

No. 311490-III

FILED

COURT OF APPEALS, DIVISION III

NOV 27 2012

OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

RUSSELL H. BENSCH and CELLIE D. BENSCH, husband and wife,

Respondents

v.

DON C. DIXON and PATRICIA E. BRITZA,

Appellants.

BRIEF OF APPELLANTS'

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ASSIGNMENTS OF ERROR

- I. The Trial Court erred in granting Respondents relief by Summary Judgment in their action for Replevin?
- II. The Trial Court erred in resolving the ultimate question of fact by concluding that the Benschers did not intend to abandon their personal property after they left it behind for more than 14 months following a foreclosure sale of their land and made no attempt to claim it until third parties purchased the property in good faith.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Where landowners 1) lost title to their land pursuant to a foreclosure and a Trustee's Sale, 2) removed personal property from the land and stored it nearby within the time frame allowed by law, and 3) left other personal property behind for more than 14 months without making any attempt to claim or collect it, and 4) claimed they did not know their entire property had been foreclosed despite mailed and published legal notices fully describing their land, did the Trial Court err in resolving an ultimate question of fact regarding credibility and intent to abandon by awarding the foreclosed landowners summary judgment in their action against the new owners for replevin?

STATEMENT OF THE CASE

On June 8, 2012, Russell H. and Cellie D. Bensch, husband and wife (Bensches) sued Don C. Dixon and Patricia E. Britza (Dixon/Britza) seeking Replevin of abandoned personal property that had been owned by the Bensches but which was left on foreclosed land. That land was ultimately purchased by Dixon/Britza fourteen (14) months after the last day that the Bensches had any right to possession of the property (CP 1-6). The Bensches lost their property pursuant to foreclosure for non-payment of their monthly mortgage payments on both first and second position Deeds of Trust. (Declaration of Raymond L. Davis, CP 56-60). Dixon/Britza filed their Answer and Affirmative Defenses on July 6, 2012 denying the Bensches' claims of ownership and alleging affirmative defenses including, among others, estoppel, laches and abandonment (CP 7-13).

The Bensches claimed that they did not realize that their entire parcel, which was covered by the Deed of Trust, was sold at the non-judicial Trustee's Sale. They claimed that they had title to three (3) separate parcels that made up two (2) 20-acre parcels with separate tax descriptions. They claim to have believed that it was only the middle parcel containing the house that was foreclosed and therefore they thought they still owned the remaining

20 acres to the West. They did not explain the status of the unimproved strip of land to the East of the allegedly foreclosed parcel in the middle. The basis for their belief, they claim, was that when they originally financed the property in 2003, the Lender focused the appraisal on the five (5) acres of the East 20-acre parcel land with the improvements and *orally* told them he was not interested in the rest of the land; that they understood from this conversation when they paid off the owner contract on the land with the mortgage in 2003, they owned everything except the improved parcel (Declaration of Russell Bensch, CP 16-47). As admitted by the Bensches in their Memorandum in Support of Summary Judgment, the Deed of Trust encompassed the entire 40-acre parcel (CP 48-55; see also Declaration of Raymond Davis, CP 56-60. Further, the Bensches claim they believed only the 20 acres was foreclosed because the Notice of Trustee's sale filed in Ferry County described the property as:

THE E ½ OF THE NW ¼ OF THE SE ¼,
EXCEPTING THEREFROM THE SOUTH 165 FEET
THEREOF; SEE EXHIBIT A FOR FULL DISCLOSURE.

Commonly Known as: 103 NANCY CREEK RD,
KETTLE FALLS, WA 99141.

Tax Parcel ID No. 7-37-32-31-00010-00.

