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No. 361136

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RONALD THORNHILL and MADELINE THORNHILL,
Husband and Wife, Respondent

v.

KRISTOPHER ROBINSON, JENNIFER KRAFT, and all other
Occupants of 422 Barth Ave., Richland, WA 99352, Appellant

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

No. 1 The trial court erred by concluding the unlawful detainer proceeding was properly applied to the parties’ Contract premised on the court’s finding that the parties’ Contract and course of performance failed to establish a real estate contract.

No. 2 The trial court erred by refusing to dismiss the summary unlawful detainer proceeding on subject matter grounds where the Contract and

course of performance establish Kris held a purchaser's interest placing the strength of Thornhills' title and corresponding right to possession at issue.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1

1.1. Did the Rent to Own Agreement and the parties' course of performance establish all the necessary elements of a real estate contract?

1.2. Did the Rent to Own Agreement's "option" language actually establish an option, or simply a time for Kris's balloon payment?

1.3. Was the unacknowledged Contract saved from the statute of frauds by partial performance?

1.4. Is a purchaser of real property under a real estate contract subject to an unlawful detainer proceeding?

No. 2

2.1. Should unlawful detainer's summary proceedings be available where the parties' contractual relationship and course of performance establishes more than a tenant's bare possessory right and places plaintiff's strength of title at issue?

III. STATEMENT OF THE CASE

Ronald and Madeline Thornhill (the “Thornhills”) agreed to purchase a home at 422 Barth Ave., Richland, Washington and sell it to Appellant, Kris Robinson (“Kris”) and his then-wife, Kathryn Robinson. VRP1 53-55. At the time, Kris was employed by the Thornhills through a company Thornhills owned. VRP1 53. The agreed purchase price was \$170,000, VRP1 56, which included somewhere between \$20,000 and \$25,000 in addition to the basic purchase for improvements to be made to the home. VRP1 53; VRP1 56; CP 89.

To memorialize the agreement, the Thornhills downloaded a contract entitled “Rent to Own Agreement” from the internet, CP 81, and the parties executed it on 10-16-2014 (the “Contract”). CP 14. The Contract was not acknowledged by a notary. *Id.* Attached to the Contract was an amortization table for a 20-year note at 4.5% with a principal amount of \$170,000 with each principal and interest payment totaling the installment payment of \$1,075.50. CP 93-100. The Contract did not contain an integration clause. *See* CP 4-5.

Thornhills used the amortization table “because we wanted to give [Kris] a dollar number that they would have as equity when they hit the five-year point.” VRP1 54 (Thornhill on direct); VRP1 82-83 (Thornhill on cross). Ronald testified it was his intent that Kris payoff the loan

balance or refinance the home at the end of the five-year period. VRP1 53:21-54:13. Madeline kept track of those payments on an amortization chart, CP 16, to show how much interest was paid, what the principal balance was remaining on the Contract, VRP1 79, and how much equity Kris had acquired in the home. CP 54-55.

The Contract also contained a provision requiring payment of a purchase price of \$141,136.23 in September 2019 at the end of the five-year term. CP 4. The Contract titled that provision an “Option to Purchase.” *Id.* That \$141,136.23 figure corresponded to the principal balance remaining on the note at the beginning of the 60th month as shown on the amortization table, CP 96, and the payment spreadsheet maintained by Madeline. CP 17.

At the beginning of the Contract term, Kris made a payment of \$1,200 and missed a payment for April 2015. VRP1 56. No action was taken to recover those payments. *See* VRP1 56. After those missed payments, Ronald, as Kris’s employer, began deducting the Contract payments from Kris’s wages on a weekly basis. CP 24-25. The deduction included the principal and interest of \$1,075.50, as stated in the Contract, plus \$224.50 for estimated insurance and taxes. CP 14-15. \$1,300 was chosen by the parties to make a round number without change for the Contract payments. VRP1 55. Because the additional amount to cover

taxes and insurance were estimated, Thornhills agreed to account for and settle the excess or shortage at the end of the five-year contract period when the final payment was due. VRP1 55; VRP1 15.

