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NO. 52607-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY HAN and SILVERWATER NATURE PLACE, LLC,
Appellants

v.

ROBERT CARTANO and MAUREEN CARTANO,
Respondents

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Han¹ conveyed the subject property to the Cartanos by warranty deed. Han admits that the Cartanos had the right to sell it. Despite these admissions she recorded a lis pendens and sought to quiet title – ostensibly to stop any sale until the Cartanos conceded to Han’s demands. 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. Because Han stated no actionable claim to title, the lis pendens was properly cancelled. Ms. Han’s claim for monetary relief survived. Because no substantial right is implicated, the trial court’s order is not appealable.

After the lis pendens was released the property sold to a third party. Because this Court cannot grant effective relief, this appeal is moot and should be dismissed.

II. COUNTER STATEMENT OF THE CASE

A. FACTS

On September 11, 2017 Han conveyed the subject property to the Cartanos by statutory warranty deed.² Han alleges that she had a right to

¹ The Appellants are Ms. Han and Silverwater Nature Place, LLC. For simplicity the Cartanos adopt the Appellants’ convention and refer to them collectively as “Han.”

² CP 28-31. The Amended Complaint erroneously alleges the conveyance was by quitclaim deed (CP 11), but the only deed was a warranty deed, which Han concedes. BA 3.

buy back the property within ninety days.³ Ninety days expired on December 10, 2017.

Han admits that after the ninety days expired, “the Cartanos were authorized to sell the property but the agreement was that [the Cartanos] would keep an additional \$50,000 as payment for the loan, plus the rents that he received until the property was sold as interest on the loan....”⁴ Appellant Silverwood would keep any extra funds over \$400,000.00 “as it was really her [sic] property.”⁵

After the lis pendens was cancelled by the trial court, the Cartanos planned to (and did) sell their property in mid-September 2018.⁶

B. PROCEDURE

Han filed this action on May 23, 2018.⁷ Han filed an Amended Complaint on June 8, 2018.⁸ The Cartanos moved to cancel the lis pendens. Their motion stated that “Plaintiffs have no interest in the property...” and Han’s “claims to an interest in the property are frivolous....”⁹

The trial court agreed and cancelled the lis pendens.¹⁰ Han filed a timely notice of appeal,¹¹ but did not seek to supersede the trial court’s order or otherwise prevent the sale.

³ Id.

⁴ CP 11.

⁵ Id.

⁶ Id.

⁷ CP 1.

⁸ CP 9.

⁹ CP 18-19.

¹⁰ CP 41-43.

¹¹ CP 134-139.

III. ARGUMENT

A. THIS APPEAL IS MOOT.

An issue is moot when the appellate court can no longer provide effective relief.¹² After the lis pendens was cancelled, the Cartanos planned to (and did) sell their property in mid-September 2018.¹³ Since Han did not supersede or otherwise prevent that sale, her appeal is moot. The issue of mootness “is directed at the jurisdiction of the court.”¹⁴ As such, it “may be raised at any time.”¹⁵ As Han conceded, if the lis pendens was lifted, and the property sold, “there will not be an adequate remedy for the plaintiff.”¹⁶

If this Court were to remand and allow the re-recording of the lis pendens it would affect the rights of the third-party purchaser because the lis pendens would cloud its title even though there was no lis pendens attached to the property when the sale closed. Because the property was sold to a third party, there is no relief the court can provide. The appeal is moot. It should be dismissed.

¹² *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wn.2d 345, 350, 932 P.2d 158 (1997). *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

¹³ CP 11, BA 4.

¹⁴ *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

¹⁵ *Id.*

¹⁶ CP 45.

B. THE TRIAL COURT’S ORDER IS NOT APPEALABLE.

This appeal is not a “Decision Determining Action” under RAP 2.2 because the effect does not, “determine the action,” “prevent a final judgement” or “discontinue the action.” Han’s Amended Complaint only alleges the Cartanos anticipatory repudiation of the alleged obligation to pay Ms. Han when the property sold:

12. After 90 days, the Cartanos were authorized to sell the property but the agreement was that he [sic] would keep an additional \$50,000 as payment for the loan, plus the rents that he [sic] received until the property was sold as interest on the loan. The agreement was that plaintiff Silverwood would keep any extra funds received over \$400,000 as it was really her [sic] property. The Cartanos began collecting and keeping the monthly rents from the property after the first 90 days.

13. It is believed that the Cartanos are in the process of selling the property for \$549,000, to a third-party, and intend on keeping all the funds without following the verbal agreement between the parties.¹⁷

Han had no claim to title admitting “the Cartanos were authorized to sell the property....”¹⁸ Han only claims that she was entitled to the proceeds of the sale – a claim for money. Cancelling the lis pendens did nothing to affect Han’s claim to money owing due to the alleged oral

¹⁷ CP 11.

