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Case No. 52934-3-II

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

VERISTONE FUND I, LLC

Appellant,

v.

MARY-ANN KERRIGAN

Respondent

**REPLY BRIEF OF APPELLANT
VERISTONE FUND I, LLC**

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I. REPLY ARGUMENT

A. Kerrigan Presents Unsupported Arguments.

Preliminarily, there are statements in Respondent Kerrigan’s Brief made without factual support, and that should not be given credence by the Court.

First, Kerrigan claims that she never “had the opportunity” to prevent Veristone’s March 2018 foreclosure, which wiped out her junior security interest as recorded on May 15, 2017 when Veristone had already encumbered Campbell’s record title. Resp. at 15. Kerrigan’s statement is demonstrably false.

As Kerrigan stated to the trial court, she “did not feel compelled to intervene in the foreclosure proceedings,” because of her erroneous belief in holding a priority lien, but she certainly knew of the trustee’s sale and voluntarily chose not to act. CP 166:22-24; *cf.* RCW 61.24.130(1) (allowing any person with a claim of lien to restrain a trustee’s sale on “any proper legal or equitable ground.”).

Second, Kerrigan contends that “the Property has sufficient value to support both parties’ lien interests” and Veristone is trying to “reap an enormous windfall.” Resp. at 16. Kerrigan fails to cite to the record in support of these conclusions, undoubtedly because *the record lacks evidence of the Property’s current valuation.*

Rather, it is clear that Veristone paid \$36,813.61 to purchase the Property at a sheriff's sale in November 2016. CP 129. By the time of non-judicial foreclosure in March 2018, Campbell's debt to Veristone had grown to \$55,102.87. CP 158, ¶ III. Veristone paid \$43,228.92 to purchase the Property at the non-judicial foreclosure auction, thereby suffering a financial loss relative to both the original purchase and debt owed. CP 163, ¶ 10.¹ Kerrigan claims that her \$25,000.00 lien recorded May 15, 2017 (plus interest) should now take priority over Veristone's limited recovery, and somehow all parties will be made whole. There is no factual basis for Kerrigan's incredible assertion.

Third, Kerrigan conveniently omits mention of the trial court's default order against Campbell entered in May 2018, which specifically found that "Campbell did not possess legal title to the Property when he sought to encumber it on May 8, 2017 with a Deed of Trust...." CP 99. Despite Kerrigan being served with Veristone's action four months earlier, she chose to not appear or defend until Campbell's default was taken and the trial court's order was entered. CP 84 (service or on about February 23, 2018), CP 101 (Kerrigan Answer filed June 27, 2018).

¹ Because of the non-judicial process, Veristone could not seek a deficiency judgment against Campbell. RCW 61.24.100(1).

While the default order against Campbell made it clear that he lacked full title to the Property—because he contributed nothing toward the purchase price—the later, erroneous summary judgment ruling contradictorily treated Kerrigan as being able to encumber the *entire* Property on May 8, 2017. But since Kerrigan could not encumber Veristone’s actual and complete ownership interest on May 8, 2017, this ruling should be reversed as a matter of law.

B. Kerrigan’s Argument that Veristone and Campbell Were Tenants-in-Common Validates Veristone’s Position.

Kerrigan states that the recorded Sheriff’s Deed vested title to Veristone and Campbell as tenants-in-common. Resp. at 4, 5.

In such situation, “each cotenant’s title is ‘separate and distinct, and each tenant owns a separate estate.’ ” *In re Foreclosure of Liens*, 130 Wn.2d 142, 148, 922 P.2d 73 (1996), *citing Falaschi v. Yowell*, 24 Wn. App. 506, 509, 601 P.2d 989 (1979); *see also In re Estate of Wagner*, 2016 WL 4618954 (2016) (unpublished). “A tenant-in-common may impose a lien or other encumbrance upon his or her own undivided interest in the property.” *Id.*, *citing Patrick v. Bonthius*, 13 Wn.2d 210, 215, 124 P.2d 550 (1942). “However, one cotenant cannot do anything with respect to the *common property* to bind the cotenants without authorization or

ratification.” *McGill v. Shugarts*, 58 Wn.2d 203, 204, 361 P.2d 645 (1961) (emphasis in original).

