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No. 63267-1-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

DANJEL ENTERPRISES, LLC
a Washington State limited liability company,

Plaintiff/Respondent

v.

RUDOLPH I. VALDEZ and JANE DOE VALDEZ, husband and wife and the
marital community composed thereof; and FIDELITY NATIONAL TITLE
COMPANY OF WASHINGTON, INC., a Washington State corporation,

Defendants/Petitioner.

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COURT OF APPEALS
DIVISION I
CLERK

**REPLY OF PETITIONER
FIDELITY NATIONAL TITLE COMPANY OF WASHINGTON, INC.**

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ORIGINAL

Washington law is clear: a court can order a party to deposit contested funds into the registry of the court in only two scenarios: (1) where the party holding the funds admits the funds belong to another party, as provided under RCW 4.44.480; or (2) where the moving party seeks an attachment in compliance with RCW Chapter 6.25. The first scenario, known as interpleader, does not apply here because Fidelity claims a right to the funds in its possession and denies that it holds any funds belonging to Danjel or any other party to the underlying failed real estate transaction. The second scenario, prejudgment attachment, also does not apply here; neither Danjel nor the trial court complied with the statutory requirements for an attachment. Therefore, the trial court's summary judgment order constitutes an impermissible prejudgment seizure of Fidelity's property.

In its response, Danjel introduces neither authority to the contrary nor argument justifying a change to this long-established law. For these reasons, the trial court's summary judgment order should be reversed.

I. RESTATEMENT OF CASE

The following facts are undisputed:

- The trial court made no findings of fact at summary judgment.

- Fidelity never received the earnest money from Valdez.
- Fidelity notified Danjel that it never received the funds no later than September 2007, approximately six months before Danjel filed this lawsuit.

Furthermore, it is necessary to correct some factual errors contained in Danjel's Response:

- Danjel's allegation that Fidelity "blatantly disregarded" the trial court's order to deposit its funds into the court's registry is misleading. Fidelity timely and in good faith sought reconsideration, vacation, and finally discretionary review of that order. Furthermore, Fidelity posted bond pending review as directed by the trial court.
- The record does not support Danjel's statements that Fidelity gave "repeated" assurances that it had received the money. On the contrary, Fidelity mistakenly confirmed that it had received the deposit only once; the other "admissions" cited by Danjel were actually generic responses advising parties about the need for proper signatures when disbursing funds from an escrow file.

Fidelity concedes that it made a clerical error when it mistakenly informed Danjel and Valdez that it had received Valdez' \$150,000 earnest money deposit. However, Fidelity is aware of no legal theory under which it can be held liable to Danjel for those funds; Valdez walked away from the transaction before the closing date, and therefore no action or omission by Fidelity deprived

Danjel of these funds.¹ Danjel has likewise provided no citation to authority showing Fidelity can be held responsible for Valdez's failure to deposit the earnest money or complete the transaction.

II. ARGUMENT

A. Neither RCW 4.44.480 nor *McCracken* authorize the court to seize contested funds.

1. RCW 4.44.480

The object of statutory interpretation is to ascertain and give effect to the intention of the legislature in enacting a particular statute. *Martin v. Aleinikoff*, 63 Wn.2d 842, 389 P.2d 422 (1964). If it is clear and unambiguous (as in this case), the courts go no further. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). Whether the statute is ambiguous or not, the court must avoid interpretations that are "forced, unlikely, or strained." *Personal Restraint of Smith*, 139 Wn.2d 199 (1999).

The sole authority cited by either party that would allow a court to compel a party to deposit funds into the registry of the court is RCW 4.44.480:

¹ At most, Danjel can seek some form of reliance damages, but there is no evidence of such damages in the record and this was not argued as summary judgment.

Deposits in Court-Order. When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money, or other thing capable of delivery, which being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in the court, or delivered to such party, with or without security, subject to further direction of the court.

RCW 4.44.480. This statute is clear – a court can only order a party to pay funds into the court registry if the party admits it holds or controls funds that belong to another party.

In its response, Danjel contorts this unambiguous language:

In other words, the Court cannot order a non-party to deposit an arbitrary amount of money in to the court registry. The court may, however, order funds deposited when there is controversy over the right to the fund.”²

Nowhere does the statute address “non-parties”; nowhere does it reference “arbitrary” sums. More importantly, Danjel’s conclusion that the statute permits a court to order funds deposited where there is a “controversy over the right to the funds” squarely contradicts the statute’s plain language requirement that the holding party admit the funds belong to someone else. Danjel’s

² Brief of Respondent, p.4.

interpretation would maul the express legislative intent.³ It would allow a court to order any defendant to deposit disputed funds merely because the defendant might, after adjudication, be found liable. No rational evaluation of RCW 4.44.480 would countenance so aberrant and dangerous an interpretation.

Danjel further confuses the issue by suggesting that Fidelity “repeatedly admitted” that it had received the earnest money deposit from Valdez.⁴ RCW 4.44.480 expressly states that such an admission must be made in connection with litigation, either by “pleading or examination.” *Supra*. Here, Fidelity has made no such admission; indeed, Fidelity notified Danjel that Valdez never deposited the earnest money several months before Danjel commenced this lawsuit.

³ See also *Borders Electronic Co., Inc. v. Whirlpool Inc.*, 531 F.Supp. 125, 128 (D.C.N.Y. 1982) (plaintiff must clearly establish that defendant is trustee of plaintiff's property or holds property belonging to plaintiff); cf. 26B C.J.S. Deposits in Court § 4 (“A party cannot be compelled to deposit a fund which he or she has never possessed.”).

⁴ On the contrary, Fidelity mistakenly confirmed that it had received the deposit only once (cite); the other “admissions” cited by Danjel were actually generic responses advising parties about the need for proper signatures when disbursing funds from an escrow file.