Since Kris has been living in the home, he has made significant improvements to the home and has personally performed most all the labor to make those improvements. *See* VRP1 56; CP 89. The Contract obligated him to make the repairs, which he also performed. CP 4. These improvements included interior and exterior paint, built a new front porch, installed privacy fencing, installed tiling in the kitchen, installed new blinds, replaced windows, performed HVAC repairs, and performed all general maintenance for upkeep of the home. CP 89. Kris also paid all insurance, taxes, and utilities. CP 81-82. Altogether, Kris estimates his investment in improvements at about \$28,000, \$8,000 of which was hard money from his own pocket and the remainder financed as part of Thornhills' loan. CP 89.

Kris resided in the home through July 2017 without complaint, demand, or dispute between he and the Thornhills regarding the Contract for the home purchase. *See* VRP1 56-57. After Kris's employment with the Thornhills ended in July 2017 and they were no longer able to deduct Contract payments from his wages, this dispute first arose over the Contract payment amount. CP 90. The dispute was whether the \$1075.50

amount stated in the Contract was correct or the \$1,300 the Thornhills had been deducting from his wages. CP 90. This dispute resulted in Kris making no August 2017 payment, followed by \$2,700 in payment in September 2017, and \$525 in October (collectively totaling \$1075 per month). CP 17, CP 90.

Ronald commenced this action on or about October 26, 2017 as an unlawful detainer action under the Residential Landlord and Tenant Act (“RLTA”) and RCW §§ 59.12 *et seq* (“UD”) claiming unpaid rents of \$2,560.11. CP 1-7. Kris then paid \$1,075.50 into the Court Registry each month from November 2017 through January 2017. CP 90. Ronald served an additional 20-day notice claiming termination of the lease on or about November 3, 2017. CP 56.

On or about December 12, 2017, an evidentiary hearing was held to summarily determine the correct payment amount and the right to possession. *See* VRP1. Kris appeared pro se and Thornhills appeared through counsel. The Court found the Contract enforceable through part performance and found the course of performance established Kris’s agreement to the increased \$1,300 payment term to cover taxes and insurance. CP 81-82. The Court determined Thornhills had the superior right to possession, found Kris in unlawful detainer, and granted Thornhills a writ of restitution. CP 82.

Kris then obtained counsel and immediately requested a stay on execution of the writ of restitution which was granted on January 25, 2018. Kris then asked the trial court to dismiss the action due to lack of subject matter jurisdiction on the basis the Contract constituted a real estate contract and a purchase interest which took its resolution outside the subject matter jurisdiction of a summary unlawful detainer proceeding. CP 126-32. The Court concluded the Contract and course of performance were insufficient to establish a real estate contract or convey a purchase interest to Kris that would take the party relationship outside the unlawful detainer statute. CP 198-99. The court denied the motion, lifted the stay, and entered judgment against Kris. CP 202-06. Kris has paid all amounts due under the Contract and continues to pay \$1,300 per month.

IV. SUMMARY OF ARGUMENT

Unlawful detainer actions are summary proceedings available to real property owners seeking to regain possession of real property from another person. Because it is a summary proceeding purely limited to the question of possession as between an owner and a non-owner, it does not apply to purchaser's interests under real estate contracts or other bona fide purchase interests until the purchaser's interest has been forfeited, title is quieted to the seller, or the seller otherwise proves superior title.

In the present case, Thornhills contracted with Kris to sell him the

home for \$170,000 at 4.5% interest with monthly payments and required him to pay the entire balance due at the end of the fifth year. Kris took possession of the home, was obligated to and did make substantial improvements to the home, made regular payments under the Contract, paid taxes and insurance, and generally treated the home as *his* home *not* as a rental. Kris held a purchase interest that cannot be forfeited or quieted in a summary unlawful detainer proceeding.

V. ARGUMENT

V.1. Issue No. 1.1. Did the Rent to Own Agreement in conjunction with the parties' course of performance establish a real estate contract where the express terms and course of performance show agreement on the necessary elements of a real estate contract?

When Thornhills decided to sell the home to Kris, they agreed to a \$170,000 purchase price and a 4.5% interest rate amortized over 20 years, required a full payoff at the end of the five-year term, and prepared an amortization schedule to track payments. VRP1 54-55. Thornhills wanted the amortization schedule so Kris would know precisely the amount of equity he would have in the home at the end of the Contract term.

