

**FILED
Court of Appeals
Division II
State of Washington
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No. 54711-2-II

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

**MILWAUKEE AVENUE, LLC,
PLAINTIFF/RESPONDENT,**

v.

TED SPICE ET AL.

APPELLANT.

RESPONDENTS BRIEF

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A. Statement of Case

The relevant facts which are not in dispute as it relates to the Appellant's appeal are as follows:

1. The Respondent is the owner of the property situated at 11003 58th Street Court East, Puyallup, Pierce County, Washington, hereinafter identified as "11003". CP 73

2. The Respondent acquired title to this property through a Trustees Quit Claim Deed issued by Bryan Budsberg, as Trustee of the Bankruptcy Estate of Mark and Donna DuBois. CP 54-55

3. The sale and transfer by the Bankruptcy Trustee was pursuant to an Order of the Bankruptcy Court that approved and directed the sale of the property which was jointly owned by the Appellant (25%) and the DuBois (75%). CP 57-72

4. The Pierce County Superior Court in the Estate of Doris E. Mathews, Pierce County Probate Case number 10-4-00034-5 had entered an Order Granting the Personal Representative full non-intervention powers and specifically authorized her to transfer the assets to Donna Dubois for the purpose of allowing the Bankruptcy Trustee to sell the property and the proceeds of that sale would be an asset of the estate and subject to estate creditors. CP 213-217

5. Located on the subject property where two manufactured homes owned by the respondent. CP 73

6. The Respondent, through its attorney, gave notice to remove the manufactured homes from the property and the Appellant, having failed to remove said manufactured homes was served with the present Action for Ejectment. CP 52

7. The Appellant, in its Answer and Counterclaim, did not claim any right, title or interest in the subject property and the whole basis of the Counter Claim was for damages arising from the Respondents Ejectment Action. CP 5-10

Therefore, the Respondent filed for a Motion for Summary Judgment on the issue as to whether or not Respondent was entitled to maintain the Ejectment Action and have the manufactured homes removed and the Trial Court, after a Motion for Reconsideration by the Respondent, ruled that there was no issue of material fact that the Respondent was the owner of the real property upon which the manufactured homes were located and therefore entitled to have the same removed. It is from this decision that the Appellant has appealed. CP 333-336

Throughout the Appellant's Brief refers to its claim as a "creditor's claim", nothing could be further from the truth. Appellant's arises claims not from being a creditor of the estate under RCW 11.40 but rather out of the actions of Donna Dubois, in her capacity as Personal Representative of the Estate of Doris E. Mathews. These claims are presently set for trial in the Pierce County Superior Court and are identified as follows:

Spice v. Estate of Mathews, No. 550915-6-II (Wash. Ct. App. October 15, 2019) (unpublished) (Spice III)

a. Whether or not the Estate caused waste in the form of water damage from the pipe burst at 11003 property and what if any damages were incurred.

b. Whether or not the Estate breached a quasi-fiduciary duty to the Appellant of the Estate is found to have committed waste as set forth above.

c. Whether or not the estate caused waste relative to not signing a fire damage insurance check in August 2017.

d. Whether or not the estate engaged in a fraudulent transfer under RCW 19.44.014(1)(a) on or before March 2015 relative to the Court Order on March 2, 2015.

e. Whether or not the estate is entitled to attorney's fees and costs.

f. Whether or not the Appellant is a vexatious litigant.

None of these claims are "creditor's claims" under RCW 11.40 but are claims against the Personal Representative personally for actions of failure to act.

B. Argument

In light of the fact that the Appellant cannot deny that the Respondent has the record interest in 11003 property, Appellant is claiming that if it is successful in its current litigation as to the claims against Donna Dubois, the property is subject to satisfaction of those claims and not the proceeds from the sale of the property, that are currently held by the Bankruptcy Trustee.

