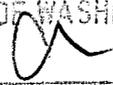


FILED
COURT OF APPEALS
DIVISION II

2017 JUN -8 PM 2:13

IN THE COURT OF APPEALS STATE OF WASHINGTON
OF THE STATE OF WASHINGTON
DIVISION II

BY 
DEPUTY

RAYMOND TUCKER,

Appellant,

NO. 49840-5-II

vs.

DARWIN TUCKER,

Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CASES

In re Estate of Gallinger, 31 Wn.2d 823, 829, 199 P.2d 575 (1948)

Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 898 (1995)

Penderson v. Potter, 103 Wn.2d 62, 11 P.3d 833 (2000)

INTRODUCTION

This case began as a simple unlawful detainer action. The defendant, Darwin Tucker resided in a home owned by his uncle, Raymond Tucker (for clarity appellant Raymond Tucker shall be known as Raymond and Respondent, Darwin Tucker shall be Darwin).

Darwin responded by claiming ownership of the property by reason of a gift deed to him from Raymond. The deed was never recorded and Darwin did not have possession of the deed. Darwin's motion for summary judgment giving title was denied by the trial court in Cause No. 12-2-14984-0. Darwin's Petition for Discretionary Review was denied by this Court and the matter referred back to the trial court.

The case was ultimately dismissed with prejudice. Thereafter the present unlawful detainer was filed and the trial court ruled that title to the property passed to Darwin. This appeal was then filed by Raymond.

The trial attorney withdrew and was substituted by the undersigned counsel because of a possible conflict of interest as a possible witness in the trial.

STATEMENT OF THE CASE

PROCEDURAL HISTORY--CHRONOLOGICAL

On 11/20/12 respondent Darwin Tucker filed a complaint in in Pierce County Superior Court against the Estate of Lawyer Tucker and appellant Raymond Tucker praying that he—Darwin—be awarded title to a Tacoma home owned by the deceased Lawyer Tucker and left to Raymond Tucker, his brother, in his will (CP 108).

Darwin was given a quit claim deed to the property by Raymond (CP 116). The deed was returned to counsel, Allan Overland, for the Estate for requested changes to be made by Raymond. It was forwarded to Raymond in Texas with a stamped-return envelope and a request to make the changes requested by Darwin. Raymond changed his mind about the gift because of "intervening bad personal feelings" and did not return the deed. Declaration of Raymond Tucker (CP 79).

Darwin moved for summary judgment awarding title to him on the grounds that the photocopy of the unrecorded gift deed effectively transferred title to him. Motion denied by the trial court (CP 54).

Darwin sought discretionary review in this court of the denial of his motion (CP 59) and sent back to the trial court.

On May 23, 2014 the trial court entered a Stipulated Order Dismissing Darwin's action with prejudice (CP 62).

Thereafter, Raymond Tucker filed an unlawful detainer action against Darwin.

Darwin responded pro se by filing a declaration and a copy of the deed. No answer was filed or served on Raymond's counsel. (CP 45) Declaration of Allan L. Overland.

The copy of the deed and declaration (CP 6) were deemed by the trial court to be an answer and the matter was set for trial at 1:30 p.m. on 9/02/16. Darwin appeared pro se and requested a continuance, granted by the court to 09/26/16. Overland appeared in the trial court at 1:30 p.m. on said date but the court had entered judgment awarding title of the property to Darwin in the morning. Declaration of Allan L. Overland (CP 45).

The trial judge's 09/26/16 hand written memorandum (CP 32) included the statement that "D Tucker will seek legal advice for preparation of documents and would return on or before 10/21/16 at 9:00 a.m. for entry of final orders."

However, on 10/03/16—18 days earlier, the court entered Findings of Fact and Conclusions of Law and Judgment dismissing the Complaint for Unlawful Detainer and declaring Darwin Tucker to be the owner of the subject property (CP 36-39).

This appeal is taken from said order and from denial of Raymond's Motion for Reconsideration (CP 42).

ASSIGNMENTS OF ERROR

NO. 1 – The court erred in awarding title to the subject real property to Darwin Tucker without any pleadings or notice to Raymond Tucker.

