

FILED

APR 15 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 304019
(Consolidated with No. 308855)

WASHINGTON STATE COURT OF APPEALS
DIVISION III

BRIAN A. WORDEN and ANNE MEREDITH WORDEN,
husband and wife,

Plaintiffs/Respondent,

vs.

JAMES M. SMITH, an individual; JANE A. SMITH, an individual,
COLUMBIA STATE BANK, a Washington State Chartered Bank,

Defendants/Appellants,

and

GRANITE FARMS, LLC,

Intervenor/Respondent.

APPELLANTS' JOINT REPLY BRIEF

CARL E. HUEBER, WSBA #12453
WINSTON & CASHATT
601 W. Riverside Ave.
1900 Bank of America Financial Center
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellants

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601 W. Riverside Ave.
1900 Bank of America Financial Center
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Attorneys for Appellants

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This brief is filed in reply to the Brief of KAL Farms, LLC and the Brief of Intervenor/Respondent (Granite Farms).

1. Personal jurisdiction over KAL Farms, LLC is proper on the basis of consent and waiver.

KAL Farms, LLC asserts on appeal that the trial court lacked jurisdiction over it because it was never a party to the underlying action.¹ (Brief of KAL Farms, LLC, p. 4) This argument is without merit because KAL Farms, LLC consented to personal jurisdiction and waived any defense it may have had to the lack of personal jurisdiction by invoking the jurisdiction of the court in order to seek affirmative relief.

In this case, the initial foreclosure complaint was filed on December 10, 2010. (CP 3) KAL Farms, LLC appeared on August 24, 2011 through counsel filing a Notice of Appearance. (CP 242) Prior to that time, KAL Farms, LLC was not a party to the litigation.

On October 14, 2011, KAL Farms, LLC filed a formal objection to Columbia Bank's motion to amend the Order that erroneously paid the outstanding real estate taxes from the sale surplus. (CP 263) Specifically, KAL Farms, LLC requested the trial court "...deny Defendant Columbia

¹ It is unclear from its brief whether KAL Farms, LLC bases its jurisdiction argument on the lack of subject matter jurisdiction or personal jurisdiction.

Bank's Motion to Amend the Stipulated Order." (CP 267) This was a specific request for affirmative relief.

KAL Farms, LLC also stipulated and waived presentment of the proposed Stipulated Order Directing Distribution of Surplus Sale Proceeds to Defendant Columbia Bank pursuant to RCW 61.12.150. (CP 275)

On April 6, 2012, KAL Farms, LLC filed a Motion to Pay which affirmatively asked the trial court to set the redemption price for this property. (CP 345) Counsel for KAL Farms, LLC also filed a Declaration in Support of its Motion to Pay. (CP 351) In this Declaration, KAL Farms, LLC asked the court to set the redemption price to include the \$65,913.37 in taxes that was mistakenly paid from the sale proceeds. (CP 353)

KAL Farms, LLC's actions operated as both consent to jurisdiction and a waiver of any defense to lack of jurisdiction it may have otherwise had.

Subject matter jurisdiction is the authority of the court to hear and determine the type of action before it. In re the Marriage of Robinson, 159 Wn.App. 162, 167, 248 P.3d 532 (2010); In re Adoption of Beuhl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Unlike subject matter jurisdiction, a party may consent to personal jurisdiction by appearing in the proceedings and arguing the case on the merits or seeking affirmative

relief. In re Estate of Little, 127 Wn.App. 915, 922, 113 P.3d 505 (2005); In re Support of Livingston, 43 Wn.App. 669, 671-72, 719 P.2d 166 (1986).

A person, whether or not a resident or domiciliary of a state, may by his consent thereto before or after an action is brought against him, permit the state to acquire jurisdiction over him in a judicial proceeding even if he has not been served with process. Copeland Planned Futures, Inc. v. Obenchain, 9 Wn.App. 32, 36, 510 P.2d 654 (1973); Restatement (Second) of Conflict of Laws §32 (1971). This rule applies even if, because of consent, the judgment has been obtained without service of process. Rubin v. Dale, 156 Wash. 676, 288 P. 223 (1930). The rule applies even if, without such consent, jurisdiction would be lacking. Pickler v. Pickler, 5 Wn.App. 627, 489 P.2d 932 (1971).

