

FILED

AUG 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297209

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

DEERE CREDIT, INC.,

Respondent

v.

CERVANTES NURSERIES, LLC, CERVANTES PACKING & STORAGE, LLC,
MANCHEGO REAL, LLC, AND JOSE & CYNTHIA CERVANTES,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY

THE HONORABLE DAVID A. ELOFSON

BRIEF OF APPELLANT

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EMANUEL JACOBOWITZ
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I. ASSIGNMENT OF ERROR

The trial court erred in entering the order dated May 24, 2010 (CP 476) granting summary judgment to Respondent and denying Appellants' Motion to Dismiss.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Does the 'Single Action Statute,' RCW 61.12.120, prevent a creditor from foreclosing on real property in Washington State Court to satisfy a debt, in an action against one debtor, while simultaneously pursuing foreclosure of collateral for the same undifferentiated debt, as against a co-debtor, in the United States Bankruptcy Court?

III. STATEMENT OF THE CASE

A. Respondent Proceeded Against Collateral In Two Courts At The Same Time On The Same Debt.

Because there are no facts in dispute for purposes of this appeal, the facts will be briefly summarized and are cited for the most part to the trial court pleadings rather than the underlying exhibits.

This is an action to foreclose on certain real property belonging to Appellants. (CP 1-21). In July 2003, all Appellants (the "Cervantes Parties") and their affiliate Cervantes Orchards & Vineyards ("COV") jointly issued three promissory notes (the "Notes") to Respondent Deere Credit, Inc. ("DCI") to borrow a total of \$3,800,000 (the "Debt"). (CP

4-5). They secured the Notes by granting mortgages on several parcels of real property (the "Collateral"). (CP 6-10).

The Cervantes Parties and COV were unable to maintain payments on the Notes. (CP 11). COV filed a petition for Chapter 11 Bankruptcy relief in the U.S. Bankruptcy Court for the Eastern District of Washington, No. 05-006600-JAR11. (CP 11). During those proceedings, DCI, COV and the Cervantes Parties worked out a loan modification - forbearance agreement which was a condition for the Plan of Reorganization in the bankruptcy proceeding. (CP 11-12, CP 195). The Plan was confirmed on that basis, and the bankruptcy proceeding was closed. (CP 469).

In 2009, however, the Cervantes Parties and COV were unable to complete the Plan of Reorganization in the bankruptcy proceeding. In October 2009, DCI called a Credit Committee meeting, recognized the failure to maintain the Plan, and decided that rather than modifying the Plan, it would proceed against the Collateral in two parallel tracks. (RP 4).¹

Specifically, DCI filed this action (the "Washington Action") in the Yakima County Superior Court to foreclose on the Collateral to satisfy

¹ Appellants' initial brief and exhibits on this issue were misfiled in the Superior Court, and although the Superior Court accepted and considered the brief and exhibits (*see* RP 1), they apparently were not kept with the Superior Court's case file and do not appear in the Clerk's Papers. Because the facts are not in dispute, the record cite is given to the Report of Proceedings in which these facts are discussed on the record.

the Debt – and shortly afterwards, it moved to reopen the bankruptcy proceeding to move for the appointment of a liquidating trustee and for that trustee to begin auctioning off the Collateral to satisfy the Debt. (CP 469, RP 43).

B. The Trial Court Granted Judgment In Favor Of Respondent And Denied Appellants' Motion To Dismiss.

DCI moved in the Washington Action for summary judgment against the Cervantes Parties, and the Cervantes Parties defended and cross-moved to dismiss, primarily on the ground that DCI, by pursuing foreclosure in both courts simultaneously, had violated the Single-Action Statute, RCW 61.12.210. (CP 470-73). In February – April 2010, repeated hearings were held on DCI's motion in the Bankruptcy Court for liquidation (which involved extensive evidentiary hearings), and also in the Washington Action on its motion for summary judgment and Appellants' cross-motion to dismiss. (RP 13).