NO. 2 – The court erred in not applying the doctrine of res judicata from Pierce County Superior Court Cause No. 12-2-4984-0 in which Darwin Tucker's Complaint to acquire title was dismissed with prejudice.

NO. 3 – The court erred in entering the Findings of Fact and Conclusions of Law and Order entered 10/03/16 without any lawful basis to do so.

ARGUMENT

The action of the trial court in quieting title to a parcel of real property in an unlawful detainer action and which had no pleadings requesting such action is unusual. The respondent was pro se and therefore given certain latitude in the procedure—which is reasonable if it did not affect title to the property. The unlawful detainer action could have been dismissed because of counsel's hard of hearing problem and missed the hour. However, the issue of respondent's reliance on a photocopy of a gift deed did not override the actions of the respondent with advice of counsel in dismissing his claim of ownership (CP 62-63). Both the appeals court and the trial court rulings were ignored by the entry of the order of 10/03/16.

Even if the pro se respondent is given the benefit of any technical failure, there remains the lack of jurisdiction by the trial court to change ownership

without pleadings. The respondent did not obtain counsel to present the Findings of Fact and Conclusions of Law and Order. These were drafted by the court and used 18 days before the hearing set for presentment. Appellant had no time to object (CP 45).

The doctrine of res judicata applies to this matter and makes the Order of 10/03/16 and illegal order:

The case of Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P2d 898(1995), sets forth the elements of res judicata as follows:

"Res judicata refers to "the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action." It is designed to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts." For the doctrine to apply, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made."

"Under the principles of res judicata a judgment is binding upon parties to the litigation and persons in privity with those parties."

In the case of Penderson v. Potter, 103 Wn.2d 62, 11 P.3d 833 (2000), the court said:

"Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) a cause of action, (3) subject matter, and (4) quality of persons for or against whom the claim is made."

It should be noted that the Defendant did not answer the Complaint, did not deny the allegations and did not ask for relief, and the exhibit filed in the place of an answer was not served on Plaintiff. It is understandable that pro sees be given extra consideration so the exhibit was deemed to be an answer.

The dismissal with prejudice of the respondent's action to obtain title in Pierce County Superior Court Cause No. 12-2-14984-0 is res judicata as to the question of ownership. Respondent had only a photocopy of an unrecorded deed. The dismissal of the action on which it was based ended the matter.

The delivery of a gift must be complete. *In re Estate of Gallinger*, 31 Wn.2d 823, 829, 199 P.2d 575 (1948) held:

"A gift will not be presumed, but he who asserts title by this means must prove by evidence which is clear, convincing, strong and satisfactory a clear and unmistakable intention on the part of the donor to make a gift of his property, and the delivery of the property must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit."

CONCLUSION

The court should honor the doctrine of res judicata and reverse the trial court's order changing the ownership of the subject real property from Raymond Tucker to Darwin Tucker.

The facts are that Raymond did not complete the gift of the property. He changed his mind before the gift was perfected because of "personal" things.

Darwin did not have possession of a deed—only a photocopy of one when asserting ownership.

The dismissal with prejudice of Darwin's 2012 quiet title action ends the matter.

Because aged counsel for appellant got the time of hearing incorrect the respondent may be entitled to a dismissal of the unlawful detainer action but not overcoming the doctrine of res judicata.

Respectfully submitted this 8 day of June, 2017.



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IN THE COURT OF APPEALS
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RAYMOND TUCKER,

Appellant,

NO. 49840-5-II

vs.

DARWIN TUCKER,

Respondent.

DECLARATION OF SERVICE

GEOFFREY C. CROSS
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The undersigned is now and during all times mentioned herein, has been a citizen of the United States and the State of Washington, and a resident of Pierce County, Washington; was over eighteen years of age at the time of service, and is competent to be a witness in the above entitled action and not a party thereto; that on the 8th day of June 2017 your declarant served the defendant, Darwin Tucker, with a true and correct copy of the Brief of Appellant in the above entitled cause by going to his house at 1155 South Anderson St., Tacoma, WA 98405, knocking at the door. When there was no answer I placed the Brief of Appellant in his mail box. I have also caused the Brief of Appellant to be mailed to him by certified mail and by regular mail on January 3, 2017 by my legal secretary.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on June 8, 2017 at Tacoma, Washington.



Geoffrey Cross