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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 46208-7-II

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

SEVEN SALES LLC,

Appellant,

vs.

BEATRICE OTTERBEIN and PIERCE COUNTY, WA,

Respondent

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Seven Sales LLC (“Seven Sales”) is a judgment creditor against Respondent Beatrice Otterbein (“Otterbein”). As a result of a foreclosure to enforce a sewerage lien, Pierce County is in possession of surplus funds belonging to Beatrice Otterbein. Seven Sales LLC asserts that the funds are subject to a writ of garnishment, which it obtained. Pierce County asserted, and the superior court below agreed, that the nature of how Pierce County came into possession of the funds renders writs of garnishment inapplicable to the funds.

Central to the dispute is the legal question of whether funds held by Pierce County are the property of Otterbein. And, if so, whether the funds are subject to garnishment immediately or whether there must be an “application” for the funds.

Another set of issues involve Pierce County’s creation of an application process relating to surplus proceeds for tax foreclosures. The first issue on that point is whether Pierce County can erect legal barriers to ownership of surplus proceeds in the form of an application process. If Pierce County is able to create such a barrier, then another question is whether a judgment creditor, such as Seven Sales LLC, is able to draft an “application” for this type of surplus funds thereby making the funds *either* payable to a former owner or a judgment creditor.

Seven Sales asserts that surplus proceeds of a tax foreclosure sale are owned by the record title holder. Furthermore, where a county comes into possession of such surplus sales it is merely *in possession of* funds that are owed to the record title holder and owes those funds to the record title holder. Seven Sales maintains that Pierce County is improperly erecting barriers to ownership, and that the Superior Court improperly read RCW 84.64.080 as evidencing a legislative intent to remove surplus funds from garnishment proceedings.

II. IDENTITY OF APPELLANTS

Seven Sales is a Washington limited liability company. It is a Pierce County Superior Court judgment creditor of Beatrice Otterbein via an assignment of judgment on May 14, 2013, which assigned a June 15, 2012 judgment in the amount of \$8,860.63.

III. ASSIGNMENTS OF ERROR

1. The trial court incorrectly interpreted RCW 84.64.080 as limiting the application for surplus foreclosure funds to only the “record title holder.” CP 100 (Conclusion of law 6).
2. The trial court incorrectly interpreted RCW 84.64.080 to be a legislative determination that surplus foreclosure funds are not “available” to judgment creditors. CP 101 (Conclusion of Law 7).

3. The trial court incorrectly determined that Pierce County is “not indebted to” Otterbein, and therefore discharged Pierce County from the writ of garnishment. CP 102 (Orders 1-3).

IV. STATEMENT OF ISSUES

1. Whether funds payable to the Otterbein being held by Pierce County pursuant to a sewer sale foreclosure are subject to garnishment by the judgment holder Plaintiff (assignment of error 2 and 3)? Yes, the funds are the property of Otterbein, and the fact that the funds may escheat to Pierce County eventually does not affect the current ownership of the funds by Otterbein.
2. Whether Pierce County can erect legal barriers to ownership of surplus proceeds in the form of an application process not authorized by law (assignment of error 1 and 3)? No, the process created by Pierce County is inconsistent with the applicable statute.
3. Whether only a record title holder can make an “application” for surplus funds held by Pierce County (assignment of error 1)? No, the applicable statute does not create an application process that imposes restrictions that affect ownership rights.

V. STATEMENT OF THE CASE

The relevant facts in this case are straight forward. The underlying judgment in this case resulted from Otterbein breaching a contract with

Heritage Rehab LLC. CP 96. The judgment was entered against Otterbein on June 15, 2012 for \$8,860.63. CP 96. On May 14, 2013 that judgment was assigned to Seven Sales. CP 98.

In Pierce County Superior Court case no. 12-2-11748-4 (“the Foreclosure Action”) Pierce County sought to foreclose a sewer service charge under RCW 84.64. CP 96. On March 15, 2013 Pierce County obtained an order authorizing Pierce County to conduct the foreclosure sale. CP 97. On April 26, 2013 the foreclosure sale occurred and Pierce County obtained \$34,323.54 in excess of the sewer lien and other offsets (“excess funds” or “surplus funds”). CP 98.