On May 24, 2010, the Superior Court granted the motion for summary judgment to allow foreclosure on the Collateral (CP 476). By then, the Bankruptcy Court had already granted DCI's motion in that proceeding and appointed the liquidating agent, who had scheduled auction sales of the Collateral. (CP 469.)

Appellants timely noticed an appeal in this Court after entry of judgment and decree of foreclosure.

IV. ARGUMENT

A. **Standard of Review.**

This Court reviews a summary judgment *de novo*, making the same inquiry the trial court did: summary judgment should not be granted unless the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002). The burden of proof is on the Respondents as the moving party, and any doubt as to the existence of a genuine issue of material fact is resolved against summary judgment. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All facts are considered in the light most favorable to the Cervantes Parties, and all reasonable inferences are drawn in their favor. *Id.*

B. **The Single Action Statute Is Plain And Unambiguous.**

The sole issue here is one of first impression, but one that is easily resolved by straightforward statutory construction. The Single Action Statute, RCW 61.12.120, provides in its entirety:

The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other

action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.

The Washington Supreme Court construed this statute broadly to effect its remedial purpose, when a creditor sought to attach property during foreclosure proceedings:

While it is true that, strictly speaking, an attachment is not a separate action, but an ancillary proceeding, it would, if resorted to before judgment, be an additional remedy not contemplated in foreclosure proceedings under our statutes. The evident spirit and intent of section 5893 was to prevent plaintiffs from harassing defendants in foreclosure actions, with ancillary proceedings prosecuted before judgment, for the purpose of seeking additional and concurrent remedies other than those authorized by statute or arising in the usual course of procedure. It was to prohibit a mortgagee securing by writ of attachment or otherwise an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale.

Advance Thresher Co v. Schimke, 47 Wash. 162, 164, 91 P. 645 (1907)
(emphasis added).

Here, DCI attempted to gain “an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting same by foreclosure and sale.” The Liquidating Agent had scheduled auction sales of much of the Collateral to satisfy the Debt, yet DCI continued to pursue foreclosure of other parcels in the Washington Action. DCI was required by the plain text of the Single

Action Statute to choose one or the other, until its first elected remedy was exhausted. *See Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (the “plain meaning rule” requires courts to derive the meaning of the statute from the “wording of the statute itself.”)

C. DCI’s Arguments Cannot Overcome The Plain Statutory Language.

The Superior Court’s reasons for bypassing the statute’s plain meaning are unclear. The Order dated May 24, 2011 merely says, “I find the actions are not the same and there is no bar to the Plaintiff’s current action.” Obviously the whole point of the statute is to avoid concurrent actions that are “not the same.” The Superior Court could not possibly have so misread the statute. Possibly the Court meant that it agreed with DCI’s position, that the actions were not relevantly similar, because they were not on the same debt. If so, this was error.

There is no dispute here that the three mortgages at issue all secured, indiscriminately, the entire balance of the Debt created by the three Notes. DCI did not seek to satisfy one discrete portion of the Debt with its own discrete security in one action, and another portion secured separately in the other proceeding. It sought to satisfy the same Debt, secured on all the Collateral, in both proceedings. The Single Action Statute therefore applies by its plain meaning.

DCI also argued that the liquidation in the Bankruptcy Proceeding was not an “action” at all within the meaning of the Single Action Statute. This is clearly not what the Superior Court held (“the actions are not the same”); moreover, it would have been error to so hold. DCI relied primarily on *In re 1020 Warburton Avenue Realty Corp.*, 127 B.R. 333 (Bankr. S.D. N.Y. 1991), but its reliance is misplaced.

In *1020 Warburton*, an involuntary debtor argued that the creditor’s institution of proceedings was in bad faith, because it was intended to evade the strictures of a somewhat similar New York State statute, under which a creditor may not pursue an action for a money judgment on a debt at the same time that it seeks to foreclose on the debt’s security. *1020 Warburton*, 127 B.R. at 334. The bankruptcy court refused to construe the New York State statute that way as a matter of federal supremacy: to hold that a violation of the New York State statute was per se bad faith under the Bankruptcy Code, would effectively elevate that State law over the creditor’s Bankruptcy Code rights to relief. *Id.* at 336 (“state statutes may not impose conditions for the filing of bankruptcy cases in Federal courts,” and “RRAPL § 1301 governs state procedures and has no application to bankruptcy cases which are constitutionally within the exclusive province of Congress.”).

