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No. 52607-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KIMBERLY HAN and SILVERWATER
NATURE PLACE, LLC,
Appellants/Plaintiffs

v.

ROBERT J. CARTANO,
Respondent/Defendant

APPELLANTS' REPLY BRIEF

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COME NOW Appellants, Kimberly Han and Silverwater Nature Place, LLC, by and through their attorney of record, Kelly DeLaat-Maher of Smith Alling P.S., and submit Appellants' Reply Brief to Respondents' on appeal as follows:

I. RESTATEMENT/CLARIFICATION OF FACTS

Han substantially relies upon the facts contained within the Appellant's brief. Notwithstanding, some clarification is necessary following Respondent's Brief on Appeal.

A. FACTUAL BACKGROUND

Cartano does not dispute important facts set out in Han's opening brief on appeal. Specifically, Cartano does not dispute that the parties had an oral agreement that contradicted the terms of the Purchase and Sale Agreement. Cartano admitted in his response and to the trial court that following the recording of the Statutory Warranty Deed, Han would be able to "re-purchase" the property within 90 days, during which time Han collected the rents on the property. CP. 23. Although he disputes that any agreement extended past 90 days in the argument portion of his brief, he does not spend much ink denying Han's claims in his factual recitation. Specifically, Han alleged she still had an interest in the property so as to have it transferred back to her upon repayment of the loan, but during the

period after the initial 90 days, Cartano would collect rents even though Han would continue to be responsible for expenses. CP 38, 101.

Cartano offers no explanation as to the discrepancies in the Purchase and Sale Agreement as to the sales price and closing date. He also offers no explanation as to why Han initially executed a Quit Claim Deed, consistent with her explanation that the monies transferred to Han were actually a loan secured by deed. CP 37-38, 92-94.

B. PROCEDURAL HISTORY

In his recitation of the procedural history of the case, Cartano states that the court determined that Han had no interest in the property, and that her claims to an interest in the property were frivolous. He further states that the trial court “properly dismissed the quiet title claim because the Amended Complaint, *taken in a light most favorable to Han*, did not state an actionable quiet title claim.” *Respondent’s Brief*, at 1 (emphasis added). However, procedurally Cartano did not file a motion to dismiss under CR 12(b)(6), nor a Motion for Summary Judgment. Cartano’s Motion to Release the Lis Pendens cannot procedurally operate to dismiss Han’s quiet title claims.

II. ARGUMENT

A. THE APPEAL IS NOT MOOT

Cartano argues that the appeal is moot because the property at issue was sold shortly after the lis pendens was released. He further argues that since the property has been sold, the appeal should be dismissed. It should be noted, however, that the property was not sold at the time Han filed her appeal, which was scheduled to close in September, 2018. CP 24. Cartano sold the property that was subject to the appeal at his own risk. The fact that he sold the property to a third party at his own risk, and the property was purchased by a third party at their own risk, does not make the subject matter of this appeal moot.

A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). “It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal ... should be dismissed.” *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); see also *Hart v. Department of Social & Health Servs.*, 111 Wash.2d 445, 447, 759 P.2d 1206 (1988).

Examples of a moot case include *In re Cross*, 99 Wn.2d 373, 662 P.2d 828 (1983), wherein the appellant appealed her civil commitment, but the detention had long ended by the time the Supreme Court issued its

decision. *Id.* at 376. In *Grays Harbor Paper Co. c. Grays Harbor County*, 74 Wn.2d 70, 442 P.2d 967 (1968), the Supreme Court determined that an appeal was moot after statutory changes to a challenged tax act were made, removing alleged deficiencies. In *Hagen v. Messer*, 38 Wn.App. 31, 683 P.2d 1140 (1984), the Court of Appeals was called to determine whether a \$5,000 bond was required in order to maintain a lis pendens during appeal on a case in which sisters sought an interest in real property transferred by their father prior to his death. The Court stated the issue was moot since the appellate court decision reversed the summary judgment dismissal of the case, thereby allowing the sisters' claims to proceed. *Id.* at 31.

Respondent misconstrues whether release of the lis pendens allowing him to transfer it to a third party renders the case moot. It does not. Indeed, during the appeals process, title to the property is still in dispute.