Critically, Kerrigan fails to address the principle that unequal contributions to a property’s purchase price give rise to unequal ownership shares. *See, e.g., Iredell v. Iredell*, 49 Wn.2d 627, 631, 305 P.2d 805 (1957); 17 Wash. Prac., Real Estate § 1.28 (2d ed.). It is undisputed in this case that Campbell made no contribution toward purchase.

Thus, as applied to the facts presented below, a tenancy-in-common means that Kerrigan’s purported May 8, 2017 encumbrance on Campbell’s “separate and distinct” zero-percent inchoate interest in the Property could not affect Veristone’s likewise-“separate and distinct” one-hundred percent inchoate interest. On May 8, 2017, Kerrigan simply did not have a lien on *Veristone’s* title to the Property.

When Veristone recorded a quitclaim deed in favor of Campbell, conveying its *unencumbered title* to him on May 12, 2017, Kerrigan’s Deed of Trust could not suddenly expand in scope to affect a non-party to that transaction. Instead, it remained limited to a lien on Campbell’s ripened interest—albeit an illusory encumbrance on a zero-percent interest.

By the time Kerrigan properly recorded her Deed of Trust on May 15, 2017 to encumber all of the unified title interest that Campbell held,

Veristone had already done the same *three days earlier*. As to that unified estate, Veristone was indeed “first in time, first in right.”

C. The Doctrine of After-Acquired Title Does Not Save Kerrigan’s Attempt to Achieve a Higher Priority.

Kerrigan claims that the doctrine of after-acquired title resulted in her May 8, 2017 *lien on nothing* “automatically and instantly” becoming a *lien on the entire Property* once the Sheriff’s Deed was recorded on May 10, 2017.² But the Sheriff’s Deed merely changed the respective interests of Veristone and Campbell from inchoate to actual. *See, e.g., Performance Constr., LLC v. Glenn*, 195 Wn. App. 406, 416, 380 P.3d 618 (2016). The Sheriff’s Deed did not broaden Kerrigan’s purported encumbrance to also encompass Veristone’s share in the Property.

“The ‘after-acquired title doctrine’ addresses a situation in which a person purports to convey to another an interest in property that person does not possess and then, after actually obtaining that interest, seeks to avoid the consequences of the conveyance on the ground that he or she had no interest to convey in the first place.” 23 Am. Jur. 2d Deeds § 278.

A similar situation to Kerrigan’s claim was analyzed in the New Mexico Supreme Court case of *Texas Am. Bank/Levelland v. Morgan*, 105

² The Response Brief routinely gives the wrong date for the Sheriff’s Deed, *i.e.*, May 11, 2017. Resp. at 4, 8. The Sheriff’s Deed was in fact recorded on May 10, 2017. CP 150-151.

N.M. 416, 733 P.2d 864 (N.M. 1987).³ That decision involved individuals who jointly owned real property in *equal shares*—much greater than Campbell’s ownership interest in this case.

In *Morgan*, a bank loaned money to one owner (Halliburton) and supposedly encumbered the entire property; that individual later conveyed his interest to the other owner (Morgan). *Id.* at 417. The Court recognized that:

New Mexico has never addressed whether one joint tenant may encumber the property interest of another cotenant without consent. The jurisdictions which have decided this question, however, have uniformly agreed that one cotenant may not encumber the other cotenant’s interest without consent.

Id. (citations omitted). Applying this principle, the Court found that “Halliburton, being a joint tenant, was not free to execute a mortgage which would encompass a greater interest in the property than he owned himself. It stands to reason, therefore, that the mortgage which Halliburton executed could not encumber Morgan’s interest in the property.” *Id.*

In addition, the Court held, “[t]he corollary of the rule that a grantor can only give that which he owns is that a grantee can only receive

³ *But see Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 336 P.3d 972, 975 (N.M. 2014), *cert. denied* (Oct. 8, 2014) (finding on second appeal that mortgage covenants led to after-acquired title, unlike a quitclaim deed for which the doctrine would not apply).

that which the grantor is entitled to convey.... [T]he Bank, having received a mortgage only upon Halliburton's interest, is unable to enlarge that encumbrance, after the fact, to encompass the entire property." *Id.* at 418 (citation omitted); *see also Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955 (Fla. Dist. Ct. App. 2010) (applying same principle to tenants-in-common).

