

67176-6

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

Lawrence Jametsky, a single man,
Appellant,

v.

Rodney A. Olsen and Jane Doe
Olsen and Mathew Flynn and Jane
Doe Flynn,

Respondents.

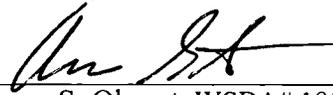
Case No. 67176-6-I

BRIEF OF RESPONDENTS
RODNEY OLSEN AND
MATHEW FLYNN

(Proof of Service attached)

Respectfully submitted this 10th day of October 2011.

Sternberg Thomson Okrent & Scher, PLLC

BY: 
Aaron S. Okrent, WSBA# 18138

BY: 
Scott R. Scher, WSBA# 18168
500 Union Street, Suite 500
Seattle, WA 98101
(206) 233-0633
Attorneys for Respondents
Rodney A. Olsen and Mathew Flynn

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I. INTRODUCTION/SUMMARY OF ARGUMENT

Respondent, Rodney Olsen, purchased real property from Appellant, Lawrence Jametsky in November 2008. Mr. Jametsky is now trying to revoke that sale by creatively alleging that he was a distressed property owner under Chapter 61.34 RCW based upon nonpayment of his real property taxes. However, that argument fails when the Court applies the statute to the undisputed facts. It is undisputed that earlier in 2008, many months before closing of the transaction and long before meeting Respondents, Mr. Jametsky made two real property tax payments to King County totaling \$5,120.15. It is further undisputed that King County has never issued a Certificate of Delinquency on the property and the County never commenced or threatened a foreclosure regarding property taxes. If Mr. Jametsky had not sold the property, nor made a tax payment in 2009 (similar to the one he made in 2008) the earliest any potential of a risk of loss for nonpayment of property taxes would have been 7 months later in May 2009, when the County would have then issued a Certificate of Delinquency. By definition and confirmed in the summary judgment ruling, Mr. Jametsky was not a distressed homeowner under Chapter 61.34 RCW.

It is undisputed that Mr. Jametsky was aided and represented in this transaction by Michael Haber; that Mr. Haber was a licensed loan

officer; and that he had been advising Jametsky for up to 12 months before Mr. Olsen offered to purchase the property. Mr. Olsen never met Mr. Jametsky until after the sale of the property and Mr. Flynn only met him a few times, always with Mr. Haber present. It is also undisputed that Mr. Jametsky applied almost all of the proceeds from the sale to satisfy his debts, both a secured Deed of Trust, various judgment liens, and other debts. Mr. Jametsky then entered into a lease of the property from Mr. Olsen for \$850 per month with an option to purchase the property within 18 months for \$10,000 more than original price he sold the property. Mr. Jametsky paid rent for more than a year before he decided to stop his payments.

Mr. Jametsky remained on the property without paying rent for over a year while Mr. Olsen continued to pay the real property taxes, Jametsky's sewer bill, insurance, and Olsen's debt service on a mortgage loan.

Mr. Olsen brought an unlawful detainer action which was stayed when Mr. Jametsky filed his action under the new RCW 61.34.020. Mr. Jametsky, as a matter of law, by definition, does not qualify as a distressed property owner.¹

¹ The Jametsky prior motion and his appeal brief are based upon the use of tabloid journalist type sensationalism and catch phrases that are not supported by the undisputed facts. The Court should look beyond this improper labeling and embellishments and

II. ASSIGNMENTS OF ERROR

1. Was the Superior Court correct when it determined that the former Jametsky property was not yet at a risk of loss for failure to pay property taxes under Chapter 61.34 RCW when:

a. it is undisputed that Mr. Jametsky twice made real property tax payments in 2008 some 5-7 months prior to entering into the transaction in order to avoid being at a risk of loss;

b. it is undisputed that King County did not issue any Certificates of Delinquencies on the property;

c. it is undisputed that King County would not have issued any Certificate of Delinquency for approximately seven months after the date the Olsen-Jametsky transaction closed; and,

d. it is undisputed that any alleged tax foreclosure would have occurred, at the earliest, over a year after the Olsen-Jametsky transaction closed.²

2. Are the Respondents entitled to an award of its attorneys' fees and costs in having to respond to this appeal?

focus on the undisputed facts. The Respondents do not get an opportunity to respond to the Appellant's Reply Brief, however, we know the Court will keep to evidence supported in the record. An accurate statement of undisputed facts, based upon Mr. Jametsky's own sworn deposition testimony and the declarations provided by Olsen and Flynn, is included in the below "Statement of Facts."

² Even Appellant's section on "Issues" falsely states Mr. Jametsky was 4 years delinquent on the property taxes. Simply not true and unsupported by the evidence.

III. STATEMENT OF RELEVANT FACTS

A. Procedural

Mr. Olsen commenced an unlawful detainer action in July 2010. (CP 169) Around the same time, Jametsky commenced an action against Mr. Olsen, Matthew Flynn and Michael Haber alleging violations of RCW 61.34.010 et. seq.³ (CP 1) Pursuant to RCW 59.18.363 the two actions were consolidated on October 12, 2010. (CP 5)

On April 28, 2011, Judge Jay White ruled on summary judgment granting the Respondent's motion to dismiss Jametsky's case and denied the Appellant's partial motion for summary judgment. (CP 302-305) Shortly thereafter, upon motion, Judge White entered an award of attorneys' fees and costs in favor of Respondents. (CP 321-322) Jametsky filed a notice of appeal and never brought a motion to Judge White to seek any form of supersedeas or any other stay of the Judgment, which included the lifting of the stay of the unlawful detainer.⁴ (CP 323-330)

³ Mr. Haber is not friends with Mr. Olsen and Mr. Flynn. Mr. Haber had a prior relationship with Mr. Jametsky and absent from the record is any attempt to serve Mr. Haber personally or through alternate service.