The purpose of the lis pendens statute is to provide notice to unsuspecting third party purchasers. *United Savings and Loan Bank v. Pallis*, 107 Wn.App. 398, 27 P.3d 629 (2001). The statute is procedural and intended to provide notice to the general public of the pendency of an action involving title to real estate. *Merrick v. Pattison*, 85 Wn. 240, 147 P. 1137 (1915). It has long been held that a lis pendens remains binding on subsequent purchasers until final determination through appeal is

resolved. *Morton v. Le Blank*, 125 Wn. 191, 215 P. 528 (1923). The lis pendens provides notice to subsequent third party purchasers and/or transferees, placing them on notice that they take the property subject to the property's ultimate disposition. *Snohomish Regional Drug Task Force v. 414 Newberg Rd.*, 151 Wn.App. 743, 214 P.3d 928 (2009).

Had the property been transferred to Han rather than a third party, the issue would be moot since her claims to quiet title would be fully resolved. However, since it was transferred by Cartano during the time when an appeal on the issue was pending, the issue is not moot. A third party should take the property subject to the lis pendens, and the lis pendens should remain effective through appeal, until final disposition.

B. THE ORDER RELEASING THE LIS PENDENS IS APPEALABLE

Cartano argues that the Order releasing the Lis Pendens is not appealable, since Han still has a claim for money damages. Cartano, at the same time, admits that the decision has the effect of dismissing Han's claims for quiet title, even though he did not bring a motion for dispositive relief. See Respondents Brief, p. 1.

An appealable order must affect a "substantial right." RAP 2.2(a)(3) and (13). Not only does a lis pendens cloud title and put third parties on notice of pending litigation, a lis pendens can bind a third party

to all proceedings occurring after the lis pendens was filed as if they were an original party to the action. *R.O.I., Inc. v. Anderson*, 50 Wn.App. 459, 462, 748 P.2d 1136 (1988); RCW 4.28.320. Because the cancellation of a lis pendens potentially affects the relationship between Han and any third party who purchased the property at issue, a lis pendens affects a substantial right in relation to Han and is appealable.

In *Washington Dredging & Imp. Co. v. Kinnear*, 24 Wn. 405, 64 P. 522 (1901), the trial court cancelled a lis pendens that was filed after two final determinations as to the rights of the parties to disputed land were issued. In that action, it was clear that “there was **no action pending** in the Superior Court of King County, or in any court whatever. . .at the time the lis pendens was filed.” *Id.* at 406 (emphasis added). The court unequivocally stated that since the actions were settled, discontinued, or abated, “The order of the court refusing to remove it is an order affecting their substantial rights, and is therefore appealable.” *Id.* at 406-407.

Cartano argues that unlike the parties in *Washington Dredging*, *supra*, the removal of the lis pendens did not affect a substantial right since Han still has an action for damages. Cartano takes this position, even though it is clear from this statement that unlike the situation in *Washington Dredging*, Han’s action was not settled, discontinued, or abated, as required by the statute.

If a party has a substantial right to have a lis pendens removed when there is no action pending, the converse is also true. See *Guest v. Lange*, 2019 WL 2004235 *5 (May 7, 2019).¹ In such case, an order cancelling a lis pendens is also an appealable order. *Id.* Based upon the authority cited, Han may maintain her appeal under RAP 2.2(3).

C. THE TRIAL COURT ERRED IN CANCELLING THE LIS PENDENS

1. Standard of Review

The appropriate standard for review of an order to cancel a notice of lis pendens is abuse of discretion. *Beers v. Ross*, 137 Wn.App. 566, 575, 154 P.3d 277 (2007); see also *Otis Housing Association, Inc. v. Ha*, 140 Wn.App. 470, 475, 164 P.3d 511 (2007). Statutory construction is a question of law that the court reviews de novo. *Cosmopolitan Eng'g Grp. v. Ondeo Degremont*, 159 Wn.2d 292, 298, 149 P.3d 666 (2007). In his response brief, Cartano misconstrues the proper standard of review, only stating that review of the Court's decision is de novo.