(Declaration of Russell Bensch, CP 16-47). Ironically, in that same Declaration, Bensch described previously owning the 40 acre parcel described with the address of 103 Nancy Creek Rd., Kettle Falls, Ferry County, Washington 99141. Moreover, the Declaration of Raymond L. Davis, with letters attached, indicates that the "Exhibit A" referred to in the Notice of Trustee's Sale, while not recorded in Ferry County, was mailed to the Bensches so they had the complete legal description of the property prior to foreclosure and that a full legal description of the property was published in the Republic News Miner on July 29, 2010 and August 19, 2010 (CP 56-60). The full text of that advertisement is also presented in Exhibit "A" of the Declaration of Patricia E. Britza (CP 65-83). And, the Declaration of Rachel D. Siracuse, Assessor for Ferry County, indicated that her review of Tax Parcel Numbers 7-37-32-31-0010-00 and 7-37-32-31-0010-06 showed the property to be one (1) 40.45 acre parcel. The tax coding numbers merely designated one (1) section taxed at the Residential rate and the remainder of the land taxed at the lesser Forest Land rate, but they do not designate two (2) separate parcels. The attached Assessor's map clearly showed the entire 40.45 acre tract under the same number listed in the Notice of Trustee's Sale: 7-37-32-31-0010-00 (CP 96-100).

The property was sold to Federal National Mortgage Association pursuant to the Trustee's Sale on August 27, 2010 and the Trustee's Deed was recorded on November 2, 2011 (Bensch's Memorandum in Support of Summary Judgment, CP 48-55). In August 2010, the Bensch's were observed by a neighbor removing items from the "upper 20 acres" [being both the Eastern and Western portions of the land] (Declaration of Jerry Bramhall, CP 63-64).

Dixon/Britza examined the property prior to purchase and observed that wires had been cut out of the electrical box, the vanity pulled out of the bathroom and burned on the driveway, and carpet had been ripped out of the living room and removed (per Cellie Bensch). They spent \$77,000 putting the house back in livable condition. At the time they first viewed the property Dixon/Britza also observed abandoned vehicles and equipment, a large garbage pile, old tires, 55 gallon oil barrels, and piles of metal strewn around the property. They believed the metal and junk vehicles could be sold to help off-set some of the cost of clean-up of the property and the building materials could be used on the property. Those factors influenced their decision to purchase the property (Declaration of Patricia E. Britza, CP 65-83, and Supplemental Declaration of Patricia E. Britza, CP 101-108).

The Benschers produced no evidence whatsoever that they are owners of the claimed personal property: no vehicle titles, registrations, receipts, bills of sale, or declarations from the alleged sellers. In fact, the only evidence of ownership was the Affidavit of Richard Bensch in which he gave a bare assertion of ownership and two (2) different accounts regarding how the personal property came to be located on the land. The first version was that the Benschers placed the personal property on the land when it was hauled from Seattle, Washington to Wenatchee, Washington in 1992 and then to the subject property in Kettle Falls, Washington in 2000 and the second version is that when their property was foreclosed, they believed the foreclosure did not include the Western portion of their land so they moved their vehicles and personal property to that section. (Declaration of Russell H. Bensch, CP 16-47). This is inconsistent with the Declaration of Jerry Bramshall, supra, who saw the Benschers removing their property from the upper portion of the land (both East and West) around the time of the foreclosure sale (CP 63-64).

Ultimately, Dixon/Britza closed on the 40-acre parcel in November of 2011. Sometime in December of 2011, one (1) of the workmen found an undated note from Cellie Bensch asking patience for them to remove the “heavy, hard to move” property (which they already had a place to store)

from the land as they did not expect the upper half of the 40 acres to sell and because they had been in North Dakota operating a trucking company and it would cost them two (2) to three (3) weeks of time and thousands of dollars in lost revenues to move the personal property (CP 65-83). Dixon/Britza refused. On June 8, 2012, twenty-two (22) months after the Foreclosure Sale, the Bensches filed the action for Replevin (CP 1-6). On September 14, 2012 Judge Patrick A. Monasmith granted Summary Judgment in favor of the Bensches (CP 127). An Order Granting Possession of Personal Property And Setting Conditions was entered on September 24, 2012 (CP 132-141). Notice of Appeal was filed and then an Amended Notice of Appeal was filed on October 1, 2012 (CP 128-130 & 142-154).

