

ORIGINAL

No. 41787-1-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY E DEPUTY

ROBB NUNN

Plaintiff / Appellant
v.

ERIN E. CREAGAN

Defendant / Respondent

OPENING BRIEF FOR APPELLANT NUNN

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1. Introduction

This matter comes to the appellate court following the trial court's entry of Findings of Facts, Conclusions of Law and a Memorandum of Opinion which granted Judgment to Appellant, Robb Nunn (Nunn), for \$17,924.26 as a result of two actions filed by Nunn against Respondent, Erin Creagan (Creagan). The total Judgment came to \$24,983.58 as explained below.

By way of explanation, Nunn initially sued Creagan in the Clark County District Court on July 10, 2008 under Case no. 317285-6, alleging Creagan had failed to repay a \$10,000 Promissory Note given to Nunn on October 15, 2006 which had an interest rate at 6% per annum.

Shortly after filing the District Court suit, Nunn filed a Superior Court Complaint on September 26, 2008, alleging a Real Estate Sale and Purchase Agreement between Nunn and Creagan had been breached by Creagan. The Superior Court case focused

primarily on Nunn's claim that he and Creagan became tenants in common in 2003 in a parcel of real property at 10600 SE 17th St., Vancouver, WA. Creagan having agreed to sell Nunn an undivided one-third interest in the parcel and Creagan's share becoming an undivided two-thirds interest. Creagan had purchased the property in 1995.

The two cases were consolidated on Motion of Creagan into the Superior Court action with both cases tried before the Honorable John Nichols on August 24 and 25, 2010.

Judge Nichols found the Note had not been paid and there was interest due between October 15, 2006 to December 29, 2010 in the sum of \$2,521.32. He further found that attorney's fees of \$4,450 were attributable to efforts to recover on the Note and that Appellant had satisfied the requirements of RCW 4.84.250 concerning the recovery of attorney's fees in cases of \$10,000 or less and was

therefore entitled to a portion of the overall fees in the case being the amount awarded.

Also at issue was whether or not Nunn was entitled to compensation for the labor and materials he contributed to the house and a development plan pursued for subdividing the property.

The purpose of the buy-in with Nunn was to supply funds for repair of a building on the real property and development of the remaining land of approximately 1.03 acres which Nunn had researched and discovered could be sub-divided into at least five additional lots under Clark County Washington's recently enacted Infill Statute.

Nunn's allegations were that Creagan should have contributed two-thirds of the costs of work for furtherance of the subdivision and Nunn one-third and that Creagan had failed to contribute her full two-thirds. The court found Nunn contributed more than 1/3 of the development plan costs being \$7,924.26 for work done through the planning process but denied his claim of \$5,775.00 for labor in fixing up the house on the property to be divided.

Nunn also argued he should have been credited with a small overpayment on an offsite investment project he and Creagan were involved in with other investors. The reason Nunn believes he should be credited with about \$3,300 in overpayment on that project is that generally one can include all claims they have against similar parties in the same proceeding but more importantly Creagan argued at times that Nunn had not paid his share of the contribution to the project which was known as Elk View Estates, and therefore Creagan thought she should have an offset against her \$10,000 Note for that. Nunn, having gone to the trouble of putting on proof that in fact Creagan was short in meeting her obligations and Nunn made them up, should result in an additional award of approximately \$3,300.00.

There is also the larger issue of the Court's view of how the money was disbursed when the subdivision was sold and proceeds came in. There appears to be a misfocus by the court on how to characterize division of funds between co-tenants when the ultimate

goal of the co-tenancy and the development plan was to sell to a third-party buyer, not just to improve property and hold it for their own use.

The focal point on review should be that substantial work was done by both parties to further a real estate development plan resulting in the sale of the a house and five residential unimproved lots to a third party buyer. When the planning project was perfected (mostly by Nunn) to the point where a preliminary plat approval was imminent, a developer buyer by the name of Ellsworth Springs LLC was found. That buyer agreed to pay \$580,000 for the whole project. The existence of the house was superfluous in that it would have been sold one way or the other by the third party purchasers and the proceeds of that sale should have been divided two-thirds / one-third to Creagan and Nunn. The trial court seemed to focus on the value of the house and land in 2003 (when Nunn and Creagan made their deal) instead of determining what each party should get once the third party purchaser fulfilled their contract. Nunn contends that is

not reasonable under the circumstances based on the agreements between the parties and equitable principals.

