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Court of Appeals
Division II
State of Washington
3/16/2018 4:59 PM

Kitsap County #17-2-00146-7
Court of Appeals #50997-1-II

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

JOHN SCANNELL, Petitioner

VS.

GEORGIY BULKHAK, Respondent

**ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

REPLY BRIEF

John Scannell
543 6th St,
Bremerton Wa., 98337

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REPLY ARGUMENT

1. Introduction

In his response brief, the respondent Georgiy Bulkhak (hereinafter referred to as Bulkhak,) never adequately addresses the primary issue raised by this appeal, and the one issue which renders his argument frivolous. He can never explain how an alleged owner who is out of possession, can utilize the summary procedure of an unlawful detainer, to gain possession from both a tenant and an alleged owner who are both in possession. He cannot explain the obvious, it would be a complete denial of due process to the present owner to do so, because the present owner in possession, still has not even notified of this action. Scannell, in his opening brief, presented clear case authority both in Washington and in other states, that issues such as who has superior title cannot be decided by the summary procedure. Bulkhak' argument is illogical and ill conceived, ignores the principles of stare decisis and statutory construction, relies on outdated and reversed decisions of the Washington State Supreme Court and has unnecessarily driven up the attorney fees in this case. He never addresses the issue as to how a prior decision against him on this very point should be ignored.

2. Bulkhak cannot have the court make a determination that he has superior title using the summary procedure in the unlawful detainer statute.

Bulkhak begins his argument on page 8 of his opening brief, by jumping to the issue that he has valid title, which Scannell has already pointed out cannot be determined in the summary procedure Bulkhak is attempting to utilize. He appears to argue that since Scannell can raise no defense, there is no valid dispute over the landlord tenant relationship. Then he presumptuously jumps to the conclusion that he can somehow obtain the relief he seeks, without even notifying the alleged owner in possession.

In doing so, he puts the cart before the horse. As Scannell pointed out in his opening brief, the unlawful detainer statute is in derogation of common law, when the only issue is possession and payment of rent, that it is well settled that additional claims cannot be joined in an unlawful detainer action, that any other issues such as title have to be raised in an ordinary civil action, where the form of the summons and complaint only invoked the unlawful detainer statute, the court cannot rule on the issue of title, and unlawful detainer requires that there be no dispute as to who the landlord is. In support of these principles Scannell cited to *Seattle Housing Authority v. Silva*, 94 Wn.App. 731, 952(1999), *Phillips v. Hardwick*, 29

Wash. App. 382, 386, 628 P.2d 506 (1981), *Honan v. Ristorante Italia, Inc.*, 66 Wash. App. 262, 269, 832 P.2d 89, review denied, 120 Wash. 2d 1009 (1992). *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 864 P.2d 435 (Wa.App. 12/09/1993). *Proctor v. Forsythe* 4 Wn. App 238, 480 P.2d 51. *CJS Landlord and Tenant* §1361 at 122, citing *Kimball v. Lincoln*, 72 Haw. 117, 809 P.2d 1130 (1991).

To these well reasoned arguments, Bulkhak presents nothing in rebuttal regarding the unlawful detainer statute. On page 13 of his brief, He cites to RCW 59.12 as the statutory basis for his unlawful detainer action. However, he ignores that this chapter requires that the owner must actually be in possession for the procedure to be utilized. It has long been held in Washington that it is not sufficient for a complaint to allege the plaintiff is owner in fee simple, as it is does not show possession required for RCW 59.12. *McGraw v. Lamb* 31 Wash. 485, 72 P. 100.

RCW 59.12 actually deals with procedure of forcible detainer, although it defines unlawful detainer. However RCW 59.16 deals with the procedure of unlawful detainer and in RCW 59.16.030, it is made clear that if the alleged owner is not in possession, the summary procedure may not be utilized if the defendant alleges facts that dispute who the landlord is:

It shall not be necessary for the plaintiff, in proceedings under this chapter, to allege or prove that the said lands were, at any time, actually occupied prior to the defendant's entry thereupon, but it shall be sufficient to allege that he or she is the legal owner and entitled to the immediate possession thereof: PROVIDED, That if the defendant shall, by his or her answer, deny such ownership and shall state facts showing that he or she has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought under the provisions of *chapter XLVI of the code of eighteen hundred and eighty-one. Reviser's note: "chapter XLVI of the code of eighteen hundred and eighty-one" is codified as RCW 7.28.010, 7.28.110 through 7.28.150, and 7.28.190 through 7.28.270

In his answer, Scannell alleged that Bulkhak was not the landlord or owner, that Scannell has been in continuous possession long before Bulkhak was alleged to have purchased the property and that the title Bulkhak obtained was void because it was not acquired through a legal auction. Under these facts, Bulkhak had no choice, if he wanted to prove he had superior title, but to note the action as an ordinary civil action of ejectment (RCW 7.28), just as Scannell argued in his opening brief, and the summary procedure allowed by the unlawful statute was unavailable.

