lead-Based Paint and/or Lead-Based Paint Hazards and (5) a Pet Agreement, all dated December 31, 2004, for Glens' tenancy of the Property through July, 2006. (*CP 86 and exhibits at CP 89-100*) After July 2006, the Glens continued to rent the Property from Carpenter on a month-to-month basis. (*CP 78*)

Meanwhile, in March 2006, the Property was damaged by flood. Carpenter gave Glenn permission to get estimates for the damages to the

house on his behalf, to submit to the insurance company. Carpenter then soon discovered that Glenn was trying to collect the insurance money for himself. (CP 87) The Glens became aware that Carpenter's deed was not recorded as a result of his contact with the insurance company. (CP 70) Glenn called Carpenter about it and Carpenter told Glenn that his brother Kim had possession of the deed. (CP 70) During a follow-up call, Carpenter again indicated that his brother had the deed and that "his brother was not returning his calls. etc., etc." (CP 70)

In September 2007 the Glens stopped paying rent. Carpenter thereafter issued a three-day notice to pay rent or vacate on November 1, 2007. (CP 87) Around the same time, the Glenn's attorney sent Plaintiff a letter dated October 23, 2007 stating that Plaintiff did not own the Property because he could not find a connection between Carpenter and the Property other than that Plaintiff's brother loaned money on the property in 2001. The attorney's letter also said that his client would no longer be sending rent payments to Plaintiff. (CP 112)

Carpenter spoke with Glenn's attorney on the phone, presumably on November 5, 2007 (CP 58), and told him of the unrecorded claim deed in his brother's possession and that he was having a difficult time getting his brother to respond so that he could get the deed to record it and obtain the insurance proceeds. (CP 44) Shortly thereafter, the

Glenns paid up their back rents and Carpenter never heard from them on the subject again. That is, until after Glenn had obtained a quit claim deed from Gary Glenn and stopped paying rent again. (CP 45, 47, 48 and 49).

The Glenns paid their rents in 2008 through July, (CP 102-108) noting on their January rent check that the payment was for “rent for Jan. 2008.” (CP 102) The Glenns failed to pay rent after July, 2008, and Carpenter issued a three-day notice to pay rent or vacate on September 17, 2008. (CP 138) This notice served as the basis for commencing this case as an unlawful detainer action on September 29, 2008. (CP 125) Just prior to commencing the eviction lawsuit, Carpenter was able to retrieve the deeds from his brother, and recorded them on September 26, 2009. (CP 59, 72, 79 88 & 117)

The Glenn’s answer included the affirmative defense that they were the owners of the Property by reason of having recorded a quit claim deed from Gary Green on August 25, 2008, and a quit claim deed from Yvonne Griffith on September 17, 2008, “prior to, and without actual notice of the recording of plaintiff’s deed on September 26, 2008.” (CP 117) An agreed Order was then entered converting the case to a regular civil quiet title and ejectment case. (CP 114-115) Later, another

Agreed Order was entered joining Mrs. Rebecca Glenn as a party defendant. (CP 113)

In answer to interrogatory asking Defendant Glenn to “{d}escribe in detail all inquiries that you, or anyone on your behalf, made to Plaintiff regarding his ownership interest in the property that is the subject of this lawsuit. In your answer, please include what responses were received to the inquiries, and identify any documents that support, or in any way relate to, this interrogatory and your answer,” Defendant responded as follows:

I first became aware of an ownership issue when I was served papers by the Attorney General, stating I was a defendant in a lawsuit to foreclose a Medicaid lien on the property. I was told that all that was recorded by Carpenter was a deed of trust, which did not convey ownership (this was further substantiated by a title search done by Evergreen Adjustment Company, and my attorney told me he came up with the same result- only a Deed of Trust from Yvonne Griffith).