Cartano's position is based upon his argument that the trial court's action in summarily dismissing Han's quiet title claims was proper under CR 12(b)(6). Cartano undisputedly did not bring a motion to dismiss under CR 12(b)(6) – instead opting only to bring a motion to release the lis

¹ Unpublished opinion cited under GR 14.1(a).

pendens. As such, the trial court's action in treating the motion as one under 12(b)(6) or CR 56 is simply improper. Had the court actually dismissed Han's claims under CR 12(b)(6) or CR 56, and entered an order stating as such, then Cartano would be correct that the only standard of review is de novo. However, the order that is being appealed is one releasing a lis pendens, which is reviewed under an abuse of discretion standard.

Even assuming Cartano did bring a motion to dismiss under CR 12(b)(6), both Cartano and counsel for Cartano filed declarations in support of the motion that raised matters outside of the Complaint and Amended Complaint. Pursuant to CR 12(b)(6), the motion should then have been treated as one for summary judgment under CR 56. Han was not afforded the time to prepare a response under CR 56. Simply stated, Cartano cannot justify the court's action in dismissing any of Han's claims without following proper procedure under either rule.

2. Han Claims an Interest in the Property

Cartano argues that the facts outline an oral unexercised Option to Purchase rather than any other agreement, and therefore the court was justified in dismissing any quiet title claims under CR 12(b)(6) or CR 56. Again, this argument assumes that proper procedure was followed in bringing a Motion to Dismiss or for Summary Judgment, which it was undisputedly not. Additionally, Cartano did not argue that Han had an

unexercised option to the trial court in support of his Motion to Release the Lis Pendens. Instead, he argued that the doctrine of merger and the statute of frauds prevented Han from asserting a claim for quiet title.

Further, Han presented facts to the trial court prior to release of the lis pendens that there was an agreement past the initial 90 days wherein Cartano was to collect the rent as “interest on the loan,” but she would still have an opportunity to pay back the loan and have it transferred back to her since the property was still hers by oral agreement. CP 36-39. Contrary to Cartano’s argument now, the facts were disputed. The Court was in no position to make determinations based upon CR 56 or CR 12(b)(6), since neither such motion was before the Court.

3. Han’s Complaint was for Quiet Title

Cartano argues that Han does not articulate her claim to quiet title, and therefore the court is justified in dismissing her claims under a motion to release the lis pendens. Cartano ignores his own failures in properly noting a motion to dismiss her claim, no matter how poorly her claim may have been worded in her Amended Complaint to Quiet Title. CP 9-17.

CR 8(a) requires that a pleading contain a short and concise claim showing that the pleader is entitled to relief, and a demand for judgment. Washington is a “notice pleading” state. *State v. LG Electronics, Inc.*, 185 Wn.App. 394, 407, 341 P.3d 346 (2015). The notice pleading concept

anticipates that the issues to be tried will be delineated by pretrial discovery. *Mose v. Mose*, 4 Wn.App. 204, 209, 480 P.2d 517 (1971).

An action to quiet title is equitable and designed to resolve competing claims of ownership. *Kobza v. Tripp*, 105 Wn.App. 90, 95, 18 P.2d 621 (2001). “An action to quiet title allows a person in peaceable possession or claiming the right to peaceable possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.” *Id.* Even if the claim is ultimately invalid, the parties are still entitled to a decree making a determination. *Id.* (citing to *McGuinness v. Hargiss*, 56 Wn.2d 162, 105 P.233 (1909) (overruled on other grounds)).

Here, Han’s Complaint and Amended Complaint both reference quiet title, and her request for relief specifically asks for judgment quieting title. CP 3-3; 9-17. She states in both versions that despite the transfer of the property to Cartano, the property was still really hers pursuant to an agreement between the parties. Although perhaps unartful, Han’s Complaint was sufficient under notice pleading principals to put Cartano on notice that she was making a claim to title to the property based upon an oral agreement between the parties that contradicted the Purchase and Sale and Deed transferring the property.

a. Title is at Issue

Cartano argues that title could not be at issue in this case, because Han failed to exercise an option to purchase. Cartano's statement implicitly acknowledges that the parties had an oral agreement that was not consistent with either the Statutory Warranty Deed or the Purchase and Sale Agreement. A dispute exists as to the terms of that oral agreement, making the Court's summary determinations that Han's claims for quiet title would not succeed premature and improper.

