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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

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

NO. 49844-8-II

JOHN CHOQUER, a married man, as his sole and separate property,

Appellant,

vs.

GUY WAY AND ZENAIDA WAY, husband and wife,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

APPELLANT CHOQUER'S OPENING BRIEF

JOHN CHOQUER, Plaintiff Pro se
9213 NE Mason Creek Rd.
Battle Ground, WA 98604
(503) 819-5115

P/M: 5/11/17

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I ASSIGNMENT OF ERROR

1. The trial court erred in ordering issuance of a writ of restitution after learning Appellant's farm was sold non-judicially, in violation of RCW 61.24.030(2), on June 5, 2015.

A. Issue Pertaining to Assignment of Error.

1. Under Washington law is it lawful to foreclose a farm non-judicially?

II STATEMENT OF THE CASE

Appellant purchased the Property for $349,000 in June 2004. *CP*, at 7. For more than 140 years prior to the day on which Appellant purchased the Property -- including the date on which Appellant purchased the Property – the Property was utilized exclusively for agricultural purposes. *CP,* at 13. This fact is uncontested. Attached hereto as Appendix ("A")-1 thru A-2 (Certified on back) is a true and correct copy of a document that was filed in the Clark County Tax Assessor's Office on June 3, 2004. The document proves the Property was designated as open space, farm and agricultural land on the day Appellant purchased the Property. This fact is uncontested.

Shortly after purchasing the Property Appellant began working to convert the property from a farm to a vineyard. *CP,* at 8-9. Over several years, he shaped the land for drainage, installed a drainage system, groomed the Property's slope to most efficiently accommodate the drainage system, and began to install, and substantially installed, an irrigation system. *CP,* at 10. Appellant also constructed 3 bio-swale ponds

on the property. Clark County issued a permit for the construction of each of these ponds. *CP,* at 10. These facts are uncontested.

After working for years to create a vineyard on the Property, on March 6, 2009, with the help of Appellant's neighbor, Appellant began planting the first grafted grapevines. *CP,* at 9. That year Appellant planted more than 8000 grafted grapevines on 7 acres of vineyard-ready land. *CP,* at 9. Appellant has been engaged in the process of growing grapes on the land, without interruption, ever since. *CP,* at 17.

Even though Appellant was not able to complete the automation portion of the irrigation system before losing possession of the property, the drips lines had been installed for over 4 years. Appellant was able to produce batches of wine for production purposes following both the 2015 and 2016 growing seasons. *CP,* 10. Plaintiff was utilizing the Property as a vineyard on the day he moved off the Property. *CP,* at 10.

After producing small batches of wine – in the three hundred fifty to four hundred fifty case range -- in 2015 and 2016 -- Appellant expected to have a full grape production run in 2017 to be made into wine and sold to Vinesynergy, LLC. The Property was never anything other than agricultural land in Appellant's hands. *CP,* at 10. These facts are undisputed.

Appellant's ownership interest in the Property was sold for $25,570 on June 5, 2015. *CP*, at 10. Respondents were the purchasers at the trustee's sale. Prior to the sale and continuing until early 2017,

Appellant was unaware that the non-judicial foreclosure of agricultural land is prohibited by RCW 61.24.030(2).

Shortly after winning the bid, Respondents brought an unlawful detainer action. Appellant resisted on the basis that Respondents had not properly notified Appellant's spouse of the pending action. The trial court held in favor of Respondents and issued an order for writ of restitution. Appellant timely appealed on September 9, 2015.

This Court affirmed the trial court ruling in a decision issued on December 28, 2016. Following this court's ruling, Respondents initiated a second unlawful detainer action, seeking the issuance of a new order for writ of restitution.[1] Appellant filed a motion to reverse the trial court's decision and to rescind the trustee's sale because Appellant's land was agricultural land on the day he purchased the property and was agricultural land on the day the trustee's sale occurred. After considering both arguments, the trial court denied Appellant's motion and granted Respondents' motion for writ of restitution.

Appellant timely appealed.

III ARGUMENT

A. Non-judicial foreclosure of agricultural land is void.

Under Washington law, agricultural land must be foreclosed judicially. RCW 61.24.030 sets up a list of requisites for a trustee's sale. *Schroeder v. Excelsior Management Grp., LLC,* 177 Wn.2d 94, 106, 297

[1] The original order had expired.

P.3d 677 (2013). Pursuant to that statutory provision, it is requisite to a trustee's sale that land which is used primarily for agricultural purposes on both the day the deed of trust is granted and the day the land is scheduled to be sold must be foreclosed judicially. *Schroeder,* 177 Wn.2d at 105; *Brown v. Dept. of Commerce,* 184 Wn.2d 509, 519, 359 P.3d 771 (2015); *Gardner v. First Heritage Bank,* 175 Wn. App. 650, 669-670 (2013). The non-judicial foreclosure of agricultural land is void, not voidable.