I had entered into an oral “rent to own” agreement with David Carpenter, and I was repairing the flood damage to the house (from the reservoir on the hill failing). Regina Harpster was the insurance adjuster for the city, and said she needed verification of ownership of the house in order to pay out the city’s insurance proceeds. I had just assumed that Carpenter owned it, because he was renting it to me, and had agreed to sell to me as well. When I called him about the confusion regarding the title to the property, he was evasive. First he said his brother Kip had an unrecorded Quit Claim Deed- then backpedaled, and said maybe it was a tax sale deed. I became suspicious, and called my attorney. My attorney did a title search, and sent David Carpenter a letter stating that Carpenter did not own the property, and was therefore not justified in collecting rent from me. When Carpenter never did produce a deed or any other ownership

documents, I decided to approach Gary Green to get a Deed. He signed a quitclaim deed to me, which I recorded. Gary Green told me he thought his sister Yvonne Griffith had died. I contacted my attorney again, and the Attorney General's office, in trying to serve their lawsuit foreclosing their Medicaid lien, had found Yvonne Griffith. My attorney then negotiated a quitclaim deed from Yvonne Griffith to me, as well. At that point, Carpenter had never produced or recorded any documents of ownership, and I believe that I am the owner of the property, even though Carpenter did record deeds after I had recorded mine. (CP 80)

In response to a request for production asking any document identified in response to the aforesaid interrogatory, the Glenns produced their 2008 deeds and the letter from their attorney dated October 23, 2007. (CP 81 & 112)

Appellant Carpenter moved for Summary Judgment alleging that Glenn had sufficient actual, constructive or inquiry notice to defeat Glenn's claim of superior title under the recording statute. This motion also claimed that Glenn could not obtain bona purchaser status through a quit claim deed received as a "gift." (CP 77-85) This motion was noted for hearing April 17, 2009. Glenns' response (without exhibits) was sent by e-mail during the *evening* of April 6, 2009 (CP 35 A?) and also by regular mail no earlier than April 6, 2009. Incorporated with the response was Defendants' Cross Motion for Summary Judgment Quieting Title. (CP 68)

In Reply, Carpenter waived objection to the late response to Carpenter's motion, but objected to Glenns' Cross Motion being heard at the April 17th hearing, on the basis of it being untimely and not allowing sufficient time for an adverse party's response (*CP 50*) The declarations included with the Response/Cross Motion contained hearsay statements including (1) that Gary Green, after being asked, told David Glenn that he had not issued a deed on the property to anyone else (*CP 71*), and, (2) when asked, Gary Green assured Glenns' attorney that he had not signed any previous deeds. (*CP 59*) Carpenter's objection to this hearsay at oral argument was sustained (*CP 32*), but the Court granted Glenns' Cross Motion for Summary Judgment. (*CP 42-43*)

Carpenter filed a Motion for Reconsideration (*CP 36-41*.) Glenn timely responded (*CP 31-35*) and the motion was denied. (*CP-30*)

Carpenter Filed a Notice of Appeal. (*CP 28-29*)

Carpenter then filed a Motion to Strike and Redact Hearsay from Clerk's Papers Prior to Transmittal to Appellate Court. (*CP 24-27*) In support of this motion, Carpenter obtained a declaration from Gary Green directly contradicting the hearsay statements that both Glenn and his attorney attributed to him in their declarations. In fact, he stated that he told both Mr. Glenn and his attorney that he did not recall whether he had signed a previous deed on the property, and had never assured

Glenn's attorney or anyone else that he had not signed any other deed on the property. *(CP 15-16)* Also in support of this motion, Carpenter obtained a declaration from Yvonne Griffith (the other heir) wherein she claimed that she told Glenn's lawyer specifically that she had signed her interest in the property to someone else years ago, and that the lawyer told her he was just there to clear up the paperwork. *(CP 18)*

Carpenter's motion to strike and redact the hearsay prior to transmittal of Clerk's Papers was denied, as was Glenn's request that the motion itself not be submitted as part of the Clerk's Papers transmitted to the Court of Appeals. *(CP 1)*

ARGUMENT

1. STANDARD OF REVIEW:

The Appellate Court reviews an order on summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment 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)*. The Court is to view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26.