3. Scannell and King have superior title to Bulkhak even if the court were to attempt to determine if a landlord tenant relationship exists.

For the first time on appeal, Bulkhak, without ever explaining why he should have a right to do so¹, attempts to argue that in spite of the forgoing authority which denies the Superior court the right to determine title he appears to argue that both Scannell and King cannot even argue that they have superior title, because the existence of his tax title forecloses any defense they might raise, citing to, and misconstruing two outdated cases *Hanson v. Carr*, 66 Wn. 81, 118 Pac 927 and *Wilson v. Korte*, 91 Wn. 30,33, 157 P.47(1916) *Proctor v. Forsythe* 4 Wn. App 238, 480 P.2d 51

These cases, even if applicable at the time they were decided, have long been reversed, at least with respect to the issue of whether Scannell and King can attack their title in collateral proceedings. Tax Foreclosure judgment may be collaterally attacked and is void where record affirmatively shows lack of jurisdiction by failure to serve notice on proper parties. *Title & Trust Co. v. Columbia Basin Land Co.* 136 Wash.

63 238 P. 992 {1925). Estoppel, however, cannot be invoked to cure a want of jurisdiction. *Young v. Droz*, 38 Wash. 648, 80 P. 810:

To the contention that the owner was estopped by certain conduct from challenging the validity of a tax deed, the court, in the case cited, said: 'If the sale and the proceedings pursuant to which it took place had been merely irregular or voidable, there might be force in respondents' contention. But as the sale was absolutely void, an estoppel cannot be successfully pleaded against appellant by reason of the conduct mentioned. *Sturgiss v. Dart*, 23 Wash. 244, 248, 62 P. 858.¹

In the case cited to in his brief, it is abundantly clear that Scannell was alleging that the sale was void for lack of notice: See RCW 84.64.080, *Stritzel v. Smith*, 20 Wa.App.218, 579 P.2d 404(05/26/1978), the notice requirements of RCW 84.64.080 were held to be jurisdictional.

Of course, the two cases cited by Bulkhak have also been either qualified or reversed by the cases cited in Scannell's opening brief regarding the owner of a valid option to purchase. As a holder of a valid option to purchase, and lease, his option to purchase and lease survive any tax sale, because as a tenant and the holder of an option, he is not responsible for the taxes. *Coy v Raabe*, 69 Wash.2d 346, 418 P.2d 728 (9/22/1966) and *Graham v. Raabe*, 62 Wa.2d753, 384 P.2d 629(1963).

¹ RAP 2.5 generally requires a party to have raised the issue at the trial level.

Bulkhak attempts to argue that RCW 84.64.180 creates a presumption that the sale was conducted in a manner required by law. He then argues that Scannell has not presented any “evidence” that notice was not sufficient to overcome the presumption. Of course he fails to provide any authority that “evidence” is necessary to overcome the presumption in RCW 84.64.180 in an unlawful detainer proceeding..

In fact, the aforementioned RCW 59.16.030 states clearly what is needed to overcome the presumption for the purpose of an unlawful detainer. It only requires Scannell to deny in his answer that the plaintiff is the owner and to “state facts showing that he or she has a lawful claim to the possession thereof.” There is an implicit recognition in the statute that statements are all that are needed, because the unlawful detainer statute may require him to show cause in one week which may not be nearly enough time to obtain declarations and conduct depositions to collect enough admissible evidence to overcome the presumption.

4. Bulkhak cannot create an implied “tenancy by sufferance” by demanding rent.

Next, Bulkhak presents an utterly frivolous and nonsense argument that he can create an “implied tenancy by sufferance” simply by demanding rent. He does this by misrepresenting a holding in an older case, and ignoring the plain language of RCW 59.04.050. The case cited,

namely *Williamson v. Hallett*, 108 Wn. 176, 178-179, 182, depended on the tenancy at sufferance statute at the time. Bulkhak points out the statute in question is codified now at RCW 59.04.050 and states that a tenancy at sufferance is created when the tenant “obtains” possession without the consent of the “owner”. Here Scannell contends he obtained possession by virtue of the lease and option he had with the owner Paul King. In order for Bulkhak to obtain a tenancy at sufferance, it is first necessary for him to get the court to determine who the owner is, something that cannot be done with the summary unlawful detainer process. He is faced with the same chicken and egg problem he faced before when arguing for use of the unlawful detainer statute. Here Scannell overcame any presumption of ownership by Bulkhak by denying his ownership in the answer and stating facts in his answer that supported it.

