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Washington Court of Appeals Division Three

No. 23956-0-III

**COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

DAVID PITTS,

Appellant,

v.

GORDON H. CRAFTS and JAYMIE V. CRAFTS,

Respondents.

REPLY BRIEF OF APPELLANT

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Petitioner David Pitts submits the following reply to the brief submitted by respondents Gordon Crafts and Jaymie Crafts:

A. Argument

I. CHAPTER 7'S STATUTORY PROHIBITION AGAINST POST-DISCHARGE CREDITORS' ACTIONS BARS SPECIFIC ENFORCEMENT OF THE PENALTY PROVISION CONTAINED IN THE REAL ESTATE LEASE AT ISSUE HERE.

In their responsive brief, Crafts do not deny that a “claim” under the Bankruptcy Code includes both claims for money damages and claims for equitable relief where the equitable remedy gives rise to an alternative right to payment, nor do they offer any authority to dispute the axiom that, under Washington case law, a trial court has the power to alternatively award money damages to a plaintiff seeking specific performance of a contract, including a real estate contract. Crafts’ request for specific performance of a penalty/forfeiture provision in the Real Estate Lease falls squarely within the ambit of a “claim” under the Bankruptcy Code, and is therefore subject to the statutory prohibition against post-discharge creditors’ actions mandated by Chapter 7.

Consistent therewith, the trial court's refusal to enforce the post-discharge injunction – and its decision to grant Crafts' motion for summary judgment – should be reversed.

1. **The Crafts Have Not Established that They Can Evade the Effect of Federal Bankruptcy Law Simply by Demanding Specific Enforcement of a Penalty/Forfeiture Provision in a Contract That Was in Pre-Petition Default.**

Crafts have conceded that a “claim” under federal bankruptcy law is not limited to a demand for payment of money damages, but also includes a right to an equitable remedy, where that equitable remedy gives rise to a right of payment as determined by state law. Crafts appear to contend, however, that federal bankruptcy law is ineffective as to them, simply because they elected to pursue specific enforcement of the penalty / forfeiture provision of the Real Estate Lease, in lieu of an equivalent monetary penalty. As will be demonstrated below, this contention is without merit.

**2. The Authorities Cited By Crafts Do Not Refute
The Proposition That A Money Judgment Is An
Available Alternative To Specific Performance
Under Washington Law.**

The Washington authorities cited by Crafts support the proposition that Washington courts *may* specifically enforce a contract, but they do not hold that Washington courts *must* grant specific enforcement. This distinction is significant because the existence of judicial discretion is the very reason that the Crafts' cause of action for specific performance constitutes a claim under federal bankruptcy law. The proper focus of the inquiry – as mentioned in the Brief of Appellants – is not whether the court has the power to grant specific performance in a particular case, but rather, whether under Washington law a party's right to the equitable remedy of specific performance also gives rise to the alternative of an award of money damages.

For example, *Egbert v. Way*, 15 Wn.App. 76, 546 P.2d 1246 (1976), relied upon by Crafts, makes clear that specific performance is an equitable remedy available to an aggrieved party for breach of contract where there is no adequate remedy at law. 15 Wn.App. at 79. There has been no such determination in this case. Moreover, even after

the court has determined that there is no other adequate remedy at law, it is left to the discretion of the court to enforce the remedy. 15 Wn.App. at 80. The trial court's decision to award damages in lieu of specific performance was reversed, not because specific performance was required as a matter of law, but because the court's decision to deny specific performance was based upon mistaken assumptions. 15 Wn.App. at 81. Moreover, the Court of Appeals in *Egbert* did not mandate specific performance, but only remanded the matter to the trial court for action consistent with its opinion. 15 Wn.App. at 82.

In *Canterbury Shores Associates v. Lakeshore Properties Inc.*, 18 Wn.App. 825, 572 P.2d 742 (1977), also cited by Crafts, the issue addressed by the Court of Appeals was whether it was permissible for a trial court to grant the remedy of specific performance of an oral contract for the conveyance of an interest in real property, where there has been part performance by one of the parties, and other criteria have been met. 18 Wn.App. at 829. Concluding that the plaintiff "could have demanded" specific performance under these circumstances, the Court of Appeals cited in support of that conclusion the case of *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971), in which the Washington Supreme Court had held that a contract, within the statute of

frauds and exempted therefrom by part performance, may serve as a basis for an action at law for money damages. 78 Wn.2d at 824.

Finally, *In re Irizarry*, 171 B.R. 874, 878-79 (9th Cir. BAP 1994), also cited by Crafts in support of their argument, is inapposite. In that case, the Ninth Circuit Bankruptcy Appellate Panel concluded that the equitable remedies sought by the plaintiffs (namely, cancellation of a grant deed, recovery of property and cancellation of liens) did not give rise to alternative rights of payment of money damages under the laws of the State of California, and were therefore not “claims” under federal bankruptcy law. The holding in *Irizarry* is irrelevant, in part because the panel did not even address the equitable remedy of specific performance; but more importantly, because the panel neither considered nor applied Washington law in making its determination.