II. Assignments of Error

a. The Court erred in concluding Ms. Creagan's underlying debt on the house could be paid off in full from the proceeds of the house sale without giving Nunn credit for his one-third ownership in the house and before the remaining profits from lot sales were split two-thirds / one-third.

b. The Court erred in failing to realize that the house being part of the overall project was owned one-third by Nunn and legally a co-tenant is not responsible for the debt of another co-tenant that he or she has not assumed or entered into originally. This oversight by the Court resulted in approximately \$257,000 in funds from the LLC's contract obligation being devoted solely to Ms. Creagan's use, even though Nunn owned one-third of the whole project. The Court's reasoning also failed to take into consideration that the funds used to

pay off the underlying debt of Ms. Creagan were in fact no different than funds used to pay off any other part of the LLC's obligation.

c. The Court erred in not concluding the lack of language in the Deed making the conveyance of the one-third interest being silent as to any underlying debt or encumbrance violates the warranties of RCW 64.04.030(2). Likewise, the absence of any language in the REPSA raises the same reasonable inference that Nunn was not assuming underlying debt, particularly in light of the fact that the REPSA was executed even before a preliminary title commitment was issued.

d. The Court erred in not giving Nunn a judgment for his labor contribution of \$5,775.00 to the house in that there was uncontroverted testimony that the house was unsalable when Ms. Creagan and Nunn entered into their REPSA and the labor contributed by Nunn would have necessarily needed to be purchased on the open market.

e. The Court erred in not giving Nunn a judgment for his overpayment on the Elk View Estates LLC property transaction which he and Ms. Creagan had participated in with others.

III. Issues Pertaining to Assignments of Error

a. Was it error to conclude under Washington Common Law that a co-tenant who is not a party to an underlying debt or encumbrance either by creating that debt or joining as a signatory is responsible for any repayment of the debt of the other co-tenant.

Answer: yes.

b. Did the court fail to recognize that Nunn owned a one-third interest in the house, and running a simple mathematical conclusion should have led to the realization that money from the Sale Agreement with the LLC, one-third of which belonged to Nunn, was being used to pay off a co-tenant's debt.

c. The court erred in not concluding that the absence of language in both the Deed and REPSA making them subject to the encumbrance did not create any obligation on Nunn's part to pay any encumbrance created by the other co-tenant. The Deed was a

Statutory Warranty Deed not a Quit Claim Deed or Bargain and Sale Deed. Nunn would have no duty to share in that debt whether he had known of the debt or not. This issue includes recognition of the fact that when the REPSA was entered into there had not been even a preliminary title commitment issued that could have tipped off Nunn to the existence of the underlying encumbrance. Furthermore the fact Nunn eventually became aware of the underlying encumbrance but not at the time the REPSA was executed makes no difference under Washington Law. The Court should have also recognized that typically Deeds of Conveyance of an interest in real property would normally contain language making the conveyance subject to underlying encumbrances of record and also carried warranties of title, including that the property was free of encumbrances unless disclosed, and the failure to include such language is strong evidence that no agreement was ever reached between the parties from the initial point of the relationship that Nunn would share in the payment of Ms. Creagan's debt.

d. The Court failed to give Nunn a judgment for his \$5,775.00 in labor. This issue should be weighed in light of the fact that Nunn testified as to what labor he performed, the fact that he was a skilled experienced commercial carpenter with some thirty years experience and the house could not have been sold by the LLC or anyone else in the condition it was in when the REPSA was entered into, nor when the Deed was executed, creating the co-tenancy.

e. The Court should have given Nunn a judgment for approximately \$3,300.00 of which there was documentary evidence introduced at trial showing that Nunn advanced on Ms. Creagan's behalf an additional \$3,300.00 on a project known as Elk View Estates which had nothing to do with the 17th St. property.