Thus, *1021 Warburton* merely held that the State cannot pass procedural rules to force federal dismissals. The court did not have occasion to address whether the New York statute might require dismissal or stay of the State case, and its reasoning cannot apply to that question.

The Washington Supreme Court, in contrast, has defined “action” broadly where statutes give litigants procedural protections in an “action.” Notably, in *Schinke, supra*, it defined “action” in the Single-Action Statute to mean even ancillary proceedings within the same action. Likewise, where a party to a labor arbitration proceeding argued that he did not owe attorney’s fees recoverable in employment “actions,” the Court held otherwise:

Although some definitions of “action” indicate that it is a proceeding in a court of law, others specify that it is merely a “judicial” proceeding. Black’s Law Dictionary defines “action” as a “civil or criminal judicial proceeding,” “an ordinary proceeding in a court of justice,” and “any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.” Black’s Law Dictionary 28-29 (7th ed.1999). American jurisprudence defines “action” as “a judicial proceeding in which one asserts a right or seeks redress for a wrong.” 1 Am.Jur.2d Actions § 4, at 725-26 (1994).

Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett, 146 Wn. 2d 29, 40-41, 42 P.3d 1265 (2002).

DCI further argued that to put a bankruptcy proceeding within the meaning of an “action” for these purposes would, when there are joint

debtors, effectively require an automatic stay as against co-debtors, which of course is not required by the Bankruptcy Code. But DCI greatly overstates the effect of the Single Action Statute, because an ordinary bankruptcy proceeding is not a foreclosure proceeding. On this point, *1020 Warburton* provides useful guidance: because the commencement of a Chapter 11 proceedings automatically stays foreclosure proceedings against the property of the estate, a Chapter 11 is normally not a proceeding seeking foreclosure. *1020 Warburton*, 127 B.R. at 336. A bankruptcy proceeding, as such, is a multiparty debt reorganization procedure, not a foreclosure. The Single-Action Statute would apply to pending bankruptcy proceedings only in those very rare cases where a creditor seeks to force a liquidation by foreclosure. In those rare cases, however, the creditor is by definition pursuing foreclosure – and there is no reason he should be able to do that in two courts at the same time just because one of them is called a bankruptcy court.

Lastly, DCI argued that the Single Action Statute can never apply to proceedings against two different debtors. That reading, however, fails to match the plain language of the statute. Had the Legislature wanted to prevent only multiple proceedings against a single debtor, it could easily have drafted that statute. It did not – and for good reason. As happened in this case, joint debtors will often have overlapping interests, so that the

effect of suing them for different remedies on the same debt in multiple forums, will usually be the same vexation and oppression whether the separate actions are brought against one party or several. Either way, the Legislature's command is clear and unambiguous: the Washington Action was prohibited. Summary judgment should not have been granted, and the motion to dismiss should have been granted.

VI. CONCLUSION

Because the Single-Action Statute barred pursuit of simultaneous foreclosure remedies in different courts on the Debt, this Court should reverse and remand with instructions to enter an order vacating summary judgment and dismissing the Washington Action.

DATED this 21st day of July, 2011.

RESPECTFULLY submitted,

JOHNSTON LAWYERS, P.S.

By: 

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CERTIFICATE OF SERVICE

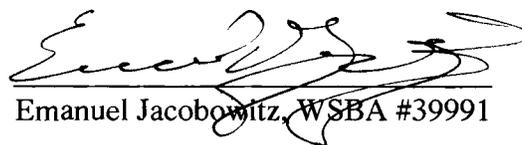
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

APPELLATE BRIEF

TO: ROGER W. BAILEY

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Dated at Seattle, Washington, this 1st day of August, 2011.


Emanuel Jacobowitz, WSBA #39991