⁴ The Appellant's counsel added to his Clerk's Papers the later entered unlawful detainer Judgment which has zero to do with "risk of loss" under Chapter 61.34 RCW. (CP 331-336) This should be stricken under RAP 9.12, as counsel is well aware it was not part of the summary judgment record and is provided to try to make an argument that is unrelated and irrelevant to the submissions to the Court or Chapter 61.34 RCW.

B. Substantive Facts

Real Property Taxes Undisputed Facts

Mr. Jametsky made two significant real property tax payments to King County on March 31, 2008 for \$3,646.67 and on May 2, 2008 for \$1,473.48 for a total of \$5,120.15. He made the payments so he would not be three years behind in his property taxes. He understood those payments would only make him two years in arrears. He believed that he made those payments so "I wasn't behind." (CP 43 and 59, which are excerpts from Jametsky's deposition, specifically, Page 20 lines 10-25, and Page 50 lines 13-16) and CP 62). These payments were made at least six months before Mr. Haber introduced Respondent Flynn to Mr. Jametsky. (CP 161)

At the time of the sale of the property to Mr. Olsen, assuming Jametsky had broken his pattern and not have made tax payments of some sort in 2009, King County was approximately seven months away from issuing a Certificate of Delinquency. (CP 152) There never was a Certificate of Delinquency or a foreclosure action in King County related to any Jametsky unpaid real property taxes on the property. (CP 41-42, Jametsky deposition excerpts, Page 18, lines 10 to Page 19, line 4).

Purchase of Property

Mr. Olsen purchased real property located at 2433 S. 135th Street, Seattle, Washington from Mr. Jametsky on or about November 10, 2008

for \$100,000. (CP 74-88)⁵ At the closing of the purchase of the property Mr. Olsen's \$100,000 was applied by a third party escrow firm engaged to close the property sale to pay the following bills and obligations of Jametsky:

Beneficial Financial:	\$58,221.15
Alliance One (Judgment):	\$ 6,934.32
United Collection:	\$ 2,459.94
Valley View Sewer:	\$ 1,819.08
King County property taxes:	\$10,666.73

Additionally, excise tax in the amount of \$1,785.00 was paid at closing. (CP 84-85)

Mr. Olsen further discovered, after closing, non-payment of additional sewer charges of approximately \$750. He paid that debt and had been paying approximately \$70 per month for Jametsky's continuing sewer related charges. (CP 168)

Mr. Jametsky was able to read and understand the material aspects of the documents he was asked to sign by Mr. Haber, his representative. In his deposition he was able to read into the record the contents of Exhibit 3 to his deposition. (CP 46, which is an excerpt to Jametsky deposition, page 23, lines 1-22.)

Mr. Jametsky's counsel states that Jametsky entered into the sale of the property "unwittingly." The actual sworn testimony is different. Mr. Jametsky understood that the transaction was going to be a sale of his

⁵ The opening of the escrow pre-dated the unfortunate death of Mr. Jametsky's son. (CP 134)

property. He acknowledged in Exhibit 3 to his deposition that he understood that he was selling his house and renting it for \$835 per month. Further, Jametsky's mother signed a statement attesting to the fact that Jametsky knew he was selling his property. (CP 46 and 72, which are an excerpt from Jametsky deposition, Page 23 lines 1-7 and Exhibit 3 thereto.) Mr. Jametsky has acknowledged that he was aware of the difference between selling and renting property. (CP 35, which is an excerpt from Jametsky deposition, Page 12 lines 4-12).

Contemporaneous with the purchase of the property, the parties entered into an Option to Purchase Agreement and a Lease Agreement. The option price was set at \$110,000 and executable within 18 months. The term of the Lease was through May 31, 2010. (CP 90 and 171) Mr. Olsen offered to extend the time to exercise the option even while he continued to pay charges on the property. (CP 169)

Mr. Jametsky remained in possession of the property pursuant to the Lease with the rent set at \$835.00 per month. Mr. Jametsky paid rent for fifteen months before he failed to pay rent for part of March 2010 and for every month thereafter. (CP 168)

Mr. Jametsky admitted he had the ability and means to pay rent at the time he stopped paying. (CP 59, excerpt from Jametsky deposition page 51, lines 6-16) He testified that he earns approximately \$1,000 per

week as an auto body mechanic. (CP 34, excerpt from Jametsky deposition Page 7, line 15 to page 8 line 17) Mr. Jametsky never paid \$110,000 to exercise the option to purchase the property and he refused an extension of time to meet the option price. (CP 169)

At the time of the summary judgment hearing, the approximate rent, per diem, late fees, not counting other recoverable expenses, exceeded \$10,600.00. (CP 169)

Facts Prior to Closing of the Property Sale.