ARGUMENT

I. The Trial Court Erred By Awarding Summary Judgment To The Bensches.

The Trial Court below ignored numerous fundamental principles regarding summary judgment when it granted the Bensches' Motion for Summary Judgment in their action for Replevin of personal property they had left on foreclosed land for over fourteen (14) months. A Summary Judgment

Motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Where different inferences can be drawn from evidentiary facts as to ultimate facts such as intent, knowledge, good faith and negligence, summary judgment is not warranted. *Johnson v. Schafer*, 47 Wn. App. 405, 735 P.2d 419 (1987), *rev'd on other grounds*, 110 Wn.2d 546, 756 P.2d 134 (1988).

One key issue in dispute was whether the Benschers had knowledge that the foreclosure pertained to *all* of the property financed and secured by the deeds of trust, or whether it merely pertained to the twenty (20) acre section of land. Since knowledge is generally a question of fact, Summary Judgment is improper where, even though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent or knowledge. *Partridge v. City of Seattle*, 49 Wn. App. 211, 741 P.2d 1039 (1987). A second disputed fact is whether the Benschers intended to abandon the property they failed to remove for fourteen (14) months. Mere conclusory allegations by Mr. Bensch in his Affidavit that he never intended to abandon the property are insufficient. Nor is it sufficient that he selectively chose which information to believe. He conveniently ignored the fact that the two (2) Deeds of Trust encumbered his entire forty (40) acres.

He ignored the fact that the Notice of Trustee's Sale and the attached Exhibit mailed to him fully described his property. He ignored the two (2) newspaper notices advertising the Trustee's Sale of the entire forty (40) acres, legally described with accuracy. He fails to mention that he stopped making any payments on both the first and second mortgages secured by the two (2) Deeds of Trust. He claimed Realtors told him only twenty (20) acres was for sale and provided an example showing that twenty (20) acres was on the MLS form, but he failed to mention that the Realtors' MLS also contained the accurate road address, parcel description as well as the accurate legal and tax parcel descriptions for the entire forty (40) acres (Declaration of Russell H. Bensch, CP 16-47). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from an opinion. Ultimate facts, conclusions of fact or conclusory statements of fact are insufficient to raise a question of fact. *Curran v. City of Marysville*, 53 Wn. App. 358, 766 P.2d 1141, *review denied*, 112 Wn.2d 924 (1989). In this case the court did not bother to hear testimony in order to evaluate the credibility of witnesses concerning knowledge, intent and behavior. As illustrated above, the Bensch's position that they did not know they had lost all their land in

foreclosure strains credibility. Summary judgment should not be granted when the credibility of a material witness is at issue; Summary Judgment also may not be appropriate when material facts are particularly within the knowledge of the moving party. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990). In this case, the Trial Court chose to resolve the ultimate issues of disputed fact in the Summary Judgment proceeding. In ruling on a Motion for Summary Judgment, the Court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue; the court is permitted to pierce the formal allegations of facts in the pleadings and grant relief by Summary Judgment, when it clearly appears from *uncontroverted facts* set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963).

Moreover, the facts in dispute recited *supra* should have been considered by the court and all reasonable inferences from the facts viewed in the light most favorable to Dixon/Britza as the nonmoving parties. Where undisputed facts are reasonably susceptible to more than one interpretation, summary judgment is improper. *Hash v. Children's Orthopedic Hosp. &*

Medical Ctr., 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988). Again, in considering a Motion for Summary Judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve the issue. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977). And, on appeal, the court engages in the same inquiry as the trial court and must consider the facts in a light most favorable to the non-moving party. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997), *modified on other grounds*, *Hayes v. City of Seattle*, 943 P.2d 265 (1997).