On July 9, 2013 Seven Sales made an application to the Pierce County Budget and Finance Department and to the Pierce County Prosecutor requesting the surplus funds be deposited into the registry of the court: “notice is hereby given that Seven Sales LLC hereby makes application for Pierce County to refund said [excess] to the record title holder Beatrice Otterbein by depositing those funds into the court registry.” CP 98. (emphasis in original removed).

On November 20, 2013, after service of the application, Seven Sales caused a writ of garnishment naming Pierce County as garnishee alleging it to be in possession of funds belonging to Otterbein. CP 98. Pierce County responded that the surplus funds were “being held in trust by the

County at this time. Since [Otterbein] . . . is the only person entitled to those proceeds . . . and she has not yet applied for them . . . Seven Sales is not entitled to garnish the excess proceeds from the foreclosure sale.” CP 99. Seven Sales controverted the answer, and the superior court denied the motion to controvert on April 4, 2014 and discharged the writ. CP 102.

VI. SUMMARY OF ARGUMENTS

Surplus funds generated by a foreclosure under RCW 84.64.080 are the property of the “record title holder” immediately following the foreclosure sale. A county in possession of such funds is “indebted” to the title holder as that word is used in RCW 6.27.100 and is, therefore, subject to a writ of garnishment.

RCW 84.64.080 provides “the excess [funds] shall be refunded following payment of all recorded water-sewer district liens, on application therefore, to the record title holder.” The statute does not require the “application” to be made by the record title holder. Here, Seven Sales made an application for the excess funds to be deposited in the court registry, and immediately thereafter caused a writ of garnishment to be issued concerning the funds. Seven Sales asserts that the surplus funds are immediately the property of the “record title holder” after the

sale. However, assuming an “application” must be made before Pierce County is “indebted” to Otterbein, that application was made here.

All issues in this matter concern interpretation of the applicable statute. Thus, all issues are reviewed a de novo. Woods v. Kittitas Cnty., 162 Wash.2d 597, 607, 174 P.3d 25 (2007).

VII. ARGUMENT

A. The basic laws of garnishment proceedings apply to this dispute

Seven Sales, as a creditor, does not carry any additional burden of proof nor is the garnishment procedure construed against it in these circumstances. Washington State has codified the procedural requirements for a writ of garnishment. See RCW 6.27.005 et seq. The legislative intent of garnishments is expressly stated in RCW 6.27.005 as “[t]he state should take whatever measures are reasonably necessary to reduce or offset the administrative burden on the garnishee consistent with the *goal of effectively enforcing the debtor’s unpaid obligations.*” (emphasis added).

A writ of garnishment directs a garnishee to not pay any debt or deliver any personal property or effects to the defendant. See RCW 6.27.100. Writs of garnishment are properly directed at funds or property held by a garnishee that is “indebted” to the defendant or at a garnishee

that has “possession or control of personal property or effects belonging to the defendant.” See RCW 6.27.060.

The legislature has specifically defined various sources or types of property that is exempt. Under RCW 6.15.010 certain personal effects such as libraries, clothes, and appliances are exempt from garnishments and executions. Even the last \$500 of a debtor is exempt. RCW 6.15.010(c)(ii)(A)(II). RCW 6.27.150 also exempts a certain portion of earnings. The procedures for enforcing or claiming the exemptions are found in RCW 6.15.060 and RCW 6.27.170. Here, none of the exemptions are applicable, nor were any asserted.

Procedurally, the controversion of garnishee’s answer is governed by RCW 6.27.220. Under that statute a plaintiff may controvert the answer by noting the matter before a “commissioner or presiding judge for a determination whether an issue is presented that requires a trial.” If answered affirmatively, the matter “shall be noted as in other cases” without requirement for additional pleadings (e.g. a summons and complaint). Id. Where there is no dispute of facts it is not necessary to conduct a trial. See Atlantic Cas. Ins. Co. v. Oregon Mut. Ins. Co., 153 P.3d 211, 137 Wn.App. 296, 306 (Div. 2 2007) (recognizing that the statute “allow[s] the superior court to have a trial if it determines that trial is necessary). Seven Sales and Pierce County did not present any factual

disputes below and neither party requested a trial. Procedurally, the trial court correctly determined that no trial was necessary and issued a final dispositive ruling on the matter.

