

FILED

OCT 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**WASHINGTON STATE COURT OF APPEALS
FOR THE DIVISION III**

NO. 296725-III

A&W FARMS, WILLIAM GUHLKE, AND ALEX GUHLKE,

Respondents,

v.

SUNSHINE LEND LEASE, INC. a Nevada Corporation;
RAYMOND COOK, JR, and ARLENE B. COOK,
(HUSBAND AND WIFE); Defendants;

RAYMOND COOK JR. AND ARLENE B. COOK

Appellant;

v.

HARD ROCK CONTROL, a West Indies limited liability
company; ELDEN SORENSEN; and ADELINE JOHNSON;
Third-Party Defendants;

ADELINE JOHNSON;

Appellant.

OPENING BRIEF OF APPELLANTS RAYMOND AND ARLENE COOK

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ASSIGNMENT OF ERROR

1. The trial court erred by assuming it had subject matter jurisdiction to proceed with the proceedings supplemental to execution.
2. The trial court erred by failing to dismiss the proceedings supplemental to execution to recover a fraudulent transfer based on the statute of limitations.
3. The trial court erred by allowing the entry of evidence on an *ex parte* basis.

STATEMENT OF THE CASE

A&W Farms, William Guhlke, and Alex Guhlke (collectively “Judgment Creditors”) obtained a judgment against Raymond Cook Jr. individually on August 23, 2001. CP 24-27. On March 21, 2002, the Judgment Creditors filed a complaint to set aside fraudulent transfers. CP 98-103. Judgment Creditors’ complaint sought to declare the “fraudulent transfers void ab initio”. CP 102. The complaint was answered by various parties, through their respective counsel. CP 129, 118, 125. The court docket indicates that there was activity on the file in the year 2002 after the service of the March 21, 2002 complaint. After 2002, there is little activity on the file until the filing of motion for supplemental proceedings on March 16, 2007. CP 187-189. No case scheduling order was entered to manage the complaint filed on March 21, 2002. CP (no case scheduling order on file.)

Five years later on March 16, 2007, Judgment Creditors

initiated Proceedings Supplemental to Execution by filing a motion for examination and paying a filing fee. CP 197-199. On July 24, 2009, Raymond Cook (Judgment Debtor) appeared with counsel for examination at the Spokane County Courthouse. CP 268. The examination was continued by order of the trial court until September 18, 2009 and was ordered to be held in Colville. CP 275-277.

On August 17, 2009, on an *ex parte* basis, the Judgment Creditors filed a confidential report with the Court. CP 278-375.

On November 30, 2009, Judgment Creditors filed a notice for a three-day trial to determine “the title and ownership of property generally known as 1690 Dead Medicine Road, Evans, Washington”. CP 376-378. In the notice of trial setting, the Judgment Creditors note that the last pleading filed was on September 23, 2002. *Id.*

On February 25, 2010 the trial court denied Raymond

Cook's motion to dismiss based on jurisdiction. CP 486-488.

SUMMARY OF THE ARGUMENT

The central issues in this matter focus on the Judgment Creditors' attempt to resurrect and eight-year-old complaint alleging a fraudulent transfer of real estate. The trial court allow this matter to proceed under the guise of a proceeding supplemental to execution of the Judgment Debtor, Raymond Cook.

The trial court should have dismiss the matter because it did not have subject matter jurisdiction. The jurisdictional provisions of RCW 4.12.010 require that actions for the recovery of real property be brought in the county where the real property situated. In this matter the real property was situated in Stevens County and the action was brought in Spokane County. Therefore the court erred by not dismissing the action based on lack of subject matter jurisdiction.

The trial court should not have allowed the matter to

proceed based upon the judgment creditors application for a supplemental proceeding, because the statute of limitations was a valid defense to the claims. The supplemental proceeding was initiated on March 16, 2007, long after the expiration of the applicable statute of limitations for fraudulent transfer of real property, which had occurred in 2001.

The trial court misapplied the fraudulent transfer statute to create an interest in real property where no interest previously existed. The purpose of the fraudulent transfer statute is to recover assets which previously belonged to the judgment debtor which were transferred to a third-party in an attempt to avoid payment of a judgment. In this matter there is no evidence that the real property in Stevens County ever belonged to the judgment debtor. The trial court created a right in the real property on behalf of the judgment debtor which never existed. As a result trial court exceeded the authority granted it under the statute.