Here, with Kerrigan acting in the role of the *Morgan* bank as the lienholder, and Campbell acting as owner Halliburton, the decision's reasoning should be persuasive as to the merits of Veristone's position—Kerrigan could not enlarge her encumbrance on a *partial* interest to later cover the *entire* property.⁴

Additionally, a quitclaim deed conveys "all the then existing legal and equitable rights of the grantor in the premises therein described, but *shall not extend to the after acquired title* unless words are added expressing such intention." RCW 64.04.050 (emphasis added); *see also* 17 Wash. Prac., Real Estate § 7.8 (2d ed.). There is no mention of after-

⁴ Like New Mexico, Washington is a lien theory state, meaning a Deed of Trust does not convey title. *See* N.M. Stat. Ann. 48-10-8; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012), *citing* 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 17. 1, at 253 (2d ed. 2004) (deed of trust "is a three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower."). The Kerrigan Deed of Trust conspicuously omits the inclusion of a trustee, although it purports to convey an interest in the Property in trust to a non-existent entity. CP 144.

acquired title in the quitclaim deed from Veristone to Campbell. CP 153-154. The quit claim deed was expressly for “security purposes only.” CP 153. That is because the purpose of Veristone’s conveyance was to be able to place its lien on the Property in order to be repaid for funding the entire purchase price. Campbell’s name would not have appeared on the Property’s title if not for Veristone’s complete contribution.

In fact, when Campbell executed the Veristone Deed of Trust in January 2017—three months prior to his loan arrangement with Kerrigan—he specifically agreed to ensure Veristone’s first lien position during the term of their loan to him. CP 136, ¶ 1. That loan term did not expire until May 31, 2017. CP 131, ¶ 2(b); CP 136. Kerrigan could only step into Campbell’s shoes, but not Veristone’s.

By the time Kerrigan recorded her Deed of Trust on May 15, 2017, Veristone’s encumbrance on Campbell’s unified fee interest in the Property took precedence. Kerrigan’s invocation of the after-acquired title doctrine cannot move her lien ahead in line.

D. Kerrigan Was Not a “Bona Fide Purchaser or Encumbrancer.”

A bona fide purchaser is:

‘one who purchases property without actual or constructive knowledge of another’s claim of right to, or equity in, the property, and who pays valuable consideration.’ If the purchaser has knowledge or information that would cause an ordinarily prudent

person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed.

Collings v. City First Mortg. Servs., LLC, 177 Wn. App. 908, 932, 317 P.3d 1047 (2013), citing *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012). There are multiple reasons why this doctrine does not pertain here.

First, Kerrigan—who was never a purchaser—did not encumber the entire Property until May 15, 2017, after Veristone’s Deed of Trust was recorded. Her purported May 8, 2017 lien was limited to encumbering Campbell’s zero-percent interest.

Second, Kerrigan had constructive knowledge of the Certificate of Sale which was recorded two months before she executed her Deed of Trust. CP 125. The Certificate of Sale revealed Veristone’s contribution to the Property’s purchase price. CP 126. A simple title search would have revealed Veristone’s inchoate interest in the Property pending recordation of the Sheriff’s Deed.

Third, Kerrigan’s Note dated March 28, 2017 and Deed of Trust dated April 19, 2017 are practically identical to Veristone’s Note and Deed of Trust which it prepared three months earlier. *Compare* CP 140-142, CP 144-147 (Kerrigan) *with* CP 131-133, CP 135-138 (Veristone).

Given this fact, it defies belief that Kerrigan loaned \$25,000.00 to Campbell to “diversify [her] retirement investments” and secured repayment of the same “without knowledge of Veristone’s Deed of Trust.” Resp. at 15, CP 175:1-2; *see also* CP 174:20-22 (Kerrigan describing “my Deed of Trust” and “my lien”).⁵

Kerrigan was not a bona fide encumbrancer, and she did not hold a superior lien on the entire Property when Veristone perfected its security interest on May 12, 2017.