IV. Statement of the Case

Robb Nunn and Erin Creagan are the parties to this transaction. Nunn is the Appellant, Ms. Creagan is the Respondent.

The case arose when Nunn filed two lawsuits against Ms. Creagan almost simultaneously. The first was a case filed in the District Court for Clark County, Washington, case no. 317285-6.

This case was filed on July 10, 2008 with Nunn claiming that a loan of \$10,000 was made to Ms. Creagan on October 15, 2006 and was not repaid, Ex-1 (The Note). Ms. Creagan countered that a project to develop a parcel of real property previously owned by Ms. Creagan gave her an offset against the Note even though the money was loaned by Nunn quite some time after the property transaction was concluded the Note being dated October 15, 2006, Ex-1.

Given the nature of Ms. Creagan's defense, Mr. Nunn filed a Superior Court Complaint in the Superior Court for Clark County, Washington Case No. 08-2-06191-8 on September 26, 2006, C.P. 3, with the primary allegations of Nunn's Superior Court suit against Creagan being that the two entered into a subdivision development plan which included a house on somewhat slightly over an acre of land and Nunn had been shorted in the development process in several respects, C.P. 3, pages 1, 2, 3, and 4. He also asked for attorney's fees on the \$10,000 Note claim in his Superior Court Complaint, C.P. 3.

The two cases were consolidated for trial in the Superior Court for Clark County before the Honorable John Nichols being heard on August 24, 25, 2010 which resulted in the Court entering its Findings of Fact and Conclusions of Law on January 14, 2011 (C.P. 40) and a Memorandum of Opinion dated October 19, 2010, C.P. 33.

By way of pertinent history Ms. Creagan and Mr. Nunn became acquainted prior to 2003, ROP 10 L 11-16, which was at first described as a romantic relationship in addition to forming an Agreement to participate in development of property at 10600 SE 17th St., Vancouver, WA, ROP 10 L 18-20.

The two entered into a formal business relationship by executing a Real Estate Purchase and Sale Agreement on October 26, 2003, Ex- 6, referred to as "Earnest Money Agreement" in the Court of Appeals Exhibit List. At some point the romantic relationship soured (when, is not clearly set forth in the record) but nevertheless the development theme continued with Ms. Creagan deeding to Nunn an undivided one-third interest in the property as

tenants in common, Ex-8 (the Warranty Deed). Thereafter each party began to contribute money to both improve the residential dwelling on the property and to further development plans so a preliminary plat approval could be obtained and the property sold to a third-party purchaser/developer known as Ellsworth Springs LLC, Ex-61 (the Real Estate Contract with Ellsworth Springs LLC).

In between the point at which a contract with Ellsworth Springs could be entered into, Nunn contended he contributed more to further the project than he should have. Each party offered numerous Exhibts which are part of the ROP but citation to the record as to checks each party claimed to have contributed will be omitted because the Judge in his Findings and Memorandum of Opinion, C.P. 40 and 33, concluded at page 4 paragraph 20 of the Findings that Nunn had overpaid by \$7,924.30 and Ordered a Judgment in that amount in Conclusion of Law 3 and C.P. 33 and 40 and the Judgment C.P. 41 and no cross-appeal was filed on this issue or any other.

The Court further found no payments have been made on the \$10,000 Note, C.P. 40 and 33, and gave Nunn a Judgment of \$10,000 and interest at 6% per annum from October 15, 2006, C.P. 41. The Court awarded attorney's fees as a result of Nunn following the Offer of Settlement procedures provided for under RCW 4.84.250, and being the prevailing party.

As the project moved along the house was improved to the stage where it was saleable and sold by the LLC to a couple by the name of Serface for \$230,000, C.P. 53. As the HUD Statement demonstrates, the sale's price was \$230,000 but the LLC had to kick in an additional \$27,175.98, C.P. 53 L-403. The LLC had acquired the property on January 31, 2006 subject to the duty to make the mortgage payments until they had paid off their contract balance of \$580,000, Ex-61. The payment of \$257,195.98 to close the Serface sale was treated as a payment on the Purchase Agreement between Nunn / Creagan and the LLC. In reality however it did not result in funds of any type going to Nunn but simply paid off Creagan's underlying mortgage.