B. Sewerage lien foreclosure proceedings *in rem* merely allow the county to recover delinquent sewer charges from the value of the property serviced and do not alter other legal relationships in any relevant way.

Sewerage liens are authorized and governed by RCW 36.94.150 and foreclosed under RCW 84.64. In the Foreclosure Action the sale was authorized as a foreclosure of a tax lien under RCW 84.64.080. As such the sewerage lien was paramount to all other recorded liens except other tax liens, and the purchaser at the sale acquired the property free of any prior liens. RCW 84.64.080. RCW 84.64.080 provides that if a tax foreclosure sale results in an amount in excess of the recorded water-sewer liens, then the “excess shall be refunded . . . on application therefore, to the record owner of the property.”

The foreclosure sale does not affect validity of any obligations Beatrice Otterbein has. The foreclosure sale does not render judgments against Beatrice Otterbein void. The foreclosure sale does not operate as a stay of other proceedings. From a judgment creditor's perspective, the sale merely eliminates the subject property itself as a source of security for

certain obligations because the subject property would no longer be an asset of Otterbein.

For example, Ms. Otterbein apparently entered into a promissory note with Bank of America which was secured by a deed of trust on the subject property. CP 97. That deed of trust would have been subject to non-judicial trustee sale under RCW 61.24.005 *et seq.* should Ms. Otterbein not fulfilled her obligations under the promissory note. Now Bank of America (or whoever is actually now holding the note) would need to bring a civil action, obtain a judgment, and engage in collection actions. Otherwise, Bank of American is simply an unsecured creditor without a judgment. Seven Sales, by contrast, is a judgment creditor with an order from superior court entitling it to utilize whatever collection activities are authorized by law for a judgment creditor.

Foreclosing a sewerage lien is a summary proceeding. See RCW 84.64.080 (“[t]he court shall examine each application for judgment foreclosing tax lien, and if defense . . . be offered by any person . . . the court shall hear and determine the matter in a summary manner.”). Its purpose is to allow state governments a quick and efficient avenue for collecting delinquent taxes (or in this case sewerage liens). Because sewer costs are frequently minimal compared to the value of the real estate RCW 84.64.080 thus allows a county to conduct the tax foreclosure sale as an

economical avenue likely to result in the outstanding debt to the county being payable. Because it extinguishes paramount liens it also encourages secured parties to pay such liens.

1. The surplus funds are the property of Beatrice Otterbein

immediately after the sale and are therefore subject to garnishment

RCW 84.64.080 does not require any application for surplus funds to create an ownership interests. The statutory requirement of paying the funds to the record owner (i.e. Beatrice Otterbein) “was intended to protect the [county] treasurer in paying out tax sale proceedings and not to determine ownership.” Stephenson v. Pleger, 208 P.3d 583, 585 (Wash. App. Div. II 2009). The statute unambiguously requires that the funds *are* the property of Beatrice Otterbein. The county treasurer was not asked below to determine ownership, but merely to recognize Otterbein as the owner who is entitled to these funds. If there is a contest over the issuance of a writ of garnishment, then a court will resolve it under RCW 6.27.

In Stephenson v. Pleger, Cumulative LLC purchased property from the Plegers after a certificate of property tax delinquency was filed and also purchased the rights to any potential surplus that might be generated by the tax foreclosure sale which was to happen a few days after the purchase. Id. at 585. Kitsap County refused to disburse the surplus to Cumulative LLC upon demand and when the Plegers applied for the funds

Kitsap County initiated an interpleader action. Id. The court of appeals expressly recognized that RCW 84.64.080 “does not create an ownership interest in the excess funds.” 208 P.3d at 585-86. The court also observed that “the procedural nature of RCW 84.64.080 has no impact on determining the rightful owner of the proceeds” and allowed a record owner to assign rights in any surplus generated by the tax sale. 208 P.3d at 586. If an owner can assign the rights *before* the sale even occurs, then clearly the “application” referenced in RCW 84.64.080 does not alter ownership of the funds because no application would have been yet possible nor would the proceeds be yet in existence. The court in Stephenson, recognized that the record title holder, as the owner of the property would also be the owner of any proceeds stemming from a sale.