The issue before the Court is whether or not at this point in time is the Respondent is entitled to an Order of Ejectment removing Appellant's manufactured homes from the property. There is no issue of fact as to who holds title to the property. Ownership is not even claimed in the Appellant's Counterclaim that only consist of a claim for monetary damage against the Respondent. CP 9-10

It is the position of the Respondent that a transfer of the property to Donna Dubois for the purpose of the Bankruptcy Sale approved by the Pierce County Superior Court the Court recognized all estate property may be subject to estate claims and when the Court authorized it be sold, the Court substituted the property with the net proceeds from the sale; which are still available to this day for estate claims. CP 321-323

The Superior Court, in making its decision, was apprised of the fact that the property was a subject to a foreclosure and the only way to stop the foreclosure and avoid a complete loss of the property, was to authorize its sale, which could only be done through the Bankruptcy Court. CP 60 & 70

The Superior Court specifically stated as follows:

“the transfer of assets is subject to RCW 11, including RCW 11.76.110 and proceeds if any, resulting from the sale and/or negotiation of real property transferred to Donna Dubois by the Bankruptcy Trustee shall be paid under priority required by statute with cost of administration, including attorney’s fees and costs, having higher priority. Any proceeds after cost of bankruptcy process will be an asset of the Estate”. (Emphasis Respondents) CP 322

The decision by the Superior Court in this matter was appealed to this Court in Spice vs. The Estate of Doris E. Mathews number 50916-6-II Wash. Ct. App.

The above specific order by the Pierce County Superior Court was considered by this Court because the Appellant argued their transfer authorized by the Superior Court was erroneous. However, this Court did not overturn that order of the Superior Court and stated as follows:

“Spice argues that the Estate should not have been permitted to transfer its assets to Donna. Specifically, Spice argues that because the Estate’s motion for the transfer was predicated on the notion that no claims against the estate remained, the order requires review, as the effects are devastating to Spice. Br. Of Appellant at 31. Spice does not provide any legal authority that such transfer was impermissible here. Spice merely states that because this court in Spice II determined there was a question of material fact regarding the breach of fiduciary duty for waste, this court must review the transfer. Spice also misstates the Estate’s motion, which acknowledged the pendency of the Spice II appeal, and requested the transfer regardless of that fact. Where counsel does not cite authority in support of a proposition, this court is not required to search out authority, but may assume that counsel, after a diligent search, has not found any. Gosney v. Foireman’s Fund Inc. Co., 3 Wn. App. 2d 828, 872, 419 P.3d 447 (2018). Here, Spice does not identify any reason why the trial court should not have granted the motion to transfer assets.

Spice v. Estate of Mathews, No. 550915-6-II (Wash. Ct. App. October 15, 2019) (unpublished) (Spice III) CP 23

The Appellant argues that when the Superior Court allowed the transfer of the property to Donna DuBois and its subsequent sale that it gave Donna DuBois an uncertain interest in the property and the title cannot vest in her until the final close of the Probate.

The Appellant offers no authority in support of this position. While it is true that the vesting of title in heirs of estate property is not absolute until the administration of the estate has occurred. However, that does not mean that during the process of administration the estate cannot sell the property and then the proceeds become subject to administration.

The order of the Superior Court addresses this issue by stating not only was the property to be transferred to Donna DuBois for purposes of the Bankruptcy sale of the property in order to preserve the same it then went on to hold that those proceeds would be subject to administration. That is what has occurred. Those funds are available and correctly held by the Bankruptcy Trustee. CP 71 & 72.

To hold otherwise would mean that any sale made during the course of administration could never be final since the creditors of the estate could then somehow make a claim against the property after it has been sold. This is not the law and there is no case cited by the Appellant in favor of that position.

RCW 11.76.170 specifically states that if the Personal Representative distributes property and there are unpaid creditor's claims those claims shall not be a lien on the property distributed but said creditor shall have a cause of action against the Personal Representative for such an amount as said creditor would have been entitled to receive.

The Appellant argues that the Trial Court erred in determining that Appellant's claims against the Estate of Doris E. Mathews could be satisfied out of the proceeds of the estate rather than title to the real properties of the estate.

In making its decision, the Trial Court in this case relied on the earlier decision by the Superior Court in the probate case of Estate of Doris E. Matthews that allowed the transfer of the property, and its sale, and the sale proceeds being held to satisfy claims against the estate. This argument is another attempt by the Appellant to review the earlier decision by the Superior Court in authorizing the sale and holding of the proceeds for creditors' claims.