E. Kerrigan, and Not Veristone, Seeks to Alter Priorities.

Kerrigan argues that Veristone is seeking to retroactively change lien priorities, but this is not true. Resp. at 12-13. Veristone has appealed to overturn an erroneous summary judgment order permitting Kerrigan to demand \$25,000 plus interest at Veristone’s expense, when she is not legally entitled to this means of recovery.

Perhaps recognizing the weakness in her contentions, Kerrigan oddly suggests that declaring her Deed of Trust subordinate to Veristone’s Deed of Trust (as it should be) creates a result “no different than the

⁵ Further undercutting Kerrigan’s reliance on the doctrine of after-acquired title discussed above, “[a] grantee who is misled through his or her own want of reasonable care and circumspection may not rely on the doctrine because estoppel is denied where the party claiming it was put on inquiry as to the truth and had available means for ascertaining it.” 23 Am. Jur. 2d Deeds § 278.

current situation” because Kerrigan would then have a lien on the Veristone-owned Property. Resp. at 12.

But yet again, Kerrigan disregards the law: “[a] nonjudicial foreclosure extinguishes all junior liens on the property.” *In re Upton*, 102 Wn. App. 220, 224, 6 P.3d 1231 (2000). The only ostensible interest ahead of Veristone when it foreclosed on its May 12, 2017 Deed of Trust was Kerrigan’s illusory May 8, 2017 encumbrance on Campbell’s zero-percent ownership share. Consequently, when Veristone foreclosed on March 30, 2018, Kerrigan’s May 15, 2017 Deed of Trust against Campbell’s unified fee title was second in time and junior in right. Neither retroactivity nor revisionism is necessary in the analysis.

Kerrigan’s security instrument was simply extinguished pursuant to established legal principles, and no call for sympathy or equity can alter this reality.⁶ The underlying debt Campbell, and only Campbell, owes to Kerrigan remains valid and she can avail herself of other avenues to recovery that do not involve compelling satisfaction through Veristone.

⁶ Although Kerrigan falsely casts Veristone’s lawsuit as implicating an equitable “forfeiture,” Veristone’s cause of action to quiet title actually does involve an equitable proceeding. *See, e.g., Kobza v. Tripp*, 105 Wn. App. 90, 18 P.3d 621 (2001). And once equity jurisdiction attaches, it attaches to the entire controversy. *Eichorn v. Lunn*, 63 Wn. App. 73, 80, 816 P.2d 1226 (1991). It is certainly equitable that Veristone be repaid for its full contribution to the Property’s purchase price without Kerrigan taking \$25,000 plus interest off the top.

II. CONCLUSION

It is axiomatic that one can only encumber that which he or she possesses. In this case, while Campbell could encumber his zero-percent nominal share in the Property with Kerrigan's Deed of Trust, he lacked authority to encumber Veristone's one-hundred percent ownership interest in the Property that ripened upon recordation of the Sheriff's Deed.

Consequently, when Veristone conveyed its interest to Campbell and recorded a Deed of Trust to protect its investment based on funding the Property's purchase in the first place, Kerrigan could not "jump over" Veristone to expand the scope of her May 8, 2017 illusory lien from nothing to everything.

The trial court's decision to the contrary gave Kerrigan greater rights than what she was entitled to, and this outcome was in error. On remand, summary judgment should be entered for Veristone.

DATED this 31st day of May, 2019.

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CERTIFICATE OF SERVICE

On May 31st 2019, I caused to be served upon the below named counsel of record at the addresses stated below, via the method(s) of service indicated, a true and correct copy of the Reply Brief of Appellant Veristone Fund I, LLC:

<p>Hillier, Scheibmeir & Kelly, P.S. Attn: Mark C. Scheibmeir P.O. Box 939 Chehalis, WA 98532</p> <p>Attorneys for Respondent Mary-Ann Kerrigan</p>	<p><input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via Electronic Filing</p>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on May 31, 2019.

/s/Karina Krivenko
Karina Krivenko

WRIGHT, FINLAY & ZAK, LLP

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