¹⁸ Id.

agreement. It does not determine the action because Han can still pursue this claim. Han recorded the lis pendens to stop the sale that she admits the Cartanos had a right to consummate.

For the proposition that the removal of a lis pendens affects a substantial right, Han cites to *Washington Dredging & Improvement, Co., v. Kinnear*.¹⁹ This case does not support Han. *Washington Dredging* was the appeal by a party seeking to cancel a lis pendens where it was clear that “no action was pending in the superior court...or in any court whatever, between the parties....”²⁰ Nevertheless, the trial court refused to cancel the lis pendens.

The Supreme Court, in concluding that the refusal to cancel a lis pendens affected the substantial rights of the owner, stated:

The lis pendens is evidently viewed by the law as a cloud on title to land which it describes. The appellants have an undoubted right to have that cloud removed. The order of the court refusing to remove it is an order affecting their substantial rights, and it is therefore appealable.²¹

Here, the Cartanos had an undoubted right to have the cloud removed. If the trial court had refused to remove the lis pendens an appeal by the Cartanos would have been ripe. But because Han’s claim is a claim

¹⁹ 24 Wn. 405, 64 P. 522 (1901).

²⁰ *Id.* at 406.

²¹ *Id.* at 523.

for money damages, and the dismissal of the quiet title claim does not affect that claim, there is no immediate right to appeal.

C. EVEN IF THE CASE IS REVIEWABLE, THE TRIAL COURT DID NOT ERR.

1. The standard of review is *de novo*.

Appellant correctly states review is *de novo*.²² This court “may affirm the trial court's ultimate decision on any grounds established by the pleadings and supported by the record.”²³ As Han correctly states, the trial court “summarily dismissed” the quiet title claims.²⁴ Because Han’s claims to title could not pass CR 12(b)(6) muster, the trial court properly dismissed those claims and cancelled the lis pendens. This court reviews a 12(b)(6) order *de novo*.²⁵

Dismissal under CR 12(b)(6) is appropriate when “it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the Amended Complaint, justifying recovery.”²⁶ Here, Han could prove no set

²² BA 8.

²³ *Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 90, 246 P.3d 205, 209 (2010) citing *Otis Hous. Ass'n, Inc. v. Ha*, 140 Wn. App. 470, 475, 164 P.3d 511, 513 (2007), *aff'd on other grounds*; *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). *Gross v. Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978). *Wendle v. Farrow*, 102 Wn. 2d 380, 382, 686 P.2d 480, 481 (1984).

²⁴ BA 10.

²⁵ *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014); *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

²⁶ *Hipple v. McFadden*, 161 Wn. App. 550, 556, 255 P.3d 730 (2011).

of facts, consistent with the Amended Complaint, for relief quieting title in Han. As such there is no justification for the lis pendens recording.

Han claims that the Court's decision was equivalent to a decision on summary judgment.²⁷ But because the trial Court could rely only on the allegations in the Amended Complaint, the quiet title claim was properly dismissed under 12(b)(6).

2. The undisputed facts in the Amended Complaint allege an unexercised option agreement that expired.

Han's admissions in the Amended Complaint²⁸ (and here) provide that: 1) Han conveyed the property to the Cartanos by warranty deed;²⁹ 2) there was essentially an oral option agreement for Han to buy the property back within ninety days;³⁰ 3) after ninety days the Cartanos had the right to sell the property but would owe Han money;³¹ and 4) Han did not exercise the option within ninety days.³²

²⁷ BA 10.

²⁸ Han claims that "the court was never provided with a copy of ANY Purchase and Sale Agreement prior to its decision releasing the lis pendens and effectively granting summary judgment in Cartano's [sic] favor...." BA 12. (Emphasis in original). She is wrong. Ms. Han attached a copy of the Purchase and Sale Agreement to the Amended Complaint. CP 13-17.

²⁹ CP 28-29; BA 3.

³⁰ CP 11.

³¹ Id.

³² Id.

a. *The property was conveyed to the Cartanos by warranty deed.*

Han concedes that the property was conveyed to the Cartanos by statutory warranty deed on September 11, 2017.³³ And although the deed was not attached to the Amended Complaint, a trial court can take judicial notice of public documents if the authenticity of those documents are not disputed.³⁴

Further when specific documents are alleged in a complaint but not physically attached, the documents may be considered on a CR 12(b)(6) motion for judgment on the pleadings.³⁵ This allowed the trial court to consider the closing statement and warranty deed in dismissing Han's claims.

b. *Han had an unexercised option to repurchase the property for ninety days after the warranty deed recorded.*

The Amended Complaint essentially recites an oral option agreement. That is, there was a verbal agreement.³⁶ Han still "unofficially"

³³ BA 3.