5. Scannell did not receive sufficient notice for the remedy Bulhak seeks in this action.

Bulhak continues his frivolous and nonsense arguments that he raises first time on appeal that Scannell and others have been given sufficient notice for the remedies sought in this action. He has presented no authority as to why he should be able to do this for first time on appeal, nor do his arguments have any merit.

First, on page 11, he provides no authority that Scannell has no standing to assert any notification held by others. As stated earlier, Scannell has the right to contest Mr. Bulkhak claim of ownership under RCW 59.16.030 by asserting King is the owner instead of the plaintiff. Obviously, in order to establish his superiority of title over Mr. King, Bulkhak has to provide Mr. King some kind of notice. His argument conveniently overlooks this necessary detail and does not give us a clue how this was accomplished.

Next he concedes that Scannell also has standing as a property manager. He provides no authority as to how he can eliminate the employee-employer relationship through an unlawful detainer. Scannell has provided ample authority that he cannot do this in an unlawful detainer action which is limited to evictions involving tenants and landlords.

Bulhak cites to two statutes for the basis as to what constitutes valid notice, in an unlawful detainer proceeding, RCW 59.12.040 and RCW 59.18.055 (residential landlord tenant act).

First, RCW 59.18.055 cannot apply for two reasons. RCW 59.18.040(2) exempts from the coverage of RCW 59.18 tenants who are purchasing the building. RCW 59.18.040(8) exempts tenants who are employees of the landlord, whose right of possession is conditioned upon

their employment. Both of these exemptions apply to Scannell by virtue of his lease option to purchase and his standing as manager.

RCW 59.12.040 does not apply for several reasons. First, RCW 59.12.010 defines unlawful detainer in terms of tenants. Even if this court were to accept service on John Scannell as a tenant, it does not constitute service on his standing as a building manager. As stated earlier, the unlawful detainer statute cannot alter his standing as a building manager, only as a tenant. So even if in theory his tenancy could be ended, John Scannell still has standing to be in the building pursuant to his standing as a building manager.

Secondly, the record shows only one summons and one complaint posted on the portion of the premises occupied by Scannell. Scannell is certainly entitled to take it down so he can use it in the proceedings to be used against him. So where do the other tenants and Mr King get notice? Bulkhak has cited to no authority that requires Scannell to make copies and serve co-defendants because, obviously no such authority exists.

Thirdly, Bulkhak has provided no argument or authority how Mr. King can be served in this fashion. He has cited no authority as to how Mr. King is a "tenant". In Washington, courts may assume that where no authority is cited, counsel has found none after search. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171(1978).

Finally, even if an argument could be made that King was a tenant, it would be at best a case of first impression. Bulkhak is asking the court to essentially rule as a matter of law, that King is a tenant, based upon his assertion in his complaint. "When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." *Bravo v. Dolsen Companies*, 125 Wn.2d 745 (1995) *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (citing 3ALewis H. Orland, Wash. Prac., Rules Practice § 5152 (3d ed. 1980)).

Bulhak has made an argument that Scannell has no right to assert standings of others as to notice, but provides no authority or argument as to why his standing as a building manager doesn't allow him to assert such standing because it impacts his position as a building manager. As a building manager he has to determine how the various occupants of the building are to be treated so he can figure out how the building is to be managed. He has to know exactly what the court expects as to what his duties and rights are as a building manager. If Bulhak shows up with the Sheriff, what is the "eviction" supposed to consist of? Are tenants who have never been given notice of this action going to be arrested? What if Mr. King instructs him to re-rent the premises, including his own apartment before the Sheriff and Bulhak even show up. How does the

court gain jurisdiction over these entities or persons when Bulkhak still has not cleared title with Mr. King?