Mr. Jametsky's close friend, a Mr. Hager, contacted the then owner of Pine Mortgage, Michael Haber, to inquire if he could assist Mr. Jametsky with his financial situation. (CP 36-37 and 52-53 which are excerpts from the Jametsky deposition, Page 13, lines 14-22 and Page 14, lines 20-24 and Page 36, line 24 to Page 37, line 5.)

During the first meeting between Jametsky, Haber and Hager they discussed that there was a \$56,000 House Hold Finance ("Beneficial ") debt which Mr. Jametsky understood was a lien against the property.⁶ Mr.

⁶ Despite all of the undisputed evidence in the hands of Jametsky's counsel of the secured nature of the Beneficial loan, he continued to represent to the trial court and now in his Appellant Brief to this Court, that the Beneficial loan was unsecured; that Mr. Jametsky held the property free and clear of all encumbrances. This is another untruth. Prior to the execution of the Quit Claim Deeds to Mr. Jametsky, Terry and Walter Jametsky received a loan for \$64,000 in 1996 secured by a Deed of Trust on the real property. That Deed of Trust was later assigned to Household Realty Corporation. (CP 138 Title Report) That secured obligation (now Beneficial) was paid off and the security released after the \$58,221.15 from the Olsen funds which were transmitted to Beneficial by the escrow firm. (CP 84)

Haber indicated he would try to obtain a loan for Jametsky. Jametsky provided Mr. Haber financial information and he ran his credit. Mr. Haber did all Mr. Jametsky's paperwork and his taxes. (CP 38-39. excerpts from Jametsky deposition, Page 15, lines 5-15, Page 15, lines 23-25, Page 16, lines 6-8, and Page 16, lines 10-13.) In reality, Mr. Jametsky started the process of trying to obtain money at least 6-12 months before October 2008. (CP 37, 51 and 52)

In October 2008, six months after Jametsky made two real estate tax payments to King County (noted above), Mr. Haber contacted Respondent Flynn through an advertisement. Mr. Haber informed him that he represented Mr. Jametsky in financial matters. Mr. Flynn never solicited Mr. Jametsky. He was introduced to Mr. Jametsky by Mr. Haber. (CP 161-162-Flynn declaration) (CP 40, 50, and 51, which are excerpts from the Jametsky deposition, Page 17, lines 6-14, Page 45, line 15-17 and Page 48, line 25 to page 49, line 3). Mr. Haber provided the Jametsky financial paperwork and credit information to Mr. Flynn. (CP 162)⁷

Based upon Mr. Flynn's analysis of the paperwork and the fact that at that moment Jametsky was seasonally employed, he informed Mr. Haber that he would not be able to arrange a loan for Mr. Jametsky. (CP

⁷ It is undisputed that prior to this sale transaction, Mr. Flynn had never met nor been affiliated with any transactions involving Mr. Haber. (CP 161-2).

162) Mr. Flynn understood that Mr. Haber, as Jametsky's representative, told Mr. Jametsky that he was not able to provide a loan. Mr. Haber then suggested a buyer could be found to purchase the home with a lease and option to purchase. (CP 162) Throughout the time prior to the closing of the sale transaction, the few times Mr. Flynn met Mr. Jametsky, Mr. Haber was always present. (CP 54, excerpt from Jametsky deposition, Page 40, lines 4-6) and (CP 162)

Mr. Jametsky testified that he felt like Mr. Haber was assisting and representing him in this transaction. (CP 56-7, excerpts from the Jametsky deposition, Page 48, line 25 to page 49, line 3.) Mr. Haber would visit Jametsky to sign documents and whenever Jametsky was required to sign documents he took Jametsky to a Starbucks. (CP 52, excerpt from Jametsky deposition, Page 37 line 6-19.)

Mr. Jametsky met at a Starbucks to execute the closing documents. Neither Mr. Flynn nor Mr. Olsen was present at that meeting. Mr. Jametsky never met Mr. Olsen until after the transaction closed. (CP 53 and 54, excerpts from Jametsky deposition, Page 38, lines 12-15 and Page 40, lines 1-3.) Mr. Olsen also has never met Mr. Haber. (CP 168)

Mr. Jametsky recalls that at the Starbucks signing it was just him, Mr. Haber, and the gentleman that was a representative from the escrow

firm owned by attorney Gary P. Schuetz. (CP 53, excerpt from Jametsky deposition, Page 38 lines 5-9.)

Mr. Jametsky confirmed in his deposition that he did sign the Residential Purchase and Sale Agreement, the Closing Agreement, the HUD 1, the Settlement Statement, and the Real Estate Purchase Lease Option. (CP 44-45 and 47-49)

Mr. Jametsky understood what the option agreement meant; that he could purchase the house for \$110,000. He also understood that he would have until May 31, 2010 to pay the \$110,000. (CP 49-50, excerpt from Jametsky deposition, Page 27 lines 17-20 and Page 28 lines 7-10.)

The escrow file reveals that Mr. Haber communicated with Mr. Jametsky's creditors to obtain payoffs on the Household Finance debt, the sewer lien and various judgments. It was Mr. Haber who communicated directly with the Escrow firm on progress of the closing and status and the wishes of Mr. Jametsky. (CP 115-128)

In spite of all the undisputed evidence, counsel for the Appellant in lower court pleadings, in oral argument, and again in the Appellant Brief (even after it was pointed out several times by Respondent) keeps stating, now to two different courts, that they were not aware of an escrow in an attempt to create an image of impropriety. There was a third party escrow firm and that cannot be disputed.