RCW 84.64.080 is, in part, a somewhat unique statute in how it was drafted. The statute can be viewed in two parts. The first part of the statute prescribes the procedural aspects of a tax foreclosure sale. The second part, which is relevant to the instant dispute, is a statutory notice (“[t]he *notice* shall be *substantially* in the following form:”) designed to inform interested parties of the upcoming foreclosure sale. See id. (emphasis added). This second part is to be only “substantially” in the

statutory form should not be viewed as creating law, but as providing exactly what it says it is providing – a notice.¹

The legislative history provides some guidance to the legislative intent. H.B. 1564, 58th Leg., Reg. Sess. (Wash. 2003) appears to be the most recent and applicable bill to amend the law. The bill analysis indicates that “[f]ollowing a foreclosure sale, the treasurer *must refund* any amount in excess.” Id. at 2 (describing section 5 of H.B. 1564 which modified RCW 84.64.080 to clarify who the record title owner is.). The second division court of appeals has previously indicated that RCW 84.64.080 may be “consistent” with due process as a result of the “provision to the effect that for a period of 3 years after the sale, the record owner of the property is *entitled to any proceeds* of such sale in excess of the sum due . . . for taxes.” Pierce County v. Wingard, 5 Wn. App. 568, 571 n. 4 (Wash. App. Div. 2 1971) (emphasis added).

Because RCW 84.64.080 “does not create an ownership interest in the excess funds,” it seems clear that any surplus funds in this dispute are the property of Otterbein. Pierce County acknowledged possession of the funds at issue. If Pierce County holds funds belonging to Otterbein, then it must be “indebted” to Otterbein or in “possession or control of personal property or effects” of Otterbein as those phrases are used in RCW 6.27.

¹ Seven Sales concedes, as it must, that courts have, nevertheless, read the statute as a source of substantive law. See e.g. In re Foreclosure of Liens, 922 P.2d 73 (Wash. 1996).

2. *Assuming arguendo that an application is required, the surplus funds become the property of Beatrice Otterbein on application therefor by anyone.*

RCW 84.64.080 references an “application” by providing in the notice portion of the statute “[i]f the highest amount bid . . . is in excess [of the delinquency plus costs] . . . the excess shall be refunded . . . *on application therefor*, to the record owner of the property owner.” (emphasis added). Below emphasis was drawn on the phrase “on application” to mean that until that “application” is made the funds are somehow not the property of the record owner. CP 61. The trial court found that Otterbein was “entitled to the excess proceeds being held” by Pierce County, but held that the funds were not subject to garnishment apparently because “in order to obtain the excess proceeds that [Otterbein] . . . is entitled to, she must first submit an application.” CP 100. Even assuming that reading to be true, Seven Sales submitted an “application” for the proceeds demanding that the funds be paid to Beatrice Otterbein.

RCW 84.64.080 makes no statement regarding who the “application” must be made by, nor the form or contents. Pierce County’s “application”

process requires that a record title holder sign a form stating what their address is, and releasing Pierce County from liability.² See CP 77-78.

In the “application” submitted by Seven Sales it was requested that Pierce County deposit the funds into the court registry as the property of Otterbein. Thereafter the writ of garnishment was issued to Pierce County. Thus, at the time the writ of garnishment was directed to Pierce County an “application” had been made and the proceeds were due to Ms. Otterbein, and therefore, subject to garnishment.

3. Analogy to non-judicial trustee foreclosure sales is unhelpful

The trial court considered non-judicial deed of trust foreclosure sales under RCW 61.24.080 to determine that the legislature “knows how to make judgment creditors eligible to receive the surplus proceeds” and by failing to do so under RCW 84.64.080 it intended not to do so. CP 101.

The non-judicial deed of trust foreclosure sale, however, is designed to address a completely different set of issues. The deed of trust act has generally been interpreted to further its three basic objectives: 1. To be inexpensive and efficient; 2. To provide equitable opportunity for interested parties to prevent a wrongful foreclosure; and 3. To “promote the stability of land titles.” See Bain v. Metropolitan Mortg. Group, 175

² It is not clear under what authority Pierce County can require a hold-harmless provision before disbursing to a record title holder its property.

Wn.2d 83, 94 (2012). On a practical level, deeds of trust (like traditional mortgages), are entered into to permit individuals to purchase property on credit with the creditor having a secured interest in the property being purchased. Additional creditors may take lower priority liens.