Until less than a month before the unlawful detainer proceeding that is the subject of this appeal occurred, Appellant was unaware that the June 5, 2015 trustee's sale of the Property violated Washington law[2] and was therefore void. *See Swartout v. Spokane,* 21 Wn. App. 665, 674, 586 P.2d 135 (1978); *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412, 334 P.3d 529 (214). Nor was Appellant aware that because the sale was void, not voidable, it could be challenged collaterally. *State v. Coe,* 101 Wn.2d 364, 371, 679 P.2d 353 (1984); *Bavand v. OneWest Bank, FSB,* 176 Wn. App. 475, 492, 309 P.3d 636 (2015).

B. *Schroeder v. Excelsior Management Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013)

In *Schroeder,* a Excelsior Management Group ("Excelsior") <u>*sold Schroeder's land non-judicially*</u>.[3] Mr. Schroeder had always farmed the land. *Schroeder,* 177 Wn.2d at 99. Nevertheless, Excelsior sold the land

[2] RCW 61.24.030(2).
[3] This case is on all fours with *Schroeder* in this regard.

by public auction and claimed the sale was lawful.[4] In support of its claim, Excelsior pointed out that Schroeder, in return for a $425,000 loan, had settled his lawsuit against an earlier attempt to foreclose by signing a new deed of trust -- and a settlement agreement -- that indicated the land was not agricultural for purposes of non-judicial foreclosure.[5] *Id.,* at 100 and 106. Moreover, the settlement was memorialized in a stipulated trial court order, which, in relevant part, read as follows:

> For valuable consideration, the receipt of which is hereby acknowledged, Schroeder, through his attorney, knowingly waives his right, pursuant to RCW 61.24.030(2) to judicial foreclosure on the subject property on the grounds it is used for agricultural purposes.
> . . . .
> 1. Schroeder has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes,
> 2. Schroeder shall not be allowed to again allege that the subject property is used for agricultural purposes,
> 3. Any future deed of trust executed by Schroeder to the defendant, an associated company or assigns, need not be judicially foreclosed but may be foreclosed nonjudicially in accordance with RCW Chapter 61.24.

Schroeder, 177 Wn.2d at 100.[6]

Excelsior argued the parties had a right to agree by contract to a waiver of the judicial foreclosure requirement, and the parties had in fact entered into such an agreement. *Id.*

The Supreme Court disagreed. Despite the deed of trust, the contractual agreement, and the above stipulation, the Supreme Court held

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[4] In this case, the sale was made at public auction, and Plaintiffs claim the sale was lawful.

[5] Defendant herein has not signed a new deed of trust, has not signed a settlement agreement of any kind, and has never agreed to accept a payment of any kind for doing either one of these two things.

[6] Defendant herein has not signed a stipulation of any kind with Plaintiffs.

the sale was void if the property was agricultural land *on the date Schroeder purchased the property and on the date of the trustee's sale.* *Id.,* at 115.[7]

The Supreme Court supported its holding by explaining that RCW 61.24.030 is not a "rights-or-privileges-creating statute." *Id.,* at 106. Instead the provision sets up a list of requirements for a lawful trustee's sale. *Id.* If any one of the requirements is not met, the sale is void, not voidable.[8]

One of the requirements in RCW 61.24.030, RCW 61.24.030(2), is *agricultural land may not be sold in the absence of judicial supervision.* *Id.,* at 107. Since the land appeared to the *Schroeder* Court to be agricultural land, the Court reversed the appellate and trial court decisions and remanded for further proceedings consistent with the court's opinion. *Id.,* at 115.

C. Appellant's Land is Agricultural Land

Before Defendant purchased the Property from Ms. Kildune in 2004, the Property had been designated and used primarily as agricultural land for more than 140 years. And from the day Defendant purchased the Property until June 5, 2015, the day the Property was sold non-judicially,

[7] In the case before this Court, the Property had been agricultural land for more than 140 years on the date Appellant purchased the Property, and the Property was agricultural land on June 5, 2015, the date the Property was sold at public auction.
[8] *See Lyons v. U.S. Bank, NA,* 181 Wn.2d 775 (2014); *Deutsche Bank National Trust Co. v. Slotke,* 192 Wn.2d 166 (2016).

Defendant utilized the Property as agricultural land -- to sell hay, apple cider, and wine.

The Property was agricultural land on the day Appellant purchased it and on the day it was sold at a trustee's sale. These facts are undisputed. Therefore, pursuant to RCW 61.24.030(2), the Property was not subject to foreclosure sale without judicial supervision.

The sale was void at its inception. Thus, legally speaking, the sale never happened. As such, legal title to the Property has never legally passed, and possession of the Property should be returned to Appellant.

IV CONCLUSION

For the reasons listed herein above, the court should return this matter to the trial court with instructions to: (1) rescind the order granting the writ of restitution; (2) invalidate the June 5, 2015 non-judicial foreclosure of the Property; and (3) return title to and possession of the Property to Appellant.