IV. ARGUMENT

A. The Former Jametsky Property was not a Distressed Home as Defined by Statute.

Jametsky's prior owned property, as a matter of law, did not meet the definition of a distressed home and, therefore, the trial court's dismissal of the Jametsky claims must be affirmed.⁸

RCW 61.34.020 defines a distressed home as either:

(a) A dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes; or

(b) A dwelling that is in danger of foreclosure or that is in the process of being foreclosed due to a default under the terms of a mortgage.

RCW 61.34.020(2).

1. No danger of foreclosure.

Jametsky admitted that he was current with his payments on the Household Finance debt which was secured by the property. (CP 41, excerpts from the Jametsky deposition, Page 18, lines 1-6) Therefore, the property was not in danger of foreclosure and certainly not in the process of being foreclosed.

⁸ Jametsky's counsel made it very clear to Judge White that if his Chapter 61.34 action is dismissed his entire case falls apart. If this is now denied by Appellant we would ask the Court to allow a supplement to the record from the transcripts of Judge White's hearing.

2. No Risk of Loss Due to Non-Payment of Taxes.

Jametsky was not in danger of foreclosure or at risk of loss due to nonpayment of real estate taxes. The real property tax foreclosure statute, RCW 84.64.050, in pertinent part states:

After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs:

...

The treasurer shall file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer shall thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates.

RCW 84.64.050. (Attached in Appendix)

It is undisputed that King County has never issued a certificate of delinquency for the former Jametsky property. Mr. Jametsky only received tax statements, not a certificate of delinquency. (CP 41-42, excerpts from the Jametsky deposition, Page 18, lines 10 to Page 19, line 4.) It is undisputed that no tax foreclosure lawsuit has ever been commenced against Jametsky. Given the procedures followed in King County, Jametsky was not close to being at *risk of loss* for nonpayment of property taxes. Further, as Mr. Jametsky stated he made the two payments in 2008 so he "wasn't behind." (CP 43)

King County defines what constitutes a property at risk for tax foreclosure. On the King County Treasurer's website there is a document that in part states:

KING COUNTY TREASURER TAX FORECLOSURES

Properties at Risk Due to Non-Payment of Property Taxes

In cases where a property owner fails to pay any particular year's property taxes to County for a total of three years, County seizes that property through rights granted by the State of Washington and attempts to sell it through a tax foreclosure auction.

(CP 148)

In King County, the policy is that there is a grace period before there is a risk of loss. As noted in the 2010 King County tax sale information website, "the grace period is three years and the full year 2008 taxes will be three years past due on May 1, 2011." (CP 152 and in portion in Appendix) Jametsky's 2006 taxes, in King County, would not have been anywhere near a risk of loss until May 2009, seven months after the transaction closed. In addition, the actual tax foreclosure action would not commence until the following June 2009 and the sale would not be for another 6 more months into December 2009. The ultimate potential loss of the property was impossible before December 2009, more than a year after this transaction closed. (See attached web shot from King County CP 148.)

It is undisputed from Mr. Jametsky' testimony and the Title Report, that at time of the transaction in 2008, the 2006 property taxes were not three years delinquent.⁹ Jametsky made \$5,120.15 in tax payments earlier in 2008 which eliminated any risk of loss until almost summer 2009.

3. Statutory Construction

The Court must read RCW 61.34.020 and RCW 84.64.050 together when it addresses the applicable tax foreclosure definitions and timelines. RCW 61.34.020 does not define any time period for *danger of foreclosure or risk of loss* regarding taxes. The Legislature has already determined what those tax time frames are in RCW 84.64.050 and chose not to change them in relation to or in RCW 61.34.020. (That is why the Legislature only addressed the definition of "danger of foreclosure" regarding a mortgage in 61.34.020(11). (See footnote 11.)

The Legislature was aware of the real property tax foreclosure statute when amending RCW 61.34.020. RCW 61.34.020 and RCW 84.64.050, and their respective timeframes, must be read together. (See, Thurston County v. Gorton, 85 Wn.2d 133, 530 P.2d 309 (1975): *The*

⁹ Counsel's prior assertions or implications that Jametsky was 4 years past due and his new assertion of a ten year rolling default is disingenuous and not supported in the record. Counsel's creative assertions are not evidence. See, fn 2, Voicelink Data v. Datapulse, 86 Wn. App. 613, 619, 937 P.2d 1158 (1997) where the Court noted that it does not consider allegations of fact not supported in the record. ***Assertions by counsel are not evidence.*** See Bravo v. Dolsen Cos., 71 Wn. App. 769,777,862 P.2d 623 (1993) (unsworn allegation of fact in appellate brief falls outside materials that court can consider), *reversed on other grounds*, 125 Wn.2d 745,888 P.2d 147 (1995)(emphasis added).

legislature is presumed to enact laws with full knowledge of laws then in existence.)