The purpose of taxation is to raise money for the State with a foreclosure sale as a last resort. In re Foreclosure of Liens, 922 P.2d 73, 130 Wn.2d 142, 154 (1996). As the foreclosure sale extinguishes liens on the property and because sewerage service charges will not typically exceed the value of real property, lienholders junior to the sewerage lien (i.e. all other lienholders) are incentivized to pay the sewerage service charge under RCW 84.64.060 to protect the security. After the foreclosure sale extinguishes the liens non-judgment holders will have no recourse until obtaining a judgment or engaging in collection activities if they are already judgment creditors (note, however, that any priority previous attached to the security would have ceased).

The beneficiary under a deed of trust (the holder of a promissory note) is typically the entity utilizing the remedy of a non-judicial deed of trust foreclosure. That entity is either the original purchase-money lender or an entity that has acquired the rights of that entity – as part of a profit generating venture typically. The entity that will be ultimately in possession of surplus funds in a deed of trust foreclosure sale will be a

private party: the trustee. The trustee is not permitted to retain the funds or determine ownership of the funds, but is to deposit them with the appropriate court, who is then entrusted with determining disbursement rights or ultimately submitting the funds to unclaimed property. See RCW 61.24.080 (3) and RCW 63.29.130. Under RCW 61.24.080(3) *recorded* interests in the property sold retain their priority on the surplus once deposited into the court registry.

By contrast a tax foreclosure sale pursuant to a sewerage lien is an effort by a county to obtain exactly the amount owed from any interested party, is required to be done subject to judicial approval, and the party in possession of surplus funds will be a public entity: the county.

The State legislature, as discussed *supra*, did not intend for county treasurer's to be obliged to determine ownership of surplus proceeds of a tax foreclosure sale. Stephenson v. Pleger, 208 P.3d 583, 585 (Wash. App. Div. II 2009). Similarly, the legislature did not intend for trustees in non-judicial foreclosure sales to make that determination. However, in both instances the courts could, and should, be able to make such determinations.

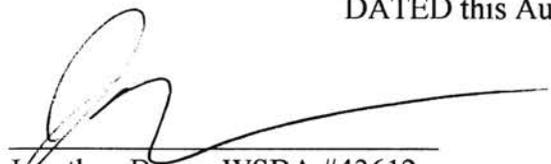
So although the legislature created an "application" for disbursement process under the Deed of Trust Act, it did not create an expedited process through the tax foreclosure process. However, it did *not* modify the

normal (i.e. non-expedited) collection activities such as garnishments. Ultimately, however, the goals and purposes of the statutes are too different for one to be a significant guide to interpretation of the other.

VIII. CONCLUSION

Whatever effect RCW 84.64.080 may have on Seven Sales' priority to the surplus funds or its entitlement as a former secured creditor does not alter the fact that Pierce County *is* in possession of funds belonging to Beatrice Otterbein. Whether she must make an application to instruct Pierce County to send the funds to a certain location does not alter the fact that Pierce County has funds she is entitled to. In short, *how* Pierce County came into possession of funds belonging to Otterbein is not relevant to determining whether a writ of garnishment can reach those funds. The legislature has established and determined how and what a debtor may claim as exempt from garnishment under RCW 6.27.090, RCW 6.27.150, RCW 6.27.160. The surplus funds at issue here are not exempt and are subject to garnishment.

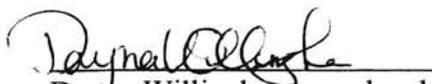
DATED this August 15, 2014



Jonathan Baner, WSBA #43612
Attorney for Appellant

CERTIFICATE OF SERVICE

I, DAYNA WILLINGHAM, a person over 18 years of age, served: Court of Appeals division II and to **Pierce County Prosecuting Attorney Donna Yumiko Masumoto and Beatrice Otterbein** a true and correct copy of the document to which this certification is affixed, August 15, 2014 via first class mail postage pre-paid. Pierce County Prosecutor Ms. Masumoto was also served via e-mail. Beatrice Otterbein was served at a purported new address: 1513 Clydette Blvd in Vidalia, GA 30474. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Tacoma, WA on 08-15-2014.


Dayna Willingham, paralegal

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