II. A Question Of Fact Exists As To Whether The Benschers Abandoned Their Personal Property.

As noted by both parties below, there is a dearth of on-point authority in Washington addressing abandonment in this context. Nonetheless, authority from other jurisdictions supports the conclusion that the Benschers abandoned their personal property.

Gurgel v. Nichol, 19 Utah 2d 200; 429 P.2d 47 (1967) involved an action by a homeowner alleging trespass and conversion by prior owner of home of certain personal property. In this case, the Supreme Court of Utah reversed and remanded the District Court's grant of summary judgment to the

homeowner where the evidence showed 1) the defendant had left personal property in the home that he vacated in August 1965 pursuant to a mortgage foreclosure and 2) defendant made no prior request to obtain his property before he entered 9 months later and removed personal property from the home. The Supreme Court concluded that the case involved a question for the jury as to whether defendant had abandoned the property. Addressing specifically the question of abandonment, the court focused on the factual nature of the issue presented in a case alleging abandonment:

Mere nonuse of property, lapse of time without claiming or using property, or the temporary absence of the owner, unaccompanied by any other evidence showing intention, have generally been held not enough to constitute an abandonment. However, such facts are competent evidence of an intent to abandon and as such are entitled to great weight when considered with other circumstances, as, for instance, a failure on the part of the owner by acts or otherwise to assert any claim to the property or right alleged to have been abandoned. But mere nonuse is not evidence of abandonment unless it continues for the statutory period of limitation of actions to recover the right or property, or unless it would be inequitable to allow the right to be asserted.

The probative force of a showing of absence, lapse of time, and nonuse may of course be rebutted by proof of facts or circumstances explaining the relinquishment and showing the absence of an intention to abandon the thing or the right, and slight circumstances have been allowed to rebut the inference of abandonment arising from long disuse. * * *

It may be that upon a trial of this case the jury, or the court if no jury is had, could find from a lapse of time that there had been an abandonment, but *we do not believe that the court can say as a matter of law that personal property is abandoned when nothing more is shown than a delay of nine months in coming to get it.*

429 P.2d at 48 (quoting in part 1 Am. Jur.2d, Abandoned, Lost, Etc., § 41; italics and underscore added).

In another action where a mortgagor sought to recover personal property after the judicial foreclosure, *Greer v. Arroz*, 330 S.W.3d.763 (Ky. Ct. App. 2011), the Kentucky Court of Appeals addressed whether the mortgages' failure to seek relief in a foreclosure action (recovery of their personal property) was conclusive evidence that they had abandoned the property and, therefore, were precluded from filing an action for conversion against the purchasers of the property. After a bench trial, the trial court concluded that the mortgagees, who had sought relief two years after the purchasers bought the property, were entitled to recover the personal property. Without providing any receipts, the mortgage valued rolls of carpet, truck, trailer, 50 cement blocks and other miscellaneous items stating their "cost" minus "depreciation." The trial court awarded the mortgagors \$6,000 representing the value of the carpet which was no longer on the property and ordered the remaining items to be returned to the mortgagors.

Reversing, the Kentucky Court of Appeals ruled that the property had been abandoned.

Abandonment of personal property is defined as “the relinquishment of a right or of property with the intention of not reclaiming it or resuming its ownership or enjoyment.” *Ellis v. Brown*, 177 F.2d 677, 679 (6th Cir.1949). Under Kentucky law, the elements of abandonment are a voluntary relinquishment of possession and intent to repudiate ownership. *Ellis v. McCormack*, 309 Ky. 576, 218 S.W.2d 391, 392 (Ky.1949). The intent to repudiate ownership may be inferred from the facts and the lapse of a long period of time following relinquishment of possession constitutes significant evidence of the intention to abandon the property. *Id.*