Cartano likens the situation at hand to *Otis Housing Ass'n v. Ha*, supra, which involved an unexercised option to purchase. That case involved a written lease with option to purchase, which was not exercised prior to a written deadline. *Id.* Since the option was not exercised, the Court determined that title was not at issue, and ordered a lis pendens quashed. *Id.* at 475.

Here, the parties both state they had an oral agreement, the terms of which are disputed, that was separate from the Purchase and Sale Agreement attached to the Complaint. CP 23. The disputed oral agreement is unlike the written lease with option to purchase addressed in *Otis*. The terms of the oral agreement are in dispute, and Han does not necessarily agree that it is properly characterized as an option agreement. Cartano, at a minimum, acknowledges an oral agreement extending past closing for 90

days. CP 23. He disputes there was any other agreement following that time frame. Han, however, presented facts to the court that there was a separate agreement extending past that time frame wherein Cartano would begin to collect rent as interest on the “loan,” which she could still pay off past that 90 initial time frame. CP 38. Based upon the disputed facts concerning the extent of the oral agreement, title is clearly at issue. Indeed, the parties do not even agree that the oral agreement is properly characterized as an “option to purchase.”

b. Han Does Not Agree that an Option Expired

As outlined above, Han has never characterized the agreement between the parties as an Option to Purchase, instead consistently characterizing the agreement as a loan with the property transferred to Cartano by deed at his request for security on that loan. Contrary to Cartano’s statement, Han did not “admit the option expired.” Brief of Respondent, P. 11. Instead, a careful reading of the record he cites reveals it actually refers to the expiration of the Purchase and Sale Agreement for a purchase price of \$425,000.00, not the expiration of an option. CP 58.

Indeed, Han’s Declaration further goes on to recount her version of what the agreement was after 90 days, including her right to pay off the loan and have the property transferred back to her. She also states that she was prepared to pay off the loan in February, 2018, prior to filing the Complaint

for quiet title, but Cartano refused. CP 58-60. Even looking to the facts stated in the Amended Complaint that Cartano could sell the property after 90 days, Han still alleges that the property was really hers. CP 11. In sum, title was at issue, and Han does not acknowledge that an option, if any, expired.

Cartano inexplicably criticizes Han's citation to *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008) in arguing that Han did not exercise any option. That case was cited solely for the proposition that part performance constitutes an exception to the statute of frauds. *Id.* It was not cited in support of the proposition that Han had exercised an oral option to purchase. However, in that case the court determined an option was enforceable under the doctrine of part performance even though the written agreement lacked an adequate legal description. *Id.* at 568. The court went on to state that although *Pardee* failed to strictly comply with the terms of the option, the case should be remanded for a determination of whether he was entitled to an equitable grace period. *Id.* at 574. Here, Han similarly deserves that the matter be remanded for a just determination of her rights under the parties' agreements.

c. RCW 19.36.110 is not Applicable

Cartano next alleges that if the oral agreement regarding the property was a loan, it is not enforceable under RCW 19.36.110. That

section provides that a credit agreement is not enforceable against a creditor unless the agreement is in writing and signed by the creditor. That section does not apply however, to an agreement regarding real estate, as presented here.

Even if the court does find that RCW 19.36 *et. seq.* was applicable to the agreement between the parties, Cartano has not demonstrated he provided the notice required under RCW 19.36.140. RCW 19.40.140 requires the creditor to give conspicuous written notice to the other party on a separate document which states that oral agreements or oral commitments to loan money are not enforceable under Washington law. Pursuant to RCW 19.36.130, if that notice is not provided, RCW 19.36.100 through 19.36.140 do not apply. Cartano's arguments as to RCW 19.36.110 are misplaced under the circumstances presented here.

d. Han Presented Facts Supporting Part Performance

Partial performance creates an exception to the statute of frauds contained in RCW 64.04.010. *Pardee v. Jolly, supra*, 163 Wn.2d at 567. Han raised issues of fact demonstrating part performance that should have been sufficient to prevent summary dismissal of her quiet title claim.

Three elements are considered to determine whether sufficient part performance exists to remove an instrument from the statute of frauds: "(1)

delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.” *Powers v. Hastings*, 93 Wn.2d 709, 717, 612 P.2d 371 (1980). A party is not required to meet all three elements.