Further, Jametsky's interpretation would require a subjective determination of "risk of loss" and "danger of foreclosure." That is not the intent of either statute and would lead to inconsistent applications by our Courts. He adds a factor not in the statute of requiring the Court to assess an inability to pay the taxes. The Legislature did not provide such an assessment in its detailed statute which Appellant admits is loaded with definitions. Mr. Jametsky is not excluded from the statute; he simply does not qualify based upon the lack of a risk of loss at that time due to nonpayment of property taxes.¹⁰

Even if the Court were to disregard the application of RCW84.64.050, Mr. Jametsky's former property still did not qualify as a distressed property. The phrase, "danger of foreclosure" is defined in part (11) of 61.34.020.¹¹ Under the terms of the distressed property statute, the maximum time period to qualify as a distressed property regarding a

¹⁰ Also, as noted below, if he did qualify, Respondents were not either a distressed home consultants nor distressed home purchasers.

¹¹ (11) "In danger of foreclosure" means any of the following:

- (a) The homeowner has defaulted on the mortgage and, under the terms of the mortgage, the mortgagee has the right to accelerate full payment of the mortgage and repossess, sell, or cause to be sold, the property;
- (b) The homeowner is at least thirty days delinquent on any loan that is secured by the property; or
- (c) The homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds, and the homeowner has reported this belief to: ...

mortgage is four months from a default, but only if the owner has reported, in good faith, to particular professionals that a default will occur.

The subject transaction was at a minimum completed seven months before any potential issuance of a Certificate of Delinquency, well past the maximum four month time period noted in the statute, plus Mr. Jametsky never took any of the required steps to even qualify for the four month period.

Under Jametsky's counsel's definition of "risk of loss" with respect to the former Jametsky property, any party who is one day late with a tax obligation is a potential plaintiff under the statute. This argument wildly extrapolates this notion with respect to the present matter and ignores the clearly defined timeframes in RCW 84.64.050. The definition of statutory risk is not "how I feel", a subjective standard; it is an objective standard under the statute. (See, RCW 61.34.020(11) with the four month maximum provision and RCW 84.64.050 where Certificate of Delinquency can issue until after three years past due, which in this case was May 2009.)

Further, the facts show Mr. Jametsky was sophisticated enough to be aware of the time lines to avoid any problems related to potential tax foreclosure. Objectively, it is undisputed that in 2008, months before meeting Mr. Flynn and before entering this transaction, Mr. Jametsky paid

\$5,120.15 towards his taxes. It is undisputed that he testified that he knew he made those payments so "he wasn't behind." (CP 43, 58 and 62)

Further, Mr. Jametsky's position is based upon what he terms an "impending tax foreclosure. (Appellant Brief page 20) The reality was that there was no judgment regarding the taxes, that there was no Certificate of Delinquency issued, and that there can be no impending tax foreclosure without the issuance of the Certificate of Delinquency. Mr. Jametsky knew, as he testified, that all he had received was the annual tax bill/statement from King County and nothing more. (CP 41-42)¹²

If Mr. Jametsky was four years behind in his property taxes, as his counsel testifies, then King County was mandated by statute, before Respondents were in the picture, to issue a Certificate of Delinquency. No Certificate of Delinquency has ever issued.

The former Jametsky property was not a distressed home and this sale transaction did not come within the purview of the then newly revised distressed property conveyance statute. The dismissal of Jametsky's action, under Chapter 61.34 RCW, should be affirmed.

¹² Jametsky's counsel, in order to artificially create an argument that Respondent is asking for a restrictive application of the law, misstates Respondent's position when he (Jametsky) states it as "because a tax foreclosure sale had not been formally scheduled" there was no risk of loss. (Appellant Brief page 9) Respondent has repeatedly pointed out that a Certificate of Delinquency was never issued; a certificate that must issue before even a threat of foreclosure or the filing of an action. This is not a restrictive reading by Respondent, but rather expansive and Jametsky still does not qualify.

B. Olsen and Flynn Were Not Distressed Property Consultants or Purchasers.

The Appellant Court should affirm the granting of summary judgment in favor of Respondent and the dismissal of Jametsky's action because he was not a distressed property owner under Chapter 61.34 RCW. Although there is no need to go further, Olsen and Flynn did not perform as or become distressed property consultants or purchasers.

Mr. Haber was Mr. Jametsky's confidant for almost a year before Mr. Flynn was contacted by Mr. Haber. (CP 37 and 56, excerpts to Jametsky deposition, page 14, lines 11-24 and page 48, line 25 to page 49, line 3.) Mr. Haber was licensed with the Department of Financial Institutions and was intimately related to the transaction. (CP 36-37 and 151) The Court can review the numerous emails from Mr. Haber to the Jametsky creditors and to the closing agent regarding Mr. Jametsky's desire to close the sale as soon as possible. (CP 115-128)

Mr. Flynn did not solicit or contact Mr. Jametsky as required by RCW 61.34.020(3)(a). He was contacted by and was asked to review the situation by Mr. Jametsky's advisor, Michael Haber. Mr. Flynn only met with Mr. Haber and Mr. Jametsky a few times before the transaction closed. Mr. Flynn, prior to that time, had never been affiliated with any transactions involving Mr. Haber. Mr. Jametsky was aware of an alleged

drug issue concerning Mr. Haber, but chose not to inform Mr. Flynn of his concerns. (CP 55, excerpt from Jametsky Deposition, page 45, lines 1-6 and CP 163)

Further, Mr. Flynn never had conversations with Mr. Jametsky regarding any foreclosure or any risk of loss for nonpayment of taxes and therefore, he did not offer to perform a service to stop any alleged foreclosure. (CP 161-163) The statute requires not only the solicitation, but an offer to perform a service of some kind that will produce a promised result. In this case not only was there no risk of loss from a tax foreclosure, Mr. Flynn, always working through Mr. Haber, never made any offers or representations based upon any real property tax situation.