³⁴ *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977).

³⁵ *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, 491 (2015) citing *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 189 P.3d 168 (2008); and *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n. 4 (9th Cir.1996) (appropriate for trial court to consider other portions of document referenced in complaint in a motion to dismiss and doing so does not convert the motion into one for summary judgment).

³⁶ CP 11.

owned the property.³⁷ Han had ninety days to sell the property.³⁸ The ninety days expired.³⁹

c. The Cartanos had a right to sell the property.

The Amended Complaint admits that ninety days after closing the Cartanos had a right to sell the property.⁴⁰

3. Based on the undisputed facts, dismissal of a quiet title claim properly led to the cancelling of the lis pendens.

Han argues that her action was to quiet title and therefore a lis pendens was justified. *See* BA 10. But Han does not articulate in her Amended Complaint, the trial court record, or her opening brief how she has a claim affecting title. A party with a claim tangentially related to real property does not necessarily state a claim to quiet title. Han wholly fails to explain the quiet title claim when Han’s Amended Complaint admits she conveyed title to the property to the Cartanos that the 90-day window to pay off the “loan” expired and the Cartanos had a right to sell the property.⁴¹ Han’s brief goes to great lengths to explain how questions of fact exist as to merger, and the statute of frauds. But the brief fails to articulate any cognizable claim Han had to quiet title when it is undisputed the Cartanos had title to the property, and a right to sell it.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Han alleged “The Cartanos began collecting and keeping the monthly rents from the property after the first 90 days.” CP11.

⁴⁰ *Id.*

⁴¹ CP 11.

RCW 4.28.320 permits a plaintiff in an action *affecting the title to real property* to file a notice of the pendency of the action with the auditor.

But title must be at issue.⁴² Here, title cannot be at issue for several reasons. First, the property was conveyed pursuant to warranty deed. Second, Han admits Cartano had the right to sell the property after ninety days – reserving her claim for damages. Finally, the statute of frauds prevents her claims.

a. *Title was not an issue.*

*Otis Hous. Ass'n, Inc. v. Ha*⁴³ is almost directly on point. In that case an unlawful detainer defendant recorded a lis pendens, claiming an interest in the real property. The trial court found an option to purchase was not exercised, and so no dispute existed regarding ownership. This court affirmed, holding that because there was no dispute regarding ownership, the trial court had a tenable basis to quash the lis pendens.⁴⁴ Here, there is no dispute as to ownership. Han gave the Cartanos a warranty deed.⁴⁵ And Han admits Cartano had a right to sell.⁴⁶

Han claims she could re-purchase for ninety days. But that ninety days expired prior to the filing of the lawsuit. Han admits that she did not seek to exercise the option until February 2018 –after the ninety days had

⁴² See *Otis Hous. Ass'n, Inc. v. Ha*, 140 Wn. App. 470, 475, 164 P.3d 511, 513 (2007), aff'd on other grounds, 165 Wn. 2d 582, 201 P.3d 309 (2009).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ BA 3.

⁴⁶ CP 11.

passed.⁴⁷ She admits the option “expired.”⁴⁸ Title to land does not vest until an option to purchase it is exercised.⁴⁹ Just as in *Ha* the option had not been timely exercised.

b. *Because the option expired, Han had no claim to title.*

Han cites to *Pardee v. Jolly*,⁵⁰ correctly, for the proposition that an oral option is enforceable if part performance is present. Han fails to analyze the facts or holding of *Pardee* and ignores that *Pardee* supports the trial court’s order because the option expired. Even if the option was orally extended there are no facts to support a claim of part performance.

The property was conveyed to Cartano by warranty deed. Among the warranties a grantor makes when giving a warranty deed is that “she warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor...”⁵¹ As such it is beyond dispute that on September 11, 2017 title was vested in Cartano. Han had no claim to title. Han claims an oral option for ninety days from then.⁵² It expired on December 10, 2017.

⁴⁷ BA 4.

⁴⁸ CP 58.

⁴⁹ *Matter of Estate of Niehenke*, 117 Wn. 2d 631, 645, 818 P.2d 1324, 1332 (1991).

⁵⁰ BA 14.

⁵¹ RCW 64.04.030.

⁵² CP 11.

Because the trial court discontinued the frivolous quiet title claim, it property cancelled the lis pendens under RCW 4.28.320.

c. An oral agreement for a loan is not enforceable.

As stated above, the transaction that Han describes in her materials is an option agreement. Han calls it a loan. If the transaction was a loan, it is not enforceable under the Credit Agreement Statute of Frauds, RCW 19.36.110 which does not except partial performance from its reach. The representations that Han alleges Mr. Cartano made, even if proven, would constitute oral agreements to loan money or extend credit. “As such, under RCW 19.36.110. [Han] cannot enforce them.”⁵³

d. Han’s allegations do not support a claim of part performance.