The trial court accepted a “confidential report” on an *ex parte* basis. Raymond Cook, nor any other party was served with notice of the filing of any report. This violates the fundamental principals of due process and as a result it was impossible for the court to be impartial after accepting materials on an *ex parte* basis.

As a result of the foregoing errors the decision of the trial court must be reversed.

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION.

The statutes granting the trial court authority to proceed in this action are two. First, the court has authority to conduct proceedings supplemental to execution of a judgment.

At any time within ten years after entry of a judgment for the sum of twenty-five dollars or over, unless the time is extended in accordance with RCW 6.17.020(3), upon application by the judgment creditor such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before the judge granting the order, or a referee appointed by the judge, to answer concerning the same; and the judge to

whom application is made under this chapter may, if it is made to appear to him or her by the affidavit of the judgment creditor, his or her agent or attorney that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him or her before the judge granting the order. Upon being brought before the judge, he or she may be ordered to enter into a bond, with sufficient sureties, that he or she will attend from time to time before the judge or referee, as shall be directed, during the pendency of the proceedings and until the final termination thereof. If the judgment debtor or other persons against whom the special proceedings are instituted has been served with these proceedings, the plaintiff shall be entitled to costs of service, notary fees, and an appearance fee of twenty-five dollars. If the judgment debtor or other persons fail to answer or appear, the plaintiff shall additionally be entitled to reasonable attorney fees. If a plaintiff institutes special proceedings and fails to appear, a judgment debtor or other person against whom the proceeding was instituted who appears is entitled to an appearance fee of twenty-five dollars and reasonable attorney fees.

RCW 6.32.010. This statute allows a trial court to order the appearance of a judgment debtor for examination. It is not a grant of general jurisdiction to proceed to determine the rights to real property. The jurisdiction of the court to determine

rights to real property are governed by RCW 4.12.010.

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property.

RCW 4.12.010.

This statute is a jurisdictional statute and not one of venue. *Snyder v. Ingram*, 48 Wn.2d 637, 296 P.2d 305 (Wash. 1956). While the authority of a trial court to determine an individual parties interest in property is properly a question of venue, the question of title to that property is only granted to the Superior Court in which that property is located. *Id.* See also, *Elsom v. Tefft*, 140 Wash. 586, 591, 250 P. 346 (1926). The *Elsom* court held that a court has authority to compel reconveyance of real property outside of its jurisdiction as to the parties before it. *Elsom* 586 Wash. at 591.

In this matter, the relief sought by the notice of trial was to determine “the title and ownership of property generally known as 1690 Dead Medicine Road, Evans, Washington”. CP 376-378. In other words, a quiet title action. As stated above, such an action must be brought in the county where the real estate is situated. RCW 4.12.010. This fact is further illustrated by the absence of parties. Arlene B. Cook was not a party to the supplemental proceeding and her rights could not be adjudicated. *Cf., Elsom v. Tefft*, 140 Wash. 586.

In addition, the evidence presented indicated that the judgment debtor had no interest in the property at the time of the supplemental proceeding. There was no evidence tracing Raymond Cook’s assets to the property short of the \$30,000 which was paid through an earnest money agreement. . These funds were paid by Raymond and Arlene Cook for the purchase of the property. The right to purchase was later assigned to Adeline Johnson.

Because the action was one to quiet title, the Spokane County Superior Court lacked jurisdiction and should have discontinued the supplemental proceedings.

II. THE CLAIMS OF THE JUDGMENT CREDITORS WERE BARRED BY THE STATUTE OF LIMITATIONS.

This matter was initiated by the Judgment Creditors filing of a an affidavit and for supplemental proceedings initiated on March 16, 2007. CP 197-199. On that day the Judgment Creditors sought and obtained an order for supplemental proceedings. *Id.* The initiation of the proceeding is evidenced by the payment of a filing fee. The latest transaction alleged in the Judgment Creditors' Complaint in January of 2002. CP 70-77, 98-103.

RCW 19.40.091 provides as follows:

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(a) Under RCW 19.40.041(a)(1), within four years after the transfer was made or the

obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under RCW 19.40.041(a)(2) or 19.40.051(a), within four years after the transfer was made or the obligation was incurred; or

(c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

RCW 19.40.091.

The Judgment Creditor discovered the allegedly fraudulent transfer sometime before March 21, 2002, the date it filed a Supplemental Proceeding Amended Complaint. CP 70-77. The exact date is irrelevant because it was long past the one-year floating statute of limitations.