With hindsight Nunn realized when further net proceeds were distributed from sales of lots by the LLC he was receiving far less than one-third of the \$580,000 the LLC agreed to pay under their Agreement with Creagan and Nunn.

In addition to the sale to Serface, Ex-53 (HUD Statement) the LLC began to make payments under their contract for the balance due. As payments came in Nunn received \$38,877.53 (Ex-54), \$39,449.49 (Ex-55) and \$23,725.12 (Ex-56) (mislabeled as payment letter to Alison Creagan). Those payments to Nunn total \$103,052.14, or just over 17% of the sale price promised by the LLC.

As mentioned, Nunn entered into the RESPA prior to knowing there were encumbrances on the property. The RESPA is dated October 26, 2003 (Ex-6) but the Preliminary Title Commitment did not issue until October 31, 2003, ROP 68, L-14. By the time he received the Deed in December he probably knew of the encumbrances. The Deed however does not make the transfer of the one-third interest subject to any encumbrance, nor does it reserve

any interest of any type such as an easement, etc. It is not ambiguous.

There were cash payments to Ms. Creagan as well as debt relief. She received a payment of \$79,767.03 on March 23, 2007, Ex-79, a payment of \$78,898.94 on March 28, 2007, Ex-80, and a payment of \$39,877.53 on March 23, 2007, Ex-81. Those payments total \$198,543, or 34.2% of the \$580,000 from the LLC. Ms. Creagan however also had her underlying debt of \$257,175.88 paid off at the time of the Serface sale, Ex-53, meaning that \$455,610 of the \$580,000 was devoted to Ms. Creagan in cash or paying off underlying debt she created between the time she bought the property and the time she entered into her transaction with Nunn. Her share of the payments received under the LLC contract, if you consider the debt relief, amounted to 78.5% of the purchase price the LLC agreed to pay. The question remains should Nunn have received \$193,033.33 being 1/3 of the \$580,000 instead of the \$103,052.14 he received and was he therefore shorted \$83,718.80 on the transaction?

V. Argument

a. The Encumbrance Issue. The question of whether any of the money being paid by the LLC should have gone to pay off all of one co-tenant's debt in this case (Creagan) is treated by the trial court in its Memorandum of Opinion as both primarily an ethical question based on risk taking in an development scheme (discussed in the Court's Memorandum of Opinion, C.P.33) but really seems to be combination of a misbalancing the equities from Nunn's view and disregarding Plaintiff's legal argument accurately set forth in their written closing argument, C.P.31. The trial court faults Nunn for not having written into the REPSA or the Statutory Warranty Deed language that an encumbrance exists on the property. Washington Law however requires no such effort on the part of Nunn. RCW 64.04.030 (2) dictates that when a Statutory Warranty Deed is used as opposed to a Quit Claim Deed or a Bargain and Sale Deed, certain warranties pass to the Grantee, including that the property was then free from all

encumbrances, RCW 64.04.030 (2). This rule applies even when the Grantee may have complete or some knowledge of the fact that some encumbrance might exist on the property, *Fagan v. Walters*, 115 Wash. 454, 197 P. 2d. 635 (1921). In *Fagan* the Grantor and Grantee were apparently friendly and had past business relations and the appellant, *Fagan*, had visited the property and observed some evidence that people had driven across the portion of the property at some time, but probably sometime in the past, *Fagan Supra at 456*. Nevertheless, the court concluded the warranty of lack of encumbrance prevailed. It is urged that rule, although being an old case, is still applicable today and under our fact pattern. There is certainly a reasonable inference that someone who knows they have debt on a portion or all of the property they are conveying a portion of to another party assumes they have an obligation to pay that debt unless there is some specific side agreement, say in the REPSA that they

will share in payment of the encumbrance. No such evidence exists in the record here.

The testimony was that Ms. Creagan was an experienced mortgage broker ROP page-17 lines 12-15 and prepared both documents.

Washington Law generally provides that one who prepares a document will have it most harshly interpreted against that preparer when there is any ambiguity.

While Washington Case Law is sparse on the subject of whether Nunn had any duty to pay Creagan's underlying encumbrances, the two cases cited in Plaintiff's Closing Argument and Memorandum of Points and Authorities seem to be well on point, C.P. 32.