6. Bulkhak provides no authority as to how the findings of a published case can somehow be reversed by an earlier case.

On Page 16, of the briefing, Bulkhak provides no authority as to how a published decision of the Washington State Supreme Court can be reversed by an earlier case. This is a nonsense argument. Obviously, one can take look at these cases and come to the common sense conclusion that whatever general rule was established by the cases *Hansen supra*, and *Carlson supra*, were modified or reversed, once the court came across a case involving an option to purchase for the very reasons given in the later cases, i.e. it would be inequitable to deprive the holder of his valuable option rights because the owner didn't pay taxes, because the holder of an option is not responsible for the payment of taxes.

7. Bulkhak's other arguments as to why Scannell's arguments are frivolous are baseless and likewise without merit.

For the most part, when Bulkhak attempts to argue why Scannell's defenses are frivolous, he resorts to the same nonsense arguments he raised above. There are two exceptions as follows:

For the first time on appeal, Bulkhak argues that Scannell was not entitled to notice of the tax sale. Scannell argues that the record is not

sufficiently developed because Scannell may have been able to present evidence that his option was essentially exercised. He could also present evidence that another court had already determined that he was entitled to notice of the sale for reasons that were not litigated in this case

Even if this court were to rule on the issue, it would have to rule that Scannell had rights to notice because he was the holder of a valid option to purchase. The statutes and authority relied upon by Bulkhak say nothing about options to purchase. In *Washington v. Williams*, 73 Wash. 2d 1, 435 P.2d 975 (Wa. 01/05/1968) the court upheld the right of the legislature to consider leases with options to purchase as a valid subject for real estate taxes. Obviously, if Scannell has invested a large amount of money in the option it would be a denial of due process to deny him the right to keep that valuable option without notice to him. Even if Bulkhak were correct in his assertion that the lease and option do not survive the tax sale, it would be unconscionable to deny him the right to keep that valuable right by not giving him an opportunity to pay the taxes.

Finally, Bulkhak says nothing about King's right to notice, which King clearly has, and if King did not receive notice as alleged in the answer, then Scannell's lease and option would survive because the sale was void as a matter of law and King would therefore be the owner

For the first time on appeal, again, without giving a basis why he should be able to raise it, Bulkhak refers to *Eagles v. Gen. Elec. Co.* 5 Wn.2d 20, 35, 104 P.2d912, (1940) for the proposition that a tax title is the equivalent of a decree quieting the title as a grant from the sovereign state.

The court made this declaration that this principle is subject to the exception that a suit by the owner must be brought within 3 years. As before, Bulkhak leaves out key details that would show why this case is not even remotely relevant.

What Bulkhak conveniently omits is that the case in question was one in which the former owner was trying to recover possession of land that he had lost in a tax sale. That is not the case here. Here, both Scannell and King have been in continuous possession since King purchases the property in 1999.

Therefore the relevant rule is that announced in *Spaulding v. Collins*, 190 Wash. 506, 68 P.2d 1025 (Wa. 06/04/1937) where the court patiently explained as to why statute of limitations can only be used as a shield, not a sword:

Since long before local improvement district No. 3 was created, respondents have been in the actual possession of the property. At all times both lots have been occupied as their home -- their dwelling being on one lot, their garage on the other. They are here seeking only to establish their right to maintain possession. Statutes of limitation serve only to extinguish remedies. *Baker v. Kelley*, 11

Minn. 480 (Gil. 358). They do not bar the defense of a right already held in enjoyment. 2 Cooley's Constitutional Limitations (8th ed.) pp. 762-764; *Pinkham v. Pinkham*, 61 Neb. 336, 85 N.W. 285. In the case cited, the rule is stated: "The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed."

Conclusion

For the reasons given in this brief and the opening brief, the petitioner respectfully requests that this court reverse the decision of the trial court to issue a writ of restitution in this case and award attorney fees to the petitioner.

Dated this 16th day of March, 2018,

S/ John Scannell
John Scannell

I certify that I sent a copy of this document to richard@richardpatricklaw.com for delivery to Richard Patrick

Dated this 16thth day of March, 2018 at Bremerton, WA.,

S/ John Scannell
John Scannell

ⁱ In this case the court ruled that a void tax sale is not a judgment. No rights are acquired or divested by it. It can neither bind nor bar anyone. Courts of general jurisdiction can by virtue of its inherent powers and with aid of statute clear its record of such judgment no matter what form and what approach to do so is made.

JOHN SCANNELL - FILING PRO SE

March 16, 2018 - 4:59 PM

Transmittal Information

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Appellate Court Case Title: John Scannell, Appellant v. Georgiy Bulkhak, Respondent
Superior Court Case Number: 17-2-00146-7

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