330 S.W.3d at 765. Specifically, the Court of Appeals focused on the fact that there was no dispute that the mortgagors knew that the personal property was located on the real property when the foreclosure proceedings began, during the proceedings, and after the master commissioner's sale. However, during the four years leading to the final confirmation of sale to purchasers and with the knowledge that the real property would be sold, the first time the mortgagors made any demand for the personal property was after it was sold to the purchaser. In fact, according to the purchaser's testimony, the initial demand for return of the property was immediately after the judicial sale, at a time when the purchaser did not have possession of the property. For thirty

(30) days after the sale, the property remained under the control of the master commissioner and, therefore, the court. However, the mortgagors neither attempted to remove the personal property nor requested relief from the court. *Id.* at 765-66. The court ruled that facts were conclusive that the mortgagors abandoned the personal property that remained on the property at the time purchaser took possession and, therefore, the purchaser became the lawful owner entitled to keep or dispose of the property. *Id.* at 766.

The Kentucky Court of Appeals also concluded that the mortgagors' recovery was barred by the doctrine of laches:

'Laches' in its general definition is laxness; an un-reasonable delay in asserting a right. In its legal significance, it is not merely delay, but delay that results in injury or works a disadvantage to the adverse party. Thus there are two elements to be considered. As to what is unreasonable delay is a question always dependent on the facts in the particular case. Where the resulting harm or disadvantage is great, a relative brief period of delay may constitute a defense while a similar period under other circumstances may not. What is the equity of the case is the controlling question. Courts of chancery will not become active except on the call of conscience, good faith, and reasonable diligence. The doctrine of laches is, in part, based on the injustice that might or will result from the enforcement of a neglected right.

Id. at 766. The Court of Appeals concluded that the mortgagors' delay in seeking the return of their personal property was unreasonable in view of

their notices of the pending sale and available judicial remedies. Instead, they sat idle as the real property was sold and possession of it transferred to the purchaser. It was certainly reasonable for the purchaser to believe that upon taking possession of the real property, all personal property that remained was abandoned and she was free to keep it or dispose of it without legal consequences. *Id.*

Illustrating a contrast to the present case, the Arkansas Court of Appeals reversed a jury verdict in favor of a neighbor after the landowner sued for trespass, the tort of outrage and conversion when he returned home from vacation to find his home ransacked, items missing and his five dogs shot dead. *Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007). The neighbor was the father of a man who allegedly agreed to rent the property to the landowner, although the facts showed that the landowner, through his attorney, had notified the alleged purchaser that he believed the sale to the landlord was illegal and that he did not intend to pay rent for his property. Addressing the defendant's argument that the landowner had abandoned his property as a defense to conversion, the court of appeals noted that

[a]bandonment requires a manifest act that expresses the intent of the owner to forsake his or her property. *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993). Property is abandoned when it has been thrown away or its possession voluntarily forsaken by the owner. *Id.*

The evidence in this case, even when viewed in the light most favorable to [the neighbor] would not support a finding that [the landowner] abandoned his personalty. [The neighbor] acknowledged that, at the time he entered the house, the power was on and the refrigerator was running. [The landowner] also testified, without contradiction, that he was on vacation when his property was taken. Most importantly, on or about April 15, [the landowner] asked his attorney to write a letter, which stated, in part, that “taking any personal property from the homestead” would be reported to the sheriff. This letter, written on [the landowner’s] behalf a few days before the taking, cannot be reconciled with any intention to forsake his property.

The neighbor contends, however, that the property looked as though it had been abandoned and that he committed no “conscious wrongdoing” because, at the time the property was taken—on or before April 15—he could not possibly have read the April 15 letter. Conscious wrongdoing is not the requisite intent for conversion. *See Car Transp. v. Garden Spot Distribs.*, 305 Ark. 82, 805 S.W.2d 632 (1991). What is required is the intent to exercise control or dominion over the goods that is in fact inconsistent with the plaintiff’s rights. *Id.* Conversion can occur even where the person who took the property is operating under a mistaken belief. *See id.* So, the question is not whether [the neighbor] believed that the property had been abandoned but whether it had been abandoned in fact. And, the proof in this case simply does not support a finding of abandonment in fact.