After Mr. Haber informed Mr. Jametsky that a loan could not be arranged, Mr. Haber returned to Mr. Flynn to advise him that Mr. Jametsky would consider a sale. (CP 162) Except for the opening of the escrow in the middle of October 2008 by Mr. Flynn, it was Mr. Haber and Mr. Jametsky working together to move forward on the sale transaction. Additionally it was a transaction that was arranged in principal before the unfortunate death of Mr. Jametsky's son. (See the date of the Title Report CP 134 which predates Mr. Jametsky's son's death.) There is no evidence that Mr. Flynn made any offers to perform the items in 61.24.020(3)(a) for Mr. Jametsky. The only evidence is that Mr. Jametsky was working with

Mr. Haber for almost a year and that Mr. Haber, after consulting with Mr. Jametsky as his agent/advisor, offered to sell the property. The momentum to move forward came from Haber and Jametsky, not Mr. Flynn.

Mr. Jametsky asserts that the closing of the transaction was less than five days after entering the Purchase and Sale Agreement and thereby violates the five day RCW 61.34.120 (6)(a)-(b) cancellation period. The undisputed facts are that the Purchase and Sale Agreement was executed on November 4, 2008 and the Closing Agreement was signed off by Mr. Jametsky on November 10, 2008, six days after the entry of the Agreement. (CP 64-70 and 74-88)

Mr. Olsen never met Mr. Jametsky until after the property sale closed. He has still never met Mr. Haber. Mr. Olsen paid money into an escrow to close the transaction. The vast majority of that money was paid out of escrow to pay liens and judgments against Jametsky and/or the property. The purchase option price was set at only \$10,000 more than Olsen paid for the property and with an 18 month time period to perform.¹³

Mr. Jametsky earned \$1,000 per week and still refused to discuss an extension on the option. (CP 34, excerpt from Jametsky deposition,

¹³ If Mr. Olsen and Mr. Flynn were scheming to take this property, why set the option price so low, give Mr. Jametsky 18 months to perform, and then offer an extension for Mr. Jametsky to exercise the option?

page 8, lines 16-17) and (CP 169) This is not the transaction targeted under Chapter 61.34 RCW.

Mr. Jametsky is aware that Mr. Flynn had never met Mr. Haber until this transaction and he (Jametsky) had never met Mr. Olsen until afterwards. (CP 55, excerpt from the Jametsky deposition, page 45, lines 12-17) and (CP 53-54) Also, Mr. Olsen has never met Mr. Haber. (CP 168) Yet, Jametsky's counsel labels them sophisticated scammers by using inflammatory phrases based upon unsupported and erroneous accusations that Haber, Flynn and Olsen "actively prey on people." This is another example of the "tabloid" approach to legal argument and is very defamatory and deceptive.

Respondents Flynn and Olson were not distressed home consultants or purchasers in this matter.

C. There is no consumer protection action.

The Appellants, as they noted to the Trial Court, are basing their consumer protection claim entirely on a finding of a violation under RCW 61.34.040(1). (Appellant Brief page 26). As noted above, Mr. Jametsky was not a qualified homeowner under Chapter 61.34 RCW and the court need not address the claim.

Appellants also fail to address the required element of causation and simply state that the transaction itself per se equates to causation.

(Appellants Brief page 27). However, in Washington, causation under the Consumer Protection Act as a "per se" finding was rejected by our Supreme Court which held that the plaintiff must put forth evidence of proximate cause. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., 162 Wn.2d 59, 84, 170 P.3d 10 (2007). In the present case, there is no evidence of proximate cause, only the legal conclusions, and at times, the inserted testimony of Jametsky's counsel.

In addition, Mr. Flynn and Mr. Olsen did nothing that would remotely rise to the level of Consumer Protection claim. In order to prevail in a private action under the Consumer Protection Act, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). "Failure to meet any one of these elements under the CPA is fatal to the claim." Shields v. Enterprise Leasing Co., 139 Wn. App. 664, 675, 161 P.3d 1068 (2007) (citing Sorrel v. Eagle Healthcare, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002)).

The sale of the property could have easily been avoided by Jametsky. Mr. Olsen never met Jametsky until after the closing of the sale

transaction. Mr. Olsen never made any representations to him other than what was in writing before the closing of the sale of the property. Mr. Olsen is not in the business of routinely buying properties and had to obtain a mortgage loan. (CP 167)

Mr. Flynn only met Mr. Jametsky a few times before the closing of the sale. He was honest with Mr. Jametsky and told him he could not provide a loan. Mr. Jametsky followed Mr. Haber's advice to move into a sale and option transaction. There was no deception. Mr. Jametsky had professional representative (Haber) and knew it was a sale. (CP 72) There is no testimony of any deceptive acts, as Mr. Jametsky admits knowing at the time that there was a sale of his property with an option to purchase. He could have reasonably avoided this alleged situation by not agreeing to sell his property.