2. *Rainier Nat'l Bank v. McCracken*⁵

Danjel's attempt to distinguish *McCracken* also fails. The *McCracken* court was asked to determine whether the trial court could compel a party to deposit contested funds into the registry of the court pending the outcome of the litigation. Based on RCW 4.44.480 the Court concluded:

A party who claims title or right to funds in his or her possession cannot be compelled to pay such funds into the registry of the court in a summary manner, or be held in contempt for the failure to do so.

...

Here, the bank obtained a pretrial order which required that the more than \$43,000 proceeds obtained by the [appellants] from the real estate contract be deposited into the registry of the Superior Court. Since the [appellants] at all times claimed title and right to all of those funds, and since that issue had not been judicially determined at the time, the order was invalid.

Id. at 508, 510 (*emphasis added*).

McCracken is a factually simple case. The bank claimed right to funds held by another party claiming fraudulent conveyance; the party admitted it held the funds but denied the bank's claims. *Id.* 500-502. This Court noted that when such

⁵ 26 Wn.App. 498, 615 P.2d 469 (1980).

controversy exists, the trial court lacks jurisdiction to order the holding party to deposit the funds pretrial:

If the party alleged to hold as trustee claims title or right to all or part of the funds in his possession, the court is without jurisdiction to compel him to surrender them by ordering a deposit in court, since this constitutes an issue which should not be tried in this summary manner, but one which requires a judicial determination, on the hearing of all the facts, that he has no right to the funds.

Id. at 510 citing *In re Elias*, 209 Cal.Rptr. 729, 747-48 (1962).

Here, Fidelity denies even holding the disputed funds, so the trial court had even less basis to order Fidelity to deposit the funds than the *McCracken* trial court had.

Danjel and the trial court's apparent reliance on the ancient case *First Nat'l Bank v. Baker*, 141 Wash. 672, 252 P. 105 (1927) is also unavailing. There the bank claimed right to payments due Baker's estate on a lumber contract. *Id.* 674-75. Baker's widow/administratrix claimed right to the funds under homestead exemption and former Rem. Comp. Stat. § 1473. *Id.* The lumber company that owed the money was party to the suit and did not contest that the funds were owed to someone, either the bank or the estate. *Id.* The Supreme Court found the funds properly ordered into the court. *Baker*, consequently, presents a classical

and proper example of interpleader as now codified at RCW 4.44.480.

By statute and binding precedent, accordingly, the trial court's order was erroneous – the court simply lacked jurisdiction to compel Fidelity to deposit its own funds pending a judicial determination on liability. No authority cited by Danjel or the trial court sheds any doubt on this long-recognized law.

B. Due Process Prohibits the Summary Seizure of Property.

“No person shall be deprived of life, liberty, or property, without due process of law.”

– Article One, § 3 of the Washington State Constitution

That a court cannot seize an individual's property without the due process of law is a cornerstone of American constitutional jurisprudence. This case questions the foundation of this jurisprudence, and asks whether a trial court can use its inherent authority to summarily seize a party's property during the pendency of a claim. Neither Danjel nor the trial court cite any authority in support of such an odious contention. The legislature of the State of Washington has by statute established the level of due process required to attach property pre-judgment as set forth in RCW 6.25.

It is undisputed the regimen established by statute was not followed.

Instead, Danjel suggests that the February 13, 2009 summary judgment hearing provided all the due process Fidelity was warranted.⁶ The trial court, however, was not at liberty to substitute its idea of due process for that established by the legislature.

Moreover, Fidelity respectfully submits that Danjel demonstrates a fundamentally-flawed view of individual property rights and the due process of law. On summary judgment, the trial court made no findings of fact; it could not, as all relevant facts were disputed. Indeed, the court emphasized that the *only* thing it was doing was “ordering the money be paid into the Court registry pending the outcome.” CP 15. In other words, the trial court ordered a prejudgment attachment of Fidelity’s property. *Cf. Whirlpool Inc.*, 531 F.Supp. at 128 (applying deposits statute where funds are disputed “would, in effect, be giving the plaintiffs in advance of judgment the benefit of an attachment”).

The February 13, 2009 hearing on summary judgment was not an attachment hearing, and neither Danjel nor the trial court

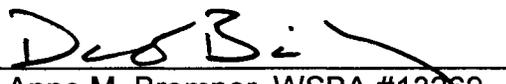
⁶ Response Brief, p. 6.

followed any of the statutory requirements for obtaining or ordering such an attachment. See RCW 6.25.010 *et seq.* For example, Danjel never applied for a writ by affidavit as required by RCW 6.25.060, and failed to satisfy the *probable validity* and *probable cause* requirements under RCW 6.25.070. For its part, the trial court neither evaluated Danjel's chances of prevailing at trial on the merits (indeed, the trial court specifically denied making such evaluation) nor did it make any determination on the burden of proof or the admissibility of evidence. See *Rogoski v. Hammond*, 9 Wn.App. 500, 513 P.2d 285 (1973) (providing detailed guidance for hearings on writs).

Simply put, the trial court gave the Danjel the benefit of an attachment without requiring it to satisfy the statutory due process requirements for an attachment. As a result, the trial court denied Fidelity the due process of law and improperly seized its property.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of *Petitioner Fidelity National Title Company of Washington, Inc.'s Reply in Support of Motion for Discretionary Review* on the following individual:

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- VIA FACSIMILE
- VIA FIRST CLASS MAIL
- VIA ELECTRONIC MAIL (per agreement)
- VIA MESSENGER

Dated this 15th day of March, 2010, at Seattle, Washington.


MARYANN J. BLACKLEDGE