Cartano argues that Han did not maintain actual possession of the property, and did not pay valuable consideration. However, Han maintained a tenant on the property, collected the rents for at least 90 days following recording of the Statutory Warranty Deed, and stored items in the garage located on the property. CP 58-60. Han also paid water bills for the tenants and property insurance. CP 96; 98-99. Han was in actual possession of the property. Second, the element of consideration is met in that Han was to forego receipt of the rents after 90 days, and pay an additional \$50,000.00 to Cartano. Because Han presented issues of fact supporting part performance of an oral agreement, her claims for quiet title should not have been summarily dismissed.

e. The Merger Doctrine does not Preclude Han’s Claims

Cartano continues to argue that the doctrine of merger prevents Han from making any claims to the property. As outlined in the Appellant’s

Opening Brief, Cartano's argument is misplaced, based upon exception to the doctrine.

Exceptions exist when the terms of the contract of sale of real estate provide that the contract is not fully performed by the delivery of the deed. *People's Nat'l Bank of Washington v. Nat'l Bank of Commerce of Seattle*, 69 Wn.2d 682, 689, 420 P.2d 208 (1966). "Under such circumstances, there is no presumption that either party, in giving or accepting the deed, waives the performance of the remaining terms of the contract." *Id.*, see also *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953).

Here, Cartano himself testified via Declaration that the parties had an oral agreement that extended past his receipt of the Statutory Warranty Deed, whereupon if the conditions had been met, the property would have been transferred back to Han. CP 23. He acknowledges this oral agreement, and even indicates he honored it. *Id.* His acknowledgement that there was an agreement is inconsistent with his position now that the merger doctrine strictly applies to the transaction. At the very least, the inconsistencies in Cartano's position, the Purchase and Sale Agreement, and the Deed should have prevented the court from summarily dismissing Han's quiet title claims without the benefit of discovery and a properly noted summary judgment hearing.

4. The Trial Court Erred in Canceling the Lis Pendens

Cartano's Response only very briefly addresses Han's contention that the Court was without authority to cancel the lis pendens under RCW 4.28.320, since the action is very clearly **not** settled, discontinued, or abated, in any sense.

Instead, Cartano only argues that a lis pendens is not properly filed in an action filed to secure a personal judgment for the payment of money. Han's Complaint seeks quiet title – whether she will be ultimately successful is not the determining factor as to whether the lis pendens should be canceled during the pendency of the case. Instead, what is required is finality. Simply stated, Cartano's motion to cancel the lis pendens was premature, and the court erred in granting it without a final disposition of the case.

D. CARTANO IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL

Cartano should not be entitled to fees on appeal, as the lis pendens was improperly canceled. Instead, in the event the case is reversed and remanded, pursuant to RAP 18.1 and RCW 4.28.328, Han is entitled to fees.

III. CONCLUSION

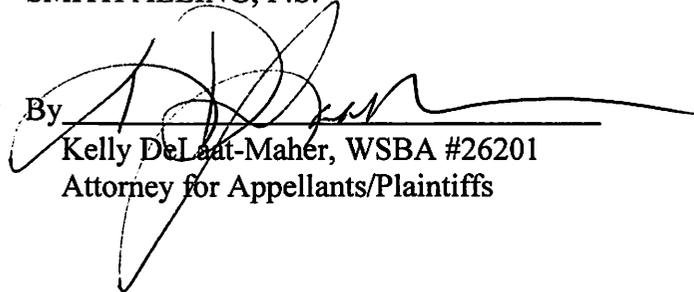
As outlined in Han's Opening Brief, this Court should reverse the trial court's Order Cancelling Lis Pendens and Awarding Attorney Fees,

reinstating the Lis Pendens, and remanding for further proceedings.

Additionally, Han requests an award of attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 21 day of October, 2019.

SMITH ALLING, P.S.

By  _____
Kelly DeLaat-Maher, WSBA #26201
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury of the laws of the State of Washington, that on October 21, 2019, I caused a copy of the foregoing to be served to the following in the manner noted below:

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DATED at Tacoma, Washington, this 21st day of October, 2019.



Teri Parr, Legal Assistant
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SMITH ALLING, P.S.

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