Walters v. Walters, 1 Wash. App. 849, 466 P.2d. 174 (1970) makes it clear that a joint tenant who is not primarily liable for an encumbrance on the property need not share in paying it off. In this case the Deed is not equivocal. It is a

conveyance without any language indicating it is subject to any underlying encumbrances or other matters of record, Ex-8. The same can be said of the REPSA which contains no mention of underlying encumbrances and was prepared by Ms. Creagan and prepared prior to the Preliminary Title Commitment being issued, ROP 14 lines 9-11.

Likewise, *Patrick v. Bonthius*, 13 Wn. 2d. 210 124 P. 2d. 550 (1942) makes is clear that where one tenant in common encumbers the interest of another who has not joined in incurring the encumbrance it leaves the non-encumbering co-tenant not liable for its payment.

It also seems the court failed to focus on who was paying what. The value of the house and land at the time Nunn and Creagan entered into their agreement had nothing to do with the ultimate progress of the project. The significant point is that the property was successfully developed in a good market and sold to an apparently knowledgeable buyer on January 23, 2006, Ex-61. That buyer specifically assumed

the encumbrances at paragraph 6 of their real estate contract. They in fact used most of the proceeds from the sale of the Serface house to pay Creagan's underlying \$257,000, Ex-53. Most of that money did not come out of the developer's pocket but was generated by the value of the house at the time of the sale. This transaction was no different than the sales which occurred from later sales of the bare lots. Therefore the LLC at all times was using Nunn's money as well as Creagan's, i.e. 1/3 of the \$580,000.00, to pay off an encumbrance created by one co-tenant which had not been created or ratified by the other.

Based on both the equities of the situation and existing Washington Common Law regardless of how sparse it might be, Nunn was entitled to have his share of the underlying encumbrance set aside and repaid to him out of Creagan's later proceeds.

The Court goes on to say in its Memorandum of Opinion, page 2, paragraph 5, in the last sentence that there

was a reversal of fortunes and infers that Nunn was lucky to have a modest loss. There is nothing in the record to support that opinion. One of the LLC owners testified they did not make money because the market dropped which is irrelevant, ROP 117 lines 1-7, but the idea there was a reversal of fortunes between Creagan and Nunn is completely unsupported by the math and record. Creagan profited handsomely, both in cash and debt relief, while Nunn did nothing more than support Creagan's profit taking measure and in weighing equities, one would logically ask themselves "why would anyone put \$105,000 into a project if they expected to get back only \$103,000?".

There is further evidence the court simply focused on the wrong transaction in its analysis. Again, at paragraph 5, page 2, C.P. 33, the court mentions the property had an appraised value of \$240,000 (an incorrect figure, see Ex-5 (the appraisal)) at the time of Nunn's purchase, therefore reasoning that his 1/3 interest was \$113,333.00. That

reasoning fails to take into consideration the substantial testimony that from the very start this was going to be planned subdivision to be sold to a third party, ROP 176 lines 18 and 19.

Nunn's 1/3 would be expected to be 1/3 of \$580,000.00 by January 31, 2006. That amounts to \$193,333.33.

There is also an unsupported assumption argued by Defendant's counsel that certain exhibits containing the language net proceeds, those exhibits being 54, 55, and 56 (Nunn's payments) and ex- 79, 80, and 81 (Creagan's payments) lend special meaning to the word "net proceeds".

Common sense leads any person who has ever purchased any parcel of real property to understand that on a HUD Statement certain deductions are taken out for any number of costs and charges and then we arrive at the bottom line which are in fact "net proceeds", meaning what the seller has in hand when they walk away from the title company.