2. THE COURT DID NOT HAVE AUTHORITY TO GRANT A CROSS MOTION FOR SUMMARY JUDGMENT ON EIGHT DAYS NOTICE OVER THE NON-MOVING PARTY'S OBJECTION. (Assignment of Error 1.)

Under CR 56(c) a summary judgment "motion and any supporting affidavits, memoranda of law, or other documentation **shall** be filed and served not later than 28 calendar days before the hearing."

In this case the earliest they were placed in the mail was April 6, 2009.¹ Under CR 6(b)(2)(A), “If the service is made by mail ... the service shall be deemed complete upon the third day following the day upon which they were placed in the mail...” or in this case, April 9, 2009. The April 17th hearing when the cross motion was granted was only 8 calendar days later, while the responsive affidavits were due 11 days before the hearing. Glens’ Cross Motion clearly did not comply with the rule. As stated of Federal Rule 56 in *Kistner v. Califano*, 579 F. 2d 1004 (1978):

Noncompliance with the time provision of the rule deprives the court of authority to grant summary judgment, *Adams v. Campbell County School District*, 483 F.2d 1351 (10th Cir. 1973), unless the opposing party has waived this requirement, *United States v. Miller*, 318 F.2d 637 (7th Cir. 1963), or there has been no prejudice to the opposing party by the court's failure to comply with this provision of the rule. *Oppenheimer v. Morton Hotel Corp.*, 324 F.2d 766 (6th Cir. 1963).

3. CARPENTER DID NOT WAIVE THE TIME REQUIREMENT OF CR 56 (Assignment of Error 1.)

Carpenter obviously did not waive the time requirement of CR 56; in fact, he specifically and repeatedly objected to the non-compliance. (CP 50)

4. CARPENTER WAS PREJUDICED BY NON-COMPLIANCE WITH RULE (Assignment of Error 1.)

¹ The Cross Motion is dated April 6, 2009, was e-mailed without its exhibits on the evening of April 6th, and filed on April 7th.

Under CR 56(c), opposing affidavits, memorandum of law or other documentation are due not later than 11 calendar days before the hearing. Eleven calendar days before April 17th is April 6th - three days before the date it was deemed served on Carpenter. There was clearly no time to obtain and submit opposing affidavits. Furthermore, these documents contain the first notice that Glenn claimed Green told and assured both Glenn and his lawyer he had not issued any deeds on the property to anyone else. There was no claim that Green had made such claims and assurances in Glenn's answer to the interrogatories, and no such claim in his Answer, Affirmative Defense or the accompanying declaration. In answer to the interrogatory the only mention of Green is where Glenn stated:

When Carpenter never did produce a deed or any other ownership documents, I decided to approach Gary Green to get a Deed. He signed a quitclaim deed to me, which I recorded. Gary Green told me he thought his sister Yvonne Griffith had died. (CP 80)

You would think Glenn would have mentioned at that time he had asked Mr. Green if he had issued any other deeds on the property and that Mr. Green had specifically assured him that he had not issued a deed on the property to anyone else. But no, the first mention of this is 8 days before the summary judgment hearing, and after the deadline to respond to Green's motion.

The Declaration of Gary Green that Carpenter was able to obtain later (CP 15-16), was not before Judge Lawler at the time he granted the Glens' Motion and is included here only because it so clearly illustrates the prejudice suffered by Carpenter due to non-compliance with the time rule of CR 56. The reason it was not before the Judge is because of the non-compliance. If Carpenter had the no fewer than 17 days to respond required by the rule, Carpenter would have had the opportunity to get the declarations before the Judge. The same is true of the (also later-obtained) Declaration of Yvonne Griffith. (CP 18-19) Without these, the Court was left with uncontroverted facts to serve as a basis for determining there was no issue of material fact. When a pleading or affidavit is properly made and is uncontradicted, it may be taken as true for purposes of passing upon the motion for summary judgment. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Henry v. St. Regis Paper Co.*, 55 Wn.2d 148, 346 P.2d 692 (1959). Even if the trial judge was able to disregard these statements as hearsay, Carpenter was prejudiced by being denied the opportunity to controvert the statements with opposing declarations due to the non-compliance with the time rule of CR 56.