Id. at 42; *see also Panel Town of Dayton, Inc. v. Corrigan*, 33 B.R. 764 (2006) (where judgment debtor made repeated attempts to collect his personal property both before and after foreclosure, no intent to abandon the property was shown).

In the case of the Benschers, they made NO attempts to collect their personal property either through the foreclosure company, lender, title company or through an attorney until *after* it had been sold to Dixon/Britza. Dixon/Britza took possession of a home that had been empty for fourteen (14) months, the property ransacked with the wiring ripped from the electrical box, the carpet removed, and the property littered with old tires, cars and metal that had been left on the land for the same fourteen (14) month period. No effort was made by the Benschers to collect any personal property after the Trustee's Sale and their twenty-one (21) day period had expired. No legal action was instituted by them during that fourteen (14) month period. The first action on their part was *after the foreclosed property had been sold to Dixon/Britza*.

Deyo v. Hagen, 41 A.D.2d 790, 341 N.Y.S.2d 328 (1973) involved a zoning case where a building situated in a zone, in which the only use

permitted by right was as a single family dwelling, had not been used for its nonconforming use as gas station for over 20 years, but rather was used to house property owner's car. The Appellate Division ruled that the possessor's non-conforming use had been changed to conforming use, and the original non-conforming use had been abandoned. Although the case involved land use for a substantially longer period, it nonetheless illustrates that in certain circumstances, a protracted period of disuse can evince abandonment:

Even if it were concluded that there was no discontinuance and that there had been no change from a non-conforming use for a period required, there was an abandonment. While it may be said that as a general rule the mere passage of time is insufficient to constitute an abandonment and usually an intent to abandon must be evidenced by some overt act (*Balm Realty, Inc. v. State of New York*; 35 A.D.2d 857; *City of Binghamton v. Gartell*, 275 App.Div. 457, 90 N.Y.S.2d 556), it has been stated that '*a protracted period of disuse, unaccompanied by circumstances which belie intent to abandon, may be regarded as an abandonment*'. (Anderson, *Zoning Law and Practice in New York State*, s 6.43, p. 160; *see also, Curtiss-Wright Corp. v. Village of Garden City*, 185 Misc. 508, 57 N.Y.S. 2d 377, *revd.* 270 App. Div. 936, 61 N.Y.S. 2d 678, *affd.* 296 N.Y. 839, 72 N.E. 2d 26; 67 N.Y. Jur., *Zoning and Planning Laws*, s 111.)

341 N.Y.S.2d at 322 (italics added). Although the *Deyo* case involved a much longer time period, it nonetheless illustrates that nonuse is a fact that can be considered by the court in determining the factual intent to abandon

property. *See also Bodkin v. Kickapoo, Inc.*, 211 Kan. 107, 505 P.2d 749 (1973) (where buyers of feed mill equipment of a specialized nature that was subject to obsolescence, had expected to use the property within six months and were aware that the sellers intended to use the warehouse in which the equipment was stored, and where the equipment deteriorated to nothing more than salvage value during three years the buyers left it on the property, the court affirmed the judgment of the trial court that the buyers had ample time to remove the property and therefore it had been abandoned).

As can be seen from the foregoing cases, disuse and a failure to attempt to claim or collect are factors from which a court can infer abandonment. That is precisely the case here. A question of fact exists as to whether the Benschers abandoned their personal property when they left it on the foreclosed property without making any attempt whatsoever to claim or collect the personal property for more than 14 months, and where they waited until *after* the land had been resold to an innocent third party.

CONCLUSION

In view of the foregoing facts and authorities, Appellants Dixon/Britza respectfully request that the Trial Court decision granting Summary Judgment to the Bensches be reversed and the case be remanded for Trial on the factual question presented.

DATED this 26th day of November, 2012.

Respectfully submitted,



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