The present action was commenced on March 16, 2007. This was accomplished by the payment of the fee to initiate a Supplemental Proceeding. CP 197-199. The trial court designated the newly filed supplemental proceeding as a

continuation of the complaint filed on March 21, 2002. This was in error. The question is one of application of law as to when this action originated:

At any time within ten years after entry of a judgment for the sum of twenty-five dollars or over, unless the time is extended in accordance with RCW 6.17.020(3), upon application by the judgment creditor such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before the judge granting the order, or a referee appointed by the judge, to answer concerning the same; and the judge to whom application is made under this chapter may, if it is made to appear to him or her by the affidavit of the judgment creditor, his or her agent or attorney that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him or her before the judge granting the order. Upon being brought before the judge, he or she may be ordered to enter into a bond, with sufficient sureties, that he or she will attend from time to time before the judge or referee, as shall be directed, during the pendency of the proceedings and until the final termination thereof. If the judgment debtor or other persons against whom the special proceedings are instituted has been served with these proceedings, the plaintiff shall be entitled to costs of service, notary fees, and an appearance fee of twenty-five dollars. If the judgment debtor or other persons fail to answer or appear, the plaintiff shall additionally be entitled

to reasonable attorney fees. If a plaintiff institutes special proceedings and fails to appear, a judgment debtor or other person against whom the proceeding was instituted who appears is entitled to an appearance fee of twenty-five dollars and reasonable attorney fees.

RCW 6.32.010.

At the time the Judgment Creditors initiated the proceedings, there was no other activity in the Court file. Indeed, the Clerk of the Court had destroyed the file one year later in 2008. There was no scheduling order setting a trial date on any previous pleadings, and the clerk treated the matter as a dead file. The attorneys had withdrawn and the court had entered a final judgment in the matter.

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

CR 54(a)(1).

With a final judgment on record, the only procedures available to the Judgment Creditors are post-judgment remedies. The filing of the order directing Raymond Cook to appear for examination was the initiation of a post-judgment proceeding. This is the date which sets the application for the statute of limitations with respect to this proceeding.

The trial court erred by allowing the Judgment Creditors to boot strap a claim for fraudulent transfer to a complaint filed in 2002. The matter should have been dismissed by application of the statute of limitations.

III. THE TRIAL COURT ERRED BY NOT REQUIRING A HEARING ON THE MOTION TO SEAL EVIDENCE.

The sealing or redacting of court records is a matter governed by GR 15(c):

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may

request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CRLJ 3.1(f).

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A conviction has been vacated; or

(D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record; or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

GR 15(c).

In this matter, the Judgment Debtor did not even know the items had been filed with the Court. No notice was provided and the items were sealed without his knowledge. Only after a review of the record was it discovered that there was a confidential report filed and sealed with the Court. This conduct is in violation of GR 15 and should not be allowed.

Cases that have considered the issues raised by ex parte contact generally contemplate some form of prejudice be shown by the aggrieved party. *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn.App. 695, 934 P.2d 715 (Wash.App. Div. 2 1997); *In re Marriage of Davison*, 112

Wn.App. 251, 48 P.3d 358 (Wash.App. Div. 3 2002).

In this matter it is impossible for the Judgment Debtor to determine what level of harm occurred from the sealing of a confidential report on an *ex parte* basis. First, the Judgment Debtor had no notice that the report was filed with the court. Second, the Judgment Debtor has no idea what was in the report and it is now sealed. Third, the Judgment Debtor has no idea what the trial judge considered from the report when making her decision. CP 373-375. The American system of justice is not based on secrete proceedings in dark rooms. The system is one of due process which includes notice and an opportunity to be heard. *Matthews v. Eldridge*, 424 U. S. 319 (1976).

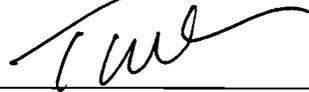
This manner of violation of GR 15(c) should not be treated lightly. It calls into question all of the proceedings herein, because the Judgment Creditor and all other parties have been shut out from a proceeding that may have been vital

to the decisions in this case. At a minimum it requires a new proceeding. At a maximum it requires dismissal of the proceeding.

CONCLUSIONS

The trial court committed multiple errors in this matter. The supplemental proceeding should have been dismissed on each of the grounds listed above. The inclusion of a sealed confidential report without notice to the other parties in the litigation is inexcusable. The decision of the trial court should be reversed with dismissal as the appropriate remedy.

Respectfully Submitted, on
October 3, 2011



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