3. **Crafts Have Failed To Distinguish Authority Cited By Pitts That Establishes That Washington Courts Have Discretion To Award Money Damages In Lieu Of Specific Performance.**

In the Brief of Appellants, *Zastrow v. W. G. Platts, Inc.*, 57 Wn.2d 347, 357 P.2d 162 (1960), was cited for the proposition that Washington courts have the discretion to award money damages as an alternative to specific performance, even when the prayer for relief requests equitable remedies. Not surprisingly, Crafts have desperately attempted to distinguish the holding in that case, but their arguments have in each instance missed the mark.

Crafts have argued that the *Zastrow* court awarded monetary damages instead of specific performance only because the property at issue had become so encumbered as to make specific performance impractical. That is a distortion of the court's holding, but more importantly, it is irrelevant. What is important about *Zastrow* – and what is missed by Crafts – is not the rationale for the court's decision to award monetary damages over equitable relief under the facts of that particular case. Instead, the importance of *Zastrow* is the holding – consistent with the other authorities cited by Crafts and discussed at Section A(2), above – that a trial court has the inherent power to award money damages as an alternative to specific performance, even where a plaintiff has specifically asked only for equitable relief.

4. Crafts Had Available To Them All Of The Remedies Available To Their Assignor And Were Not Limited To Pursuing Specific Performance Of The Penalty Provision.

Throughout their responsive brief, Crafts repeatedly assert that (1) the intent of the quit claim deed was to combine the legal titles of the two properties; and therefore, (2) the sole remedy available to them was the remedy of specific performance. The first assertion was never made in support of Crafts' motion for summary judgment, and with all due respect, it is a mischaracterization of the March 14, 2001, Real Estate Lease With Purchase Option between Pitts and the Crafts' assignor, Glen Cloninger. The second assertion is simply unsupported by the terms of the Lease or the Assignment.

(a) The Quit Claim Deed Provision Was Clearly A Penalty Or Forfeiture Which Became Enforceable Only Upon Pitts' Failure To Perform, Regardless Of the Lessor's Subjective Intent.

The March 14, 2002 "Real Estate Lease with Purchase Option" between Cloninger (the Lessor) and Pitts (the Lessee) contradicts the Crafts' repeated assertions that the intent of the parties to the Lease was to combine the legal titles of the two properties. That contract, which contained an integration clause, is entirely bereft of any language or nuance indicating such an intent. The Lease at no point provides that its purpose was to aggregate titles to the two properties at the conclusion of the six-month lease period. Rather, it is clear that the release of the quit claim deed to Cloninger was dependent upon default and, as pointed out by Pitts' opening brief, was only one among other remedies available to Cloninger and to his assignees.

Further, the Crafts' contention that the parties to the Lease intended to unite the two parcels is contradicted by the earlier actions of their assignor, Cloninger. On September 30, 2002, Cloninger sought and obtained money damages against Pitts following Pitts' default, and made no attempt to specifically enforce the penalty provision.

Lastly, the Lease at issue was exactly that: a lease. It was not a contract for Cloninger's purchase of the disputed parcel of property. Only Pitts was granted an option to purchase a parcel that belonged to Cloninger. Crafts have never denied that the 9.83-acre parcel had a

monetary value, nor are Crafts able to deny that, had they sought monetary damages equal to the value of the parcel, their post-discharge cause of action would have been precluded by federal bankruptcy law.

**(b) Crafts, As Assignees, Were Not Limited
To An Action For Specific Enforcement
Of The Penalty Provision.**

Crafts repeatedly assert that the only remedy to which they were entitled was the remedy of specific performance. However, Crafts do not dispute that their assignor earlier obtained a money judgment for breach of the lease agreement, nor do they assert that they were somehow precluded from bringing a cause of action for money damages for failure to pay rent under the lease terms. The Lease did not in any way limit the remedies that were available to the Lessor in the event of a breach. On the contrary, the Lease provided that, in the event of a default by the Lessee in the payment of rent, “Lessor may, at his option and without prejudice to the exercise of any other remedies which may available to him, treat the lease as terminated and all rights hereunder forfeited by Lessee.” (CP 74) Crafts can point to nothing in the Lease that

prohibits the Lessor from seeking monetary damages in the event of the Lessee's refusal to perform the terms of the penalty provision.

Moreover, the Assignment of Interest between Cloninger and Crafts, however, was equally broad in scope. That document assigned to the Crafts "...all of [Cloninger's] right, title and interest in that certain Real Estate Lease With Purchase Option dated March 14, 2002, by and between [Cloninger] as "Lessor" and David M. Pitts, as "Lessee"" (CP 60, CP 87)

In short, Crafts were not prohibited from seeking money damages in lieu of the remedy of specific performance, nor was the trial court precluded from awarding monetary damages in lieu of specific performance. The test for a "claim" under the Bankruptcy Code is not dependent upon whether Crafts chose to pursue an equitable remedy as opposed to money damages, nor is it dependent upon whether the trial court, in the exercise of its discretion, agreed with Crafts that an equitable remedy was appropriate.