VRP1 54-55. Kris agreed to the terms, took possession of the home, began making payments, paid taxes, water, utilities, and insurance, made repairs, and invested time, energy, and his own capital making substantial improvements to the home. CP 88-91; VRP1 56.

A real estate contract means “any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price.” RCW § 61.30.010(1). The statute does not mandate specific terms that must be included in a real estate contract, but case law has identified a number of material terms that should be included in a real estate contract:

(a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Although the *Kruse* court called these “material” terms, they are not the essential terms. Notably absent from *Kruse* are the identity of parties, description of land, and purchase price.

The Contract does not expressly define all the material terms identified by the *Kruse* court. It is the course of performance of the parties that provides the parties’ agreement to the missing terms. *University Properties, Inc. v. Moss*, 63 Wn.2d 619, 621, 388 P.2d 543 (1964) (parole evidence admissible where not all agreed lease terms had been reduced to writing). Both parties agree the Contract was not fully integrated. CP 59

(Thornhills supplemental briefing stating there are clearly numerous agreed terms not put into writing).

(a) time and manner for transferring title

In the absence of a provision providing for the quality of title, the law implies the seller will supply marketable title. *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 319, 481 P.2d 17 (1971). The Contract required Kris to pay the entire balance at the end of the five-year term as a cash sale and the parties agreed to execute all other documents necessary to complete the cash sale. CP 4. Thornhills were required to convey marketable title at the end of the five-year period when Kris made the balloon payment and refinanced the loan.

(b) procedure for declaring forfeiture;

RCW §§ 61.30 *et seq* provides the statutory procedure for declaring forfeiture of a purchaser's interest. That statute provides the purchaser with a minimum 90-day window after notice is recorded to cure any defaults in the performance of the contract.

(c) allocation of risk with respect to damage or destruction; (d) insurance provisions;

The trial court found, through course of performance, the parties agreed that Kris would be responsible for payment of insurance on the premises to insure against the risk of damage or destruction. CP 82.

(e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities;

The trial court also found Kris was and agreed to be responsible for paying taxes. CP 82. The Contract also obligated Kris to make improvements necessary to use the home, CP 4, and Kris paid the utilities. CP 81.

(f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use;

The Contract allowed, in fact obligated, Kris to make improvements to the home. CP 4. Kris was prohibited from encumbering his interest in the home, CP 5, prohibited him from assigning the contract, and restricted use of the property as a dwelling unit. CP 4.

(g) time and place for monthly payments; and

The Contract expressly stated payments to be \$1,075.50 per month payable in advance on the 1st of each month and required the entire balance remaining be paid in full at the end of the Contract term. CP 4. Although payments were later deducted from his check on a weekly basis. CP 57-58.

(h) indemnification provisions.

The trial court found, through the course of performance, that the parties agreed that Kris would be responsible for payment of insurance

on the premises. CP 82.

The Contract also fails to include an adequate legal description of the property sufficient for an unexecuted contract for sale, but when Kris took possession and began performing the remaining terms of the agreement the lack of legal description is no longer at issue. *Zinn v. Knopes*, 111 Wn. 606, 608-09, 191 P. 822 (1920).

Kris was living in and performing according to the terms of the Contract at the time Thornhills instituted this proceeding. Those terms included those expressly in the contract as modified by the course of performance as well as those not expressly written in the agreement. When considered as a whole, the parties' contractual relationship for the home was far more than a simple landlord and tenant arrangement merely conveying the right to occupy. Their Contract conveyed equitable title to Kris and Thornhill retained legal title as security for payment. The trial court erred in deciding there was no purchase interest conveyed by the contract such that Kris was subject to the unlawful detainer proceeding.

V.2. Issue No. 1.2 The Contract's "option" language did not constitute an option where the option language simply calls for a single payoff at the end of the term providing no other rights, and the parties intended for Kris to pay off the balance of the loan at the end of the term.

Thornhills structured the agreement for the home sale as a five-year "loan" they would hold with Kris as the maker so he could build his

credit and acquire equity in the home. VRP1 35; 54-55. The loan was for the principal amount of \$170,000 amortized over 20 years at 4.5% interest and the amortization table the Thornhills prepared was used to show Kris exactly how much equity he would have when the balance was due. VRP1 54-55. The Thornhills downloaded the Contract off the internet and adapted it to their agreement.