Han’s option expired. But if the option did not expire, as Han concedes the statute of frauds bars her claim unless she can establish part performance.⁵⁴ There are insufficient facts alleged for part performance.

In *Pardee* the option was enforceable despite an inadequate legal description because all three elements of the part performance doctrine were met.

Pardee maintained actual and exclusive possession of the property beginning January 18, 2004. Second, Pardee paid \$16,000 for the option. Third, the contract provides Pardee with the right to improve the property and testimony established that Pardee made

⁵³ *Cowlitz Bank v. Leonard*, 162 Wn.App.250, 254 P.3d 194, published with modifications at 161 Wn.App. 1007 (2011)

⁵⁴ BA 14.

permanent, substantial, valuable
improvements to the house.⁵⁵

While Han may have stored some personal property at the house, she did not maintain “actual and exclusive possession.” Han claims she had “actual possession.”⁵⁶ But for this proposition cites only to her storage of personal property there while third-party tenants had actual possession. No facts in the Amended Complaint, or record before the trial court support the allegation that she had actual, exclusive possession. The record is to the contrary. Han’s Amended Complaint alleges that tenants occupied the property and the Cartanos collected rent after the option period expired.⁵⁷ As such, it is undisputed Ms. Han did not have possession.

Han does not allege in the Amended Complaint she paid consideration for the option to remain open after September 11, 2018. There is nothing in the record that she paid consideration for the option to remain open after September 11, 2018. Han merely alleges that she “was” to forego rents after 90 days⁵⁸ (after the option expired), and she would, later, pay an additional fifty-thousand dollars when a sale to a third-party closed. But the promise to pay in the future is not the payment of actual consideration. And Han makes no allegation regarding any improvements to the property after September 11, 2018.

⁵⁵ *Pardee v. Jolly*, 163 Wn. 2d 558, 568, 182 P.3d 967, 973 (2008).

⁵⁶ BA 15.

⁵⁷ CP 11.

⁵⁸ BA 15.

There are no facts, consistent with the Amended Complaint that state a claim to title after the ninety-day option period expired.

e. The merger doctrine precludes Han's claims.

Han argues that questions of fact preclude a decision regarding merger. Han is wrong. The merger doctrine is based on the parties' ability to change a purchase and sale agreement's terms before closing.⁵⁹ "Execution, delivery, and acceptance of the deed becomes the final expression of the parties' contract and subsumes all prior agreements."⁶⁰ A real estate purchase and sales agreement's terms merge into the deed.⁶¹ There are exceptions to this rule only when collateral contract requirements are not contained in or performed by the execution and delivery of the deed, and *are not inconsistent with the deed*, and are independent of the obligation to convey.⁶²

Here a claim to title is diametrically opposed to the terms of the Warranty Deed – the terms are inconsistent, so the term is not enforceable.

⁵⁹ *Barber v. Peringer*, 75 Wn. App. 248, 251–52, 877 P.2d 223, 225 (1994).

⁶⁰ *Id.* citing *Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955).

⁶¹ *Id.*

⁶² *Id.* citing *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969).

A lis pendens may be filed “(i)n an action affecting the title to real property...” RCW 4.28.320. But a lis pendens is not proper where it is filed in anticipation of recovering a money judgment.

(N)otice of lis pendens may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question... The lis pendens statute does not apply, for example, to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint.⁶³

The lis pendens was improperly filed. The Cartanos “were thus entitled to have [the] cloud[] on their real estate removed.”⁶⁴

D. ATTORNEY’S FEES

Because the trial court properly cancelled the lis pendens Han is not entitled to her fees on appeal. If she is right, that the statute does not apply and she is not entitled to fees.

Because the Cartanos should prevail, pursuant to RAP 18.1 the Cartanos are entitled to their fees under RCW 4.28.328.

⁶³ *Bramall v. Wales*, 29 Wn. App. 390, 395, 628 P.2d 511, 514 (1981) (Citations omitted.) *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 668, 144 S.E.2d 882 (1965). See also *Washington Dredging & Improvement Co. v. Kinnear*, 24 Wn. 405, 64 P. 522 (1901). See generally 51 Am.Jur.2d Lis Pendens s 21 (1970).

⁶⁴ *Shutt v. Moore*, 26 Wn. App. 450, 455–56, 613 P.2d 1188, 1191 (1980).

IV. CONCLUSION

Han's Amended Complaint alleged an oral option agreement that expired. She admitted the Cartanos had a right to sell the property. The lis pendens was properly canceled. The trial Court's order cancelling the lis pendens should be affirmed.

Dated this 20th day of September 2019.

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