Net proceeds are defined as being “the amount received in a transaction minus the costs of the transaction (such as expenses and commissions)”, Black’s Law Dictionary 9th Edition. The court however seemed to impose its own definition of net proceeds thereby accepting Defendant’s argument that the payment vouchers using the term “net proceeds” determined the interpretation of the overall agreement between Nunn and Creagan. Again there is nothing in the record or how to support that type of interpretation.

b. The court failed to give Nunn a judgment for \$5,775.00. Nunn testified that he did that much labor. He introduced into evidence Ex-52 (Nunn’s labor list) and testified that was necessary to put the house in marketable condition, and it appears there is nothing in the record to refute that testimony. At one point Nunn testified that when they first got together on the project, the furnace had been condemned in the house, logically meaning it could not have

been sold under any circumstances without upgrades, ROP 12 lines 16, 17, 21 & 22..

c. The court refused to grant Nunn a small judgment for \$3,300.00 on the contribution he made on behalf of Creagan for a project known as Elk View Estates which was not related to the project sold to the LLC.

The court at page 5, C.P. 33, paragraph e, concludes there was evidence the amount was repaid in full. That seems to be contrary to the evidence in the record. Mr. Nunn testified he overpaid Ms. Creagan's share by \$3,700 but could not find one of his checks for \$400.00 leaving him with his best evidence of \$3,300.00 as an overpayment and made a contribution for his sister as well. This discussion encompasses most of ROP pages 42 to 47. At ROP 47, defense counsel at line 8 admits that during the discovery they received checks that total \$3,300 as proof of the overpayment and at line 13 seems to agree that "so he's got a \$3,000 dollar credit". Probably a review of the record would

indicate that Ms. Creagan never refuted this allegation of Nunn paying an additional \$3,300 for her on the Elk View project.

The fact they were not part of the property transaction regarding the Ellsworth Springs LLC has nothing to do with his right to have that claim litigated in this action. Generally the rules of pleading, CR 8(e)(2) allow a party to state as many separate claims or defenses he has regardless of consistencies in whether it is from legal or equitable grounds or on both.

VI. Attorney's Fees

Nunn is entitled to attorney's fees in addition to the amount awarded in the trial court concerning the \$10,000 Promissory Note.

Paragraph q of the RESPA states "if buyer or seller institutes suit against the other concerning this agreement the prevailing party is entitled to reasonable attorney's fees and expenses" Nunn was

granted a judgment for his excess contribution of materials based on his performance under the REPSA but the trial court segregated out all fees that were not related to the collection of the Promissory Note. The fees for collection of the Note were quite high because it was necessary to prove Creagan did not have an off-set for her costs of the development plan which exceeded two-thirds with Nunn in fact prevailing and proving his costs exceeded his one-third duty to contribute. If Nunn is the prevailing party on appeal he should also receive fees under paragraph q of the REPSA as well.

VII. Conclusion

1. The court should find that Nunn is entitled to an increased judgment of \$83,718.80 for not having received his full 1/3 share of the purchase price paid by Ellsworth Springs LLC which in effect credited Creagan with \$257,000 dollars out of the \$580,000 in payments as opposed to Nunn receiving only \$103,052.14.

2. Nunn should receive an additional \$5,775 or so for his labor as it was properly documented and not rebutted by the other side regardless of the trial court's reasoning, Ex-52.

3. Nunn should be awarded the additional \$3,300 based on his testimony on the Elk View Estates transaction again which was not refuted in the record, except for defense counsel's admission they had seen checks amounting to \$3,300.

4. Finally, Nunn should be awarded additional attorney's fees on his Judgment of \$7,924.26 plus fees if he prevails in this appeal.

Respectfully submitted this 3rd day of August, 2011.



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Attorney for Appellant

ORIGINAL

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

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

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7 ROBB NUNN,)
8)
9 Plaintiff/Appellant,)
10 vs.)
11 ERIN E. CREAGAN,)
12 Defendant/ Respondent.)
13)
14)

**APPEALS CASE NO. 41787-1-II
SUPERIOR CT CASE NO. 08-2-06191-8
PROOF OF SERVICE**

15 STATE OF WASHINGTON)

16) ss.
17 COUNTY OF CLARK)

18 I state under penalty of perjury under the laws of the State of
19 Washington that I am competent to be a witness and over the age of
20 twenty-one (21) years; that on August 3, 2011, I mailed a true copy of the
21 Appellant's Opening Brief via UPS to each party/attorney listed below.

22 
23 Sherri Taylor, assistant to
24 Robert D. Mitchelson WSBA#4595
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