There is no actionable consumer protection for this one time private sale. There is no deception, no public impact, and the one injured is Olsen as he paid the \$100,000 which was then applied to many of Jametsky's obligations. Olsen continued to lose money as he had not received rent since the spring of 2010, paid the property taxes and Jametsky's sewer bill, while Jametsky earned \$1,000 per week.¹⁴

¹⁴ Mr. Jametsky does not deny that the Olsen funds were used to pay his debts, including substantial liens on the property. Mr. Jametsky cannot deny that Olsen has spent

There is no evidence that Flynn, Haber and Olsen have together been involved in any prior transactions, let alone those involving the then four month old distressed property section of Chapter 61.34 RCW. The dismissal must be affirmed.

D. The Court Should Affirm Quieting Title in Mr. Olsen.

The independent escrow firm was engaged in the middle of October 2008, weeks before the unfortunate death of Mr. Jametsky' son. (Olsen and Flynn are not insensitive to Mr. Jametsky's loss, but it did not affect this transaction which was contemplated by the parties prior to the death.) The property profile performed in escrow was done on October 22, 2008 and the Title Report ordered around that same time. (CP 130 and 134) The Statutory Warranty Deed from Jametsky to Olsen was notarized and is not void as a matter of law. (CP 144)

Every conveyance of real estate shall be by deed in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by statute to take acknowledgments of deed. A qualified

thousands more paying property taxes and sewer bills, insurance and the like on the property since November 2008. What is missing here is any concern for the free ride that Jametsky has received at Olsen's expense. Mr. Olsen, in addition to paying the \$100,000 has also, since November 2008, paid over \$19,000 for Jametsky's sewer bill, insurance, and kept the taxes current and paid on the underlying debt service on his loan. (CP 166-175)

notary public may acknowledge deeds. (See, RCW 64.04.010-020 and 64.08.010).

RCW 64.04.030 notes in part:

Every deed ... when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee ... with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee ... , the quiet and peaceable possession of such premises ..

RCW 7.28.010 requires that a person seeking to quiet title establish a valid subsisting interest in property and a right to possession thereof. See also Magart v. Fierce, 35 Wn. App. 264, 266, 666 P.2d 386 (1983). The party with superior title, whether legal or equitable, must prevail. Finch v. Matthews, 74 Wn.2d 161, 166, 443 P.2d 833 (1968).

The record shows that Mr. Jametsky understood his actions in selling the property to Mr. Olsen. Mr. Jametsky has not disputed that he executed the agreements and the deed related to the sale of his property and in deposition he explained his knowledge of the same. As noted in an earlier in this brief, in Jametsky's deposition testimony, he was not only able to read, acknowledge his signatures, but he understood that he was selling his property. Further, Jametsky's mother signed a statement attesting to the fact that Jametsky knew he was selling his property. (CP

72) Mr. Jametsky executed all closing documents and the warranty deed to Mr. Olsen.

The Deed executed by Mr. Jametsky included all requirements of a valid deed and was notarized as required by law. The parties were not incompetent to execute the deed and consideration was paid and accepted. Title should be quieted in Mr. Olsen. The trial court correctly dismissed the Jametsky action.

E. Respondents are Entitled to Their Attorneys' Fees and costs.

Respondents are entitled to their attorneys' fees and costs in this matter under the provisions of paragraph q. of the Residential Real Estate Purchase and Sale Agreement and under paragraph 11 of the Lease/Rental Agreement as the prevailing party is entitled to an award of reasonable attorneys' fees and expenses. (CP 55 and 172) A party on appeal is entitled to attorney fees where applicable law authorizes the award. RAP 18.1(a). Mr. Olsen requests an award of his attorneys' fees and costs.

VI. CONCLUSION

Mr. Jametsky, by statutory definition and by King County's tax foreclosure procedure, was not a distressed home owner. Mr. Olsen has mounting damages for the non-payment of rent, attorneys' fees, and costs. Mr. Jametsky has lived for free in the house at Mr. Olsen's expense. In the meantime, Mr. Olsen has paid the 2009 and 2010 property taxes, the sewer

bills, and has paid his own mortgage incurred to buy the property. Mr. Jametsky has not only lived for free, but has reaped the benefit of having the \$100,000 paid by Mr. Olsen applied to his significant debts and judgments, which were paid off and satisfied.

The Court should, as a matter of law, affirm the superior court ruling of Judge White and provide an award to Respondents of their reasonable attorneys' fees and costs.

Dated this 10th day of October, 2011.

STERNBERG THOMSON OKRENT & SCHER, PLLC

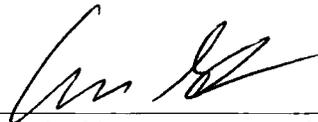


Aaron S. Okrent, WSBA 18138
Attorneys for Rodney Olsen and Matthew Flynn

CERTIFICATE OF SERVICE

I, Aaron S. Okrent, do hereby declare under penalty of perjury that I have arranged for the service of the Respondent's Brief to be delivered by legal messenger on October 10, 2011 to Mr. David Leen, Esq., 520 East Denny Way, Seattle, WA 98122.

Dated October 10, 2011 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138

Appendix

RCW 84.64.050

Certificate to county — Foreclosure — Notice — Sale of certain residential property eligible for deferral prohibited.