Thornhills testimony established his intention for the Contract was for Kris to “pay off the loan” at the end of the five-year term. VRP1 55. The Contract’s “option” language matches that intention. The Contract says the option, which requires full payment of the remaining balance, cannot be exercised until September 2019 and must be exercised by the end of September 2019. CP 4-5.

Ambiguities in contract are to be construed against the drafter, *See eg. Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 395, 254 P.3d 208 (Div. 3 2011), and that maxim is arguably even more applicable here where Thornhill’s “option” language’s actual effect coincides with the his testimony as to the intent. VRP1 54-55 (Ronald discussing the intent that Kris payoff the loan or refinance at the end of the five-year term); VRP1 15 (Thornhills counsel calling the final payment a balloon payment). No matter what we call a duck, it is still a duck. The Contract contains no option despite its inartful use of the term and its inclusion of

the term does not automatically prevent the Contract from being a real estate contract.

V.3. Issue No. 1.3 Was the unacknowledged Contract saved from the statute of frauds where Kris (1) took possession of the home, (2) made payments, and (3) completed substantial improvements on the home?

The doctrine of partial performance exists as a means to remove a deficient contract for the sale of real property from the statute of frauds. *Kruse*, 121 Wn.2d at 724-25. To establish its effect, two of the following elements must be met; “(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial, and valuable improvements, referable to the contract.”

Id.

All three elements are met in the present case. There is no dispute that Kris took possession and has been in possession during the Contract term, CP 14, there is no dispute that Kris paid substantial consideration over the Contract term, CP 18, and there is no dispute that Kris made substantial improvements to the property. VRP1 56; CP 89. These elements having been met, the doctrine of partial performance saves the Contract from the statute of frauds.

V.4. Issue No. 1.4 A purchaser's property interest must first be forfeited

before a seller can proceed with an unlawful detainer with superior title.

Under a real estate contract, the seller retains legal title as security for payment while conveying equitable title to the purchaser. *Tomlinson v. Clarke*, 118 Wn.2d 498, 509, 852 P.2d 706 (1992); RCW § 61.30.010. The seller's interest becomes a personal property interest in the form of security and right to payment and the purchaser's interest becomes a real property interest. *In re McDaniel*, 89 B.R. 861, 869 (Bankr. E.D. Wash. 1988) (reviewing and applying Washington law). Real property interests enjoy much greater protection than mere possessory tenant interests and include cure periods and redemptive rights. *Compare* RCW §§ 59.12 *et seq.*, *with* RCW §§ 61.30 *et seq.* (forfeiture), and RCW §§ 61.24 *et seq.* (deed of trust act)

Before a seller can use the unlawful detainer statute's summary proceedings as a remedy to regain possession from a purchaser under a real estate contract, the purchaser's interest must first be forfeited. RCW § 61.30.100(3). A seller is not entitled to possession until ten days after recording a declaration of forfeiture. *Id.* Only after forfeiture is a seller entitled to possession and able to "proceed under chapter 59.12. RCW to obtain such possession." *Id.* The RLTA expressly does not apply to "[o]ccupancy under a bona fide earnest money agreement to purchase or contract of sale of the dwelling unit or the property of which it is a

part.” RCW § 59.18.040. Because the parties’ Contract constituted a real estate contract, the limited statutory subject matter jurisdiction of the unlawful detainer statute could not apply and this action should have been dismissed.

V.5. Issue No. 2.1 An unlawful detainer action cannot lie where questions of superior title must first be resolved.

Expressly exempted from the RLTA are those relationships where the “tenant is, or stands in the place of, the purchaser.”

RCW § 59.18.040(2).

The unlawful detainer chapter, RCW 59.12, provides a summary proceeding for obtaining possession of real property, and gives the proceeding priority over other civil cases. The court's jurisdiction in unlawful detainer proceedings is limited to the right to possession of real property and a few related issues such as damages and rent due. Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title.

Puget Sound Inv. Grp., Inc. v. Bridges, 92 Wn. App. 523, 526, 963 P.2d 944 (1998) (tax sale purchaser’s quit claim deed from tax authority insufficient to defeat foreclosed debtor’s title sufficient to proceed with

unlawful detainer action). Where plaintiff's title is central to the issue of the right to possession, unlawful detainer is inapplicable. 35A Am. Jur. 2d Forcible Entry and Detainer § 11 (West 2018).