DATED This 10th Day of May, 2017

Respectfully submitted,

JOHN CHOQUER

John Choquer, Appellant Pro se

Appendix

FILE NO. 80-0150

OPEN SPACE TAXATION AGREEMENT

(To be used for "Open Space or "Timber Land" Classification, only)

Prepare an original with one completed copy to each of the following:
Applicant
Legislative Body
County Assessor

80 06270075

This Agreement between JAMES J. KILDUN

31209 NE Mason Creek Road, Battle Ground, WA. 98604 hereinafter called the "owner, and

(granting authority) CLARK COUNTY

Whereas the owner of the following described real property having made application for classification of that property under the provisions of RCW 84.34.

And whereas, both the owner and legislative authority desire to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic and economic asset to the public, and both parties agree that the classification of the property during the life of this Agreement shall be for:

OPEN SPACE
(Open Space and Timber Land)

Now, therefore, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

(1) During the term of this Agreement, the land shall only be used in accordance with the preservation of its classified use.

(2) No structures shall be erected upon such land except those directly related to, and compatible with the classified use of the land.

(3) This Agreement shall be effective commencing on the date the legislative body receives the signed Agreement from the property owner, and shall remain in effect for a period of at least ten (10) years.

(4) This Agreement shall run with the land described herein and shall be binding upon the heirs, successors and assigns of the parties hereto.

(5) Withdrawal: The land owner may withdraw from this Agreement if after a period of eight years the land owner makes a withdrawal request, which request is irrevocable, to the assessor. Two years from the date of that request the assessor shall withdraw the land from the classification, and the applicable taxes and interest shall be imposed as provided in RCW 84.34.070.

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(6) Breach: After land has been classified and an Agreement executed, any change of the use of the land, except through compliance with items (5) or (7) of this Agreement, shall be considered a breach of this Agreement, and subject to applicable taxes, penalties and interest as provided in Sections 9 and 12 Chapter 212 Laws of 1973 1st Ex. Sess.

(7) A breach of Agreement shall not occur and the additional tax shall not be imposed if the removal of designation resulted solely from:

(a) Transfer to a government entity in exchange for other land located within the state of Washington;
(b) A taking through the exercise of the power of eminent domain, or sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power;
(c) Sale or transfer of land within two years after the death of the owner of at least fifty percent interest in such land.
(d) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the landowner changing the use of such property.

(e) Official action by an agency of the state of Washington or by the county or city within which the land is located which disallows the present use of such land.

(f) Transfer to a church and such land would qualify for property tax exemption pursuant to RCW 84.36.020.

(8) The county assessor may require classified land owners to submit pertinent data regarding the use of the land, productivity of typical crops, and such similar information pertinent to continued classification and appraisal of the land.

Legal Description of Classified Land:

Portion of Serial No. 222975, Tax Lot 16 of Section 9, Township 4 North, Range 2 East Willamette Meridian. 8.80 acres.

This Agreement shall be subject to the following conditions:

CLARK COUNTY CODE, Chapter 3.08

Section 7. "Soil Conservation".	At least eighty (80%) percent of the tract must be in production of food or fiber.
Section 10. "Weed Control".	An effective noxious weed control program must be maintained/implemented on this "open space" tract.

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It is declared that this Agreement contains the classification and conditions as provided for in RCW 84.34 and the conditions imposed by this Granting Authority.

Dated _____

RECORD
Assessor
JUN 27 11 22 AM '80
AUDITOR
RON DOTZAUER

Granting Authority: Clark County

By _____

By _____

By _____

As owner(s) of the herein described land I (we) indicate by my (our) signature(s) that I (we) are aware of the potential tax liability and hereby accept the classification and conditions of this Agreement.

Dated 5/5/80

_____
Owner(s)

_____
(Must be signed by all Owners)

Subscribed and sworn to before me this 5 **day of** May, 1980

_____
Notary Public

Date signed Agreement received by Legislative Authority _____

RECEIVED
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Commissioners Dept.

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2017 MAY 15 AM 11:53

STATE OF WASHINGTON

BY AB
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

GUY WAY AND ZENAIDA WAY, Husband and Wife, Respondents, vs. JOHN CHOQUER, and all other persons occupying 9213 NE Mason Creek Rd, Battle Ground, WA, 98604 Appelants.	**Appellate Court Case No.: 49844-8-II** **DECLARATION OF DELIVERY OF APPELLANTS' OPENING BRIEF**

I, John Choquer, declare as follows:

1. I am more than 18 years of age;

2. I am one of the Defendants in this litigation;

3. On May 10th, 2017, I delivered a copy of the Appellants' Opening Brief, and this Declaration of Delivery to Counsel for Plaintiffs, Quinn H. Posner, prior to filing these documents with the Washington State Court of Appeals, Division Two.

JOHN CHOQUER
9213 NE Mason Creek Rd
Battle Ground, WA 98604
(503) 819-5115

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of May, 2017, at Battle Ground, Washington.

Respectfully submitted,

JOHN CHOQUER

/s/ John Choquer
John Choquer, Plaintiff Pro se

JOHN CHOQUER
9213 NE Mason Creek Rd
Battle Ground, WA 98604
(503) 819- 5115