Instead, the sole test is whether, under Washington law, the "right to an equitable remedy for breach of performance...gives rise to a right to payment" of money damages. 11 U.S.C. §101(5). In Washington, that is clearly the case. As a result, Crafts' post-discharge

attempt to enforce the penalty provision of the March 14, 2002 “Real Estate Lease with Purchase Option” is prohibited by 11 U.S.C. §524(a)(2), and the trial court’s grant of summary judgment in favor of Crafts should be reversed.

II. CRAFTS’ SEPARATE LAWSUIT FOR SPECIFIC ENFORCEMENT OF THE PENALTY PROVISION OF THE LEASE CONSTITUTES CLAIM SPLITTING.

1. Crafts’ Claim For Specific Performance Of The Lease Penalty Provision Could Have Been Brought By Cloninger In The Earlier Unlawful Detainer Action.

Crafts have asserted that Washington’s prohibition against claim splitting does not apply here, because the trial court that heard the unlawful detainer action filed by Glen Cloninger would have lacked jurisdiction to hear an action for specific performance if such an action had been brought by Cloninger. From this jurisdictional argument, Crafts conclude that their current suit does not violate the rule against claim splitting because their suit for specific performance does not involve the

same claims or the same subject matter as the earlier unlawful detainer action.

Pitts established in his opening brief that Washington's unlawful detainer statute not only allows a court to consider recovery of possession of real property, but also, to assess and award damages in connection with that possession. Authority cited by Crafts in their responsive brief affirms that a court's jurisdiction extends to assessing damages in connection with recovery of possession of real property. A trial court's jurisdiction to entertain damages as well as the right to recovery of possession of property is therefore not in dispute.

Pitts also established in his opening brief – and Crafts do not dispute this point – that in his unlawful detainer action, Cloninger sought, and was awarded, a right to possession of the property, unpaid rent, double damages, and a “late charge” penalty to be assessed under the terms of the Real Estate Lease. Crafts do not argue that the trial court's lacked the authority under the unlawful detainer statute to enforce the “late charge” penalty in favor of their predecessor in interest. In fact, they would be prohibited from taking such an inconsistent position by the doctrine of judicial estoppel. *See, Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 108 P.23d 147 (2005).

The Real Estate Lease provides that release of the quit claim deed to the Lessor is one of the penalties available in the event of a default by the Lessee. To the extent that penalties are enforceable as elements of damages under Washington's unlawful detainer statute, that statute does not distinguish between monetary and non-monetary penalty provisions, nor would the statute on its face prevent a court from awarding a monetary equivalent to the penalty sought to be enforced.

2. **Crafts Cannot Evade Washington's Rule
Against Claim Splitting By Attempting To
Differentiate Their Current Claim From The
Earlier Claim Of Their Assignor.**

The Crafts fail to explain the logic behind their conclusionary contention to the effect that their suit for specific performance does not involve the same claims or subject matter as their assignor's unlawful detainer action. Both actions stem from the same nucleus of facts – namely, Pitts' default under the Real Estate Lease – and both actions seek to enforce various rights and remedies of the Lessor under the Lease.

Furthermore, Washington courts take a broad view of “subject matter” for purposes of applying the claim splitting rule. *See, Landry v.*

Luscher, 95 Wn. App. 779, 785, 976 P.2d 1274 (1999) (holding that causes of action for property damage and for personal injury implicate the same subject matter where each cause of action arises from the same automobile accident). The subject matter of two actions will be considered identical for purpose of applying the prohibition against claim-splitting if the claims and the parties are sufficiently similar, and that is the case here. *Id.* This provides a basis for reversal of the trial court's ruling which is independent of the violation of the post-discharge bankruptcy injunction discussed above.

B. Conclusion

For the reasons set forth both herein and in Mr. Pitts' Opening Brief, as well as the argument and authorities set forth herein, the attempt by Mr. and Mrs. Craft to enforce the penalty provision in the March 14, 2002 lease agreement, based upon a pre-bankruptcy default of that agreement, violates not only the post-discharge injunction imposed by federal bankruptcy law, but also, the state law prohibition against claim-splitting. Consistent therewith, appellant requests that this court reverse the trial court's rulings granting the Crafts' motion for summary judgment and denying Pitts' motion for reconsideration, and appellant

further requests that this court remand this matter to the trial court with instructions to dismiss the underlying suit.

RESPECTFULLY SUBMITTED, this 4th day of August, 2005.

RANDALL & DANSKIN, P.S.

By: 
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 4th day of August, 2005, addressed to the following:

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