This was the result in *Bar K Land Co. v. Webb* where Ms. Webb, who could not qualify for financing on her own, entered an early possession agreement with the seller, Bar K, and agreed to pay rent until she could obtain a loan. 72 Wn. App. 380, 381-82, 864 P.2d 435 (Div. 3 1993). She took possession in February, found a co-signor for a loan, and the parties set closing out in June of the same year. *Id.* at 382. According to their agreement, approximately \$10,000 of the purchase price was to be used for remodeling the home and Ms. Webb was expected to pay the first \$3,600 towards those improvements. *Id.* The sale failed to close, Ms. Webb stopped paying rent in July, but continued with the remodeling through November. *Id.* In January, Bar K commenced an action for unlawful detainer and the court directed judgment in Bar K's favor and directed the issuance of a writ. *Id.*

Ms. Webb challenged the application of unlawful detainer to her relationship with Bar K arguing the relationship was more akin to that of purchaser and seller than landlord and tenant. *Id.* at 383. The court agreed, reasoning the agreement's requirement she make substantial improvements to the property was "far in excess of an amount a renter

would pay to improve rental property.” *Id.* at 385. Because of the significant improvements and the parties’ treatment of her as a purchaser, the court found the unlawful detainer proceeding inapplicable and remanded for further proceedings as an ejectment action. *Id.* at 386.

Kris’s relationship to the Thornhills under the Contract is very similar to Ms. Webb’s relationship with Bar K. The Contract placed upon Kris the “obligation to conduct any construction or remodeling that may be required to use or improve the [home]. CP 4. Thornhills added approximately \$20,000 for remodeling to Kris’s loan and Kris himself spent an additional \$8,000 to perform the improvements he made. Unlike Ms. Webb, Kris made the vast majority of payments prior to the unlawful detainer action and is at this moment current on contract payments.

Kris’s status, as Ms. Webb’s, is that of a purchaser. He is far from a tenant and should be given the protections against losing his property interest that are afforded under the real estate forfeiture statute or at least have the opportunity to prove the strength of his title vis-a-vis the Contract and course of performance. Neither of which can be done in an unlawful detainer proceeding. *Puget Sound*, 92 Wn. App. at 526. Until the title issues are resolved, the unlawful detainer proceeding is unavailable and the action should have been dismissed.

V.6. The prevailing party may recover attorneys’ fees and costs on

appeal where statutory authority exists to award them below.

The applicable law provides that a court may award attorneys' fees and costs to the prevailing party in an unlawful detainer action.

RCW § 59.18.290; *Soper v. Clibborn*, 31 Wn. App. 767, 770, 644 P.2d 738 (Div. 1 1982). Where a contract or statute provides for attorneys' fees and costs to a prevailing party, the appellate courts may fix those fees and costs on appeal. RAP 18.1; *Sarvis v. Land Resources, Inc.*, 62 Wn. App. 888, 894 (Div. 1 1991). If Kris prevails, he should be awarded his reasonable attorneys' fees and costs for defending against this unlawful detainer proceeding.

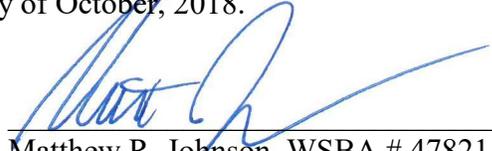
VI. CONCLUSION

Unlawful detainer proceedings are a narrow scope summary proceeding meant for expediency in recovering possession of real property where no bona fide question as to superior title is apparent. The normal application is to those relationships that clearly fit within the confines of landlord and tenant where the tenant enjoys a purely permissive possessory interest.

This is not that type of case. Thornhills testified it was their intention from the beginning to help Kris purchase a home when they chose to loan him the purchase money on a five-year contract. His duties under their agreement included the obligation to make substantial improvements and

pay insurance and taxes, obligations that do not appear in residential rental agreements. This is not a case that can or should be resolved in a limited scope unlawful detainer proceeding where questions of title cannot be resolved. For the reasons stated herein, we respectfully request the Court reverse the trial court and dismiss this action.

Respectfully submitted this 25th day of October, 2018.



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