5. THE COURT ERRED BY NOT VIEWING ALL FACTS AND INFERENCES IN FAVOR OF THE NON-MOVING PARTY
(Assignment of Error 2.)

The trial court, in granting Glenn's Motion, should have viewed all facts in the light most favorable to Carpenter. *Vallandigham, supra* at 26. A fact that should have been viewed in Carpenter's favor, but apparently was not, is that Glenn manifested an acceptance of Carpenter's explanation that his brother had possession of his deed by making up his back rent payments and not raising the issue again. In other words, by Glenn apparently accepting Carpenter's explanation by resuming his rent payments and inquiring no further, he excused Carpenter from producing the deed. Reasonable diligence required following the inquiry, *Miebach v. Colasurdo*, 102 Wn.2d 170 (1984), and Glenn did not follow his inquiry through. Instead he "took the line of least resistance and paid up the rent" because he "didn't feel [he] could afford to move forward against Carpenter at that time." (CP 71) The inference that Glenn saw an opportunity and was biding his time until he could get his ducks in a row seems clear.

6. THE COURT ERRED IN GRANTING GLENN BFP STATUS FROM GIFT TRANSFER (Assignment of Error 3.)

RCW 65.08.070 provides:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any

subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

This statute has remained unchanged since 1927. It requires both “good faith” and “valuable consideration,” neither of which are present here.

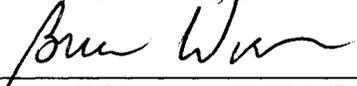
Likewise, as per *Peterson v. Paulson*, 24 Wn. (2d) 166, 180, (1945) a bona fide purchaser for value is one (a) who has had no notice of the claim of another's right to or equity in the property prior to his acquisition of title, and (b) who has paid the vendor a valuable consideration. Glenn admits to notice of Carpenter’s interest in the property and makes no claim that he paid Green anything for his quit claim deed. In fact the deed itself recites that it was given “[f]or and in consideration of Gift.” (CP 74) Therefore, Glenn cannot have obtained bona fide purchase status from that deed that would be superior to Carpenter’s interest pursuant to RCW 65.08.070, and the trial court erred to the extent such a holding is implicit in its Order on Summary Judgment quieting title to the Glenns.

CONCLUSION

For the reasons stated above, the trial court’s Order on Summary Judgment. quieting title in Defendants, was in error. The Defendants’ Motion was not timely, Plaintiff did not waive the time requirements,

and Plaintiff was prejudiced by the non-compliance. Furthermore, the trial court did not view all inferences in favor of Plaintiff when it granted Defendants' motion. Reasonable minds could certainly conclude that Glenn saw an opportunity and is trying to take advantage of it. Finally, the court erred by effectively granting the Glenns bona fide purchaser status based upon a quit claim deed given without consideration.

Respectfully submitted this 23rd day of October, 2009.



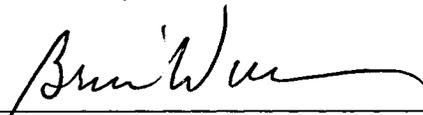
Brian Wichmann, WSBA #16467
Attorney for Appellant Carpenter

Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I sent by regular first class mail, postage prepaid, a true copy of this document to:

Michael Mittge
Attorney at Law
1079 South Markey Boulevard
Chehalis, WA 98532

Signed at SeaTac, WA on October 23, 2009.



Brian Wichmann

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BY 
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