Consent may be implied by the member's general appearance in court, waiving all jurisdictional requirements. In re Marriage of Parks, 48 Wn.App. 166, 169, 737 P.2d 1316 (1987). In addition to consenting to personal jurisdiction, a party may also be deemed to have waived the defense of lack of personal jurisdiction by seeking affirmative relief. Kuhlman Equipment Co. v. Tammermatic, Inc., 29 Wn.App. 419, 628 P.2d 851 (1981). By seeking affirmative relief, a party invokes the jurisdiction of the court. By so doing, the party waives the defense of lack

of personal jurisdiction. Kuhlman, supra at 425. Here, KAL Farms, LLC appeared and sought permissive affirmative relief from the court. This request included the inclusion of the \$65,000 tax payment which is presently in controversy. By so doing, KAL Farms, LLC consented to the jurisdiction of the court and waived the defense of lack of personal jurisdiction.

Even if KAL Farms, LLC had objected to personal jurisdiction (which it did not) under CR 12(b), it waived the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court. Grange Ins. Ass'n v. State of Idaho, 110 Wn.2d 752, 763, 757 P.2d 933 (1988); Livingston v. Livingston, 43 Wn.App. 669, 671, 719 P.2d 166 (1986).

KAL Farms, LLC's argument is without merit as it is based upon case law concerning a new defendant being added after an action has been commenced. (KAL Farms, LLC Brief, p. 5) KAL Farms, LLC asserts that personal jurisdiction over a third party defendant must be secured by proper service of a third party Summons. Also, the cases relied upon by KAL Farms, LLC are readily distinguishable.

KAL Farms, LLC relies upon James Talcott v. Allahabad Bank, 444 F.2d 451 (5th Cir. 1971). There, an attempt was made to bring a new party into complex litigation by means of a third party action. The issue

before the court was whether the trial court properly quashed service of process which was sent by registered mail for publication in Calcutta, India. The Fifth Circuit determined that service by publication on a foreign corporation was not authorized by federal statute or rule. Talcott, supra at 465. The Fifth Circuit ruled that the trial court properly granted the motion to quash the attempted service. This holding has no relevance to the present appeal. Here, there was no effort by any party to join KAL Farms, LLC as a party to the litigation. Rather, KAL Farms, LLC voluntarily appeared in this case and sought affirmative relief from the court. By so doing, KAL Farms, LLC consented to personal jurisdiction.

KAL Farms, LLC also relies upon Nelson v. Adams USA, Inc., 120 S.Ct. 1579, 529 U.S. 460 (2000). There, the defendants moved to amend a Third Party Complaint, after dismissal of its suit, to add the licensee's sole shareholder as third party defendant with individual liability. Following trial, the defendant moved to add the plaintiff's sole shareholder as a party from whom fees could be collected. The trial court allowed the amendment and simultaneously entered a judgment against the newly added party. The United States Supreme Court ruled that the trial court erred by permitting the amendment of the pleading and that such amendment violated due process. Again, this holding is irrelevant to the present appeal as none of the parties made any effort to add

KAL Farms, LLC to the litigation. Rather, KAL Farms, LLC voluntarily appeared in the case and sought affirmative relief. By so doing, it subjected itself to the jurisdiction of the court.

2. Ignoring the Law of the Case argument does not alter the fact that the trial court erroneously ruled that the Law of the Case doctrine precluded its consideration of the motion to amend the order.

Columbia Bank erred when it submitted the first order to the court. The parties have acknowledged this mistake and the fact that, but for the mistake, Columbia Bank would have been entitled to receive the full payment of the sale surplus.

Upon discovering its mistake, Columbia Bank timely asked the trial court to correct the mistake. The trial court denied this motion based on the Law of the Case doctrine. This ruling was wrong. As discussed fully in Appellants' Opening Brief, the Law of the Case doctrine does not apply to the present issues before this Court. (Appellants' Opening Brief, pp. 15-16)

Columbia Bank now seeks reversal of the trial court's ruling because it erroneously relied on the Law of the Case doctrine. Rather than address the applicability of the Law of the Case doctrine, Granite Farms has elected to ignore the argument and the controlling case law. In fact, Granite Farms sets out what purports to be the trial court's decision in

page 6 of its brief. Curiously omitted was the first sentence of the ruling that states: "The Order of September 19, 2011, became the Law of the Case when entered." (CP 307) Granite Farms merely glosses over the fact that the trial court ruled that the Law of the Case doctrine precludes the requested relief. The basis of the trial court's ruling of September 19, 2011, and its refusal to correct the mistake, was the Law of the Case doctrine.