After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs: PROVIDED, That the county treasurer, with the consent of the county legislative authority, may elect to issue a certificate for fewer than all years' taxes, interest, and costs to a minimum of the taxes, interest, and costs for the earliest year.

Certificates of delinquency shall be prima facie evidence that:

- (1) The property described was subject to taxation at the time the same was assessed;
- (2) The property was assessed as required by law;
- (3) The taxes or assessments were not paid at any time before the issuance of the certificate;
- (4) Such certificate shall have the same force and effect as a lis pendens required under chapter 4.28 RCW.

The county treasurer may include in the certificate of delinquency any assessments which are due on the property and are the responsibility of the county treasurer to collect. For purposes of this chapter, "taxes, interest, and costs" include any assessments which are so included by the county treasurer, and "interest" means interest and penalties unless the context requires otherwise.

The treasurer shall file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer shall thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates. Notice and summons must be served or notice given in a manner reasonably calculated to inform the owner or owners, and any person having a recorded interest in or lien of record upon the property, of the foreclosure action to appear within thirty days after service of such notice and defend such action or pay the amount due. Either (a) personal service upon the owner or owners and any person having a recorded interest in or lien of record upon the property, or (b) publication once in a newspaper of general circulation, which is circulated in the area of the property and mailing of notice by certified mail to the owner or owners and any person having a recorded interest in or lien of record upon the property, or, if a mailing address is unavailable, personal service upon the occupant of the property, if any, is sufficient. If such notice is returned as unclaimed, the treasurer shall send notice by regular first-class mail. The notice shall include the legal description on the tax rolls, the year or years for which assessed, the amount of tax and interest due, and the name of owner, or reputed owner, if known, and the notice must include the local street address, if any, for informational purposes only. The certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against the property may

be brought in one action and all persons interested in any of the property involved in the proceedings may be made codefendants in the action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein, except as provided above. The person or persons whose name or names appear on the treasurer's rolls as the owner or owners of the property shall be considered and treated as the owner or owners of the property for the purpose of this section, and if upon the treasurer's rolls it appears that the owner or owners of the property are unknown, then the property shall be proceeded against, as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of the proceedings and of any and all steps thereunder: PROVIDED, That prior to the sale of the property, the treasurer shall order or conduct a title search of the property to be sold to determine the legal description of the property to be sold and the record title holder, and if the record title holder or holders differ from the person or persons whose name or names appear on the treasurer's rolls as the owner or owners, the record title holder or holders shall be considered and treated as the owner or owners of the property for the purpose of this section, and shall be entitled to the notice provided for in this section. Such title search shall be included in the costs of foreclosure.

The county treasurer shall not sell property which is eligible for deferral of taxes under chapter 84.38 RCW but shall require the owner of the property to file a declaration to defer taxes under chapter 84.38 RCW.

[1999 c 18 § 7; 1991 c 245 § 25; 1989 c 378 § 37; 1986 c 278 § 64. Prior: 1984 c 220 § 19; 1984 c 179 § 2; 1981 c 322 § 4; 1972 ex.s. c 84 § 2; 1961 c 15 §84.64.050 ; prior: 1937 c 17 § 1; 1925 ex.s. c 130 § 117; RRS § 11278; prior: 1917 c 113 § 1; 1901 c 178 § 3; 1899 c 141 § 15; 1897 c 71 § 98.]

Notes:

Severability -- 1986 c 278: See note following RCW 36.01.010.

FINANCE SERVICES

Finance and Business Operations

You're in: Finance Home » Treasury services » Foreclosure

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Date: December 10, 2010 9:00 AM

Location: Washington State Trade & Convention Center, Rm. 4C, 1-2

Publication Date: TBD

1. In 2010 the properties subject to foreclosure are those on which the 2007 full year tax is delinquent. In some cases, 2006 or earlier taxes may also be delinquent. The grace period is three years and the full year 2007 taxes will be three years past due on May 1, 2010. **NOTE:** It does not matter if the 2008, 2009, or 2010 taxes are paid. It is not when there are three years of taxes past due but when one year's tax is three years past due that foreclosure begins.

2. **We do not maintain a mailing list to notify people of each year's tax foreclosure.** The great majority of people who ask for information never attend the auction or do any research once they find out what is required and what is involved. Further, people move without telling us and it is a waste of county resources when the list is returned. On or about June 10, 2010, a list of properties in foreclosure can be found by clicking the link at the bottom of this page. The Summons and Notice, which includes a list of the properties, will be published in the Seattle Times classified (legal) section sometime in late October after all our certified mail notifications are completed. A paper copy computer list may be purchased in the office on or about June 10, 2010 for \$5.00; \$8.00 if mailed.

3. We do not sell "tax certificates or "deeds" of any nature. In some states you may purchase a certificate of some kind showing that you paid the delinquent taxes but we don't have any information on this procedure because there is no provision for it in Washington State law.

4. If you obtain a list from us for research purposes, remember that you will need to come into our office or visit our web site periodically to delete those accounts that were paid since your list was printed. The web site list will normally be updated daily via the technology staff after normal working hours. **Due to the volume of work this information will not be provided by telephone.** Parcels may be redeemed from foreclosure at any time up to the day before the auction, thus we do not know what will be in the sale until the morning of the auction.