The Personal Representative had no choice but to obtain approval to sell the property because, it was subject to foreclosure. It was determined, and approved by the Trial Court that the only way to save the property to satisfy creditors, was to authorize the transfer of the property to Donna DuBois so that the Bankruptcy Court could obtain jurisdiction for the sale. It should be noted out that at the time of the Court's order there were no "creditors' claims" brought by the Appellant, but only the claims by the Appellant against the Personal Representative, personally for her actions as outlined previously.

The Bankruptcy Court recognized the Court order authorizing the sale and directing the proceeds to be used to satisfy claims against the estate. CP 71-72

The Appellant argues that Donna DuBois lost her exclusive authority under her non-intervention powers and transferred that that authority to the Court when she filed a motion to approve the transfer of estate assets to herself.

Appellant failed to bring to the Courts attention RCW 11.68.120 which clearly states that a Personal Representative who has acquired non-intervention powers shall not

be deemed to have waived those powers by obtaining any order or decree during the course of administration of the estate. Therefore, it is clear under the above referenced statute Donna DuBois was still acting under her non-intervention powers and therefore the Respondent is entitled to the conclusive presumption that the transaction is necessary for the administration of the Decedent's estate. RCW 11.68.090(1)

The Appellant is arguing that the court has equitable power to divest the estate property of an heir's interest in real property. However, the cases cited by the Appellant all refer to the inherent equitable powers of the Court but do not specifically rule that those powers includes the right to divest an heir of its interest in real property. However, that is not the issue in this case as the title is not in the heir but has been conveyed to the respondent and the appellant has not cited any case in support of the proposition that a third party who purchases assets through a court approved sale is subject to complete or partial divestment of its interest at some point later on by the probate court. The reason he has not cited any cases is because there are none.

The Appellant argues that the respondent does not have a "valid subsisting interest" in the real property and therefore cannot maintain the Ejectment Action. The Appellant goes on to argue that until the probate proceeding is closed, the property, although sold, is subject to the claims of creditors including those of the Appellant. However, he cites no cases in support of that proposition.

The record is clear that the title of 11003 conveyed to the Respondent is free of any claims from the Personal Representative, Donna DuBois personally or the estate. The title report insures title subject only to whatever individual claims that Mr. Spice might have but that certainly does not include claims by the estate itself against the property to divest

the Respondent of all or a portion of the Respondents interest to satisfy creditors' claims. Therefore, there is no issue of fact that the Respondent does have title to the property in question and can maintain an action for Ejectment against the Appellant.

The Appellant argues that the court should apply equitable principals as to whether or not an Order of Ejectment should be entered. However, the Appellant provides no cases in support of the proposition that in Action of Ejectment the Court should apply equitable principals in determining whether the titled holder is entitled to immediate relief.

The Order of the Bankruptcy Court approving the sale provides protection for the benefit of the respondent since in that Order it stated as follows:

"It is further ordered that the sale of the estates interest and the interest of Ted Spice will be free and clear of all liens and interest except real and personal property taxes. Said liens and interest will attach to proceeds of the sale as those proceeds were property and said liens and interest will be satisfied from those proceeds to the extent there are sufficient proceeds. Additionally any pending or future litigation over claims held by any party will attach only to the proceeds and not to the property sold herein including all claims by and against Ted Spice or the Estate." (Emphasis Respondent) CP 71-72

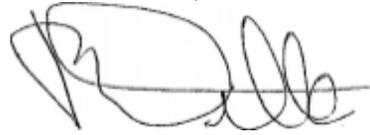
C. Conclusion

There are no factual issues requiring resolution by the Superior Court as it relates to the issue as to whether or not the Respondent is entitled to an Order of Ejectment. The 75% interest in the 11003 property that was held by the estate and sold through the Bankruptcy Court to the Respondent is conclusive and final and regardless of the outcome of the Appellant's claims against the estate and Donna DuBois. Those claims must be satisfied from other assets including the sales proceeds and neither the facts or the law justify any further action by the Superior Court in the divesting of all or any portion of the interest of the Respondent in the 11003 property to satisfy estate claims. RCW 11.76.170

Therefore, the Court should affirm the Trial Court's Order for Partial Summary Judgment.

RESPECTFULLY SUBMITTED this 17th day of September, 2020.

DILLE LAW, PLLC

A handwritten signature in black ink, appearing to read "B. Dille", written over a horizontal line.

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