Granite Farms appears to argue that there was some unspoken agreement by the parties to not follow the statutory scheme in distributing the sales proceeds and the order was somehow the result of negotiation between the parties. There is no basis in the record to support this contention. The order was the result of Columbia Bank's counsel's mistake as to the proper priorities to be applied to the sales proceeds. This problem could have been easily fixed by the court by correcting the mistake. However, the trial court ruled that it could not correct this mistake due to its mistaken belief that the Law of the Case doctrine precluded such remedial measures.

3. The trial court erroneously rejected the unjust enrichment and equitable subrogation theories advanced by Columbia Bank.

The full extent of the trial court's analysis of these arguments consists of the statement "the court also finds that the doctrines of unjust

enrichment and/or equitable subrogation do not apply." (CP 400) The trial court did not engage in any analysis nor did it set forth the basis of its rulings that neither of these doctrines apply. Without such analysis, appellate review is not possible.

In its response brief, Granite Farms attempts to transform this non-ruling into a discretionary call solely because the trial court issued a three page decision. (Brief of Intervenor/Respondent, p. 15) This does not alter the fact that the trial court summarily rejected these two arguments without any analysis. Columbia Bank presented both a legal and factual basis for the application of equitable subrogation and unjust enrichment. (4-16-12 RP 6-7; CP 365) Rather than consider, evaluate, and rule on the equitable principles, the trial court summarily rejected them. Had the trial court engaged in the proper evaluation of the arguments, its ruling would be reviewed under the abuse of discretion standard. Blueberry Place v. Northward Homes, 126 Wn.App. 352, 359, 110 P.3d 1145 (2005). However, the trial court's refusal to review these arguments constitutes the failure to exercise discretion which is an abuse of discretion. Bowcutt v. Delta North Star Corp., 976 P.2d 643, 95 WAP 311 (1999).

Granite Farms wound up redeeming the property at a price that failed to take into account that \$65,913.37 had been erroneously paid towards the taxes on the property. But for that mistaken payment, the taxes would still be owed against the property and Granite Farms would have assumed this obligation.

4. Conclusion.

The trial court had a unique opportunity to exercise its equitable powers and fix this problem. Due to its erroneous reliance on the Law of the Case doctrine and its refusal to consider Columbia Bank's unjust enrichment and equitable subrogation arguments, nothing was done.

Columbia Bank requests that the trial court's decisions be reversed and that the matter be remanded to the trial court for entry of appropriate orders consistent with this Court's opinion.

DATED this 15th day of April, 2013.



CARL E. HUEBER, WSBA #12453
WINSTON & CASHATT
Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on April 15, 2013, I caused a true and correct copy of the foregoing document to be served on the following counsel via first class US Mail, postage prepaid:

James K. Hayner
Minnick Hayner
P.O. Box 1757
Walla Walla, WA 99362

R. Crane Bergdahl
Attorney at Law
PO Box 2755
Pasco, WA 99302-2755

Kevin O'Rourke
Southwell & O'Rourke, P.S.
421 W. Riverside Ave., Suite 960
Spokane, WA 99201

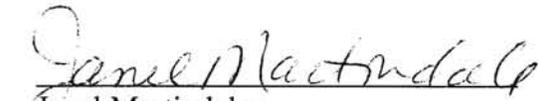
Robert G. McMillen
Telquist Ziobro McMillen
1333 Columbia Park Trail, Ste. 110
Richland, WA 99352-4713

Mona J. Giedl Gonzales
249 West Alder Street
Walla Walla, WA 99362-2809

John G. Schultz
Leavy, Schultz, Davis & Fearing, P.S.
2415 W. Falls Avenue
Kennewick, WA 99336

Hunter B. Emerick
Saalfeld Griggs, PC
P.O. Box 470
Salem, OR 97308-0470

DATED this 15th day of April, 2013, at Spokane, Washington.


Janel Martindale