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No. 64878-1-I

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 27 AM 10:50

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUE SHERMAN,

Appellant,

v.

DENNIS DIEDRICH,

Respondent.

RESPONDENT'S REPLY BRIEF

DAVID L. DAY, WSBA 8361
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ORIGINAL

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I. INTRODUCTION

This appeal stems from a grant of partial summary judgment in the trial court wherein Appellant seeks partition (which was granted by the trial court).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issue pertaining to the claimed assignments of error if so identified and cognizable, are; 1. Whether or not the Plaintiff/Appellant should be permitted to re-litigate a summary judgment previously granted, and affirmed by this Court; and 2. Whether the Court acted properly approving the referee report and ordering the sale of the subject real estate to DNR.

III. PROCEDURAL HISTORY

This case was filed as a partition action in March of 2008 in Skagit County Superior Court.

On March 16, 2009 the court granted partial summary judgment to Defendant Diedrich dismissing claims of negligence and contempt and ordering partition by sale in lieu of division of the property. CP176-178.

Plaintiff appealed from that ruling and the matter was considered by this Court. In an unpublished opinion dated January 11, 2010 under Court of Appeals No. 63574-3-I this Court affirmed the March 16, 2009 grant of partial summary judgment.

After the grant of partial summary judgment in March of 2009, Defendant proceeded with disposition by sale rather than physical subdivision. A court-ordered sale was contemplated by use of a referee. The Referee negotiated a sale with the Department of Natural Resources and reported to the Court. A motion was made, based upon the report to have the Court affirm or approve the sale. In a hearing on February 5,

2010 the Court approved the sale CP128-130. In addition, on the same date the Court refused to vacate the previous summary judgment CP126-127. This appeal presents two issues based upon the previous hearings. Those issues are whether or not the Court properly entered the judgment approving the sale and divesting title, and additionally the denial of the attempt to vacate the same summary judgment.

IV. ARGUMENT

A. Approval of Partition Sale by Order dated 2/5/10

The first issue to be dealt with is the propriety of the Court signing an order which essentially approves the sale, and divests both parties of ownership in the event of failure to sign all necessary documents at the title company.

At the initial filing of this case in the Court of Appeals, Respondent moved for dismissal because the foregoing order, CP128-130, effectively approves the sale and directs that the sale be closed at a local title company. It goes on to state that in the event any party fails to cooperate the punishment is *inter alia* a contempt and/or subject to divestment of ownership.

The Commissioner, upon reviewing the initial appeal, determined that the order was such that an appeal could be taken even though the order is interlocutory in character. (See Commissioner ruling entered March 22, 2010 Appended hereto as **Exhibit 1**).

Respondent moved to modify the ruling and supplied authorities respecting the lack of meaningful issues for review, etc. The Panel denied the motion to modify.

Because the appeal is taken from the entry of the order, Respondent will address the issues in the order and the propriety of the entry of the order. Although the briefing fails to raise any material issue

respecting the order and fails to cite any authority, this brief will address the question of whether or not it was appropriate for the Court to enter the order and whether this Court should continue to review.¹

The court order is premised upon RCW 4.64.030(b).

The recitals are that previously the Honorable John M. Meyer appointed a referee, being Jeff Ingman, and the scope of the appointment was to appraise and market the subject property under the above cause.

Department of Natural Resources made an offer of \$63,000.00 for the subject property. The referee advised the Court that the offer was a fair price and recommended the Court adopt and approve the report as well as order sale of the property for the above price.

The ruling under the order (CP128-130) essentially approves the report of the report of the referee and orders the sale to proceed further. As such, it is not a final order from which an appeal should be taken.

A close reading of the terms of the order indicate very clearly that proceeds of the sale are to be placed in the registry of the Court and further proceedings are contemplated. In addition, the terms of the order indicate very clearly that a failure to comply with the order constitutes a potential for contempt. Taken as a whole, the order is not a final order divesting or in any way terminating litigation. As such, it is error for the Court to consider, at this stage of the proceedings, an order which clearly contemplates further action by the trial court. A close counterpart is Bank of American NA v. Owens, 153 Wash. App. 115, 221 P.3d 917 (2009), review granted, 168 Wash. 2d 1039, 233 P.3d 888. In that case, the court determined the judgment had the effect of an interim order, and did not create a lien, because further litigation was contemplated. In other words,

¹ In the previous appeal this Court cited In re: Marriage of Olsen, 69 Wash. App 621, 850 P2d. 527 (1993), about the perils of practicing pro se. The same holds true in this appeal. However, reading *Olsen* indicates the dictum was about the perils of pro se litigation at trial.

an interim order was the contemplated effect.² Respondent admits the appearance of the document is that of a judgment. However, substance should be controlling, not form, First Federal Savings & Loan Association of Walla Walla v. Eleenger, 22 Wash. App. 938, 593 P2d. 170 (1979).

B. Court Denied Motion to Vacate Summary Judgment

Reading the Appellant's brief in very broad terms it appears to present a second issue as to whether the Court should have denied the motion to vacate summary judgment previously granted on March 19, 2009.

Setting aside that there have been repeated attempts to overturn the Summary Judgment, including an appeal before this Court, this appeal stems from entry of the order on February 4, 2010, CP121-123.

The first issue is standard of review. The Court of Appeals reviews a decision to vacate a judgment or order under CR 60 for abuse of discretion. Lockett v. Boeing Company, 98 Wash. App. 307, 309—310, 989 P.2nd 1144 (1999).

In this instance there is an absolute dearth of information for this Court to make an informed judgment on the propriety of refusing to vacate the summary judgment of March 19, 2009. The motion itself filed February 1, 2010 (CP35-65) was premised on the apparent information gleaned by Plaintiff from the Skagit County Planning Department. Apparently a conversation with Grace Roeder at Skagit County Planning and Development indicated that a division could be performed "by interest". Plaintiff misunderstands the meaning of a division by interest. Simply stated, the gist of this proposition is that each party has the right to sell their physically undivided interests at any time. In a response

² *Owens* determined that an interim order not determining all the merits of the case is not a judgment and, as such, does not necessarily create a lien, *Owens* at p. 126.

(CP121-123) the Defendant indicated the premise for the so-called division was incorrect, was not new evidence, and did not fit within the criteria of CR 60(b)(3) (CP121-123). The Court apparently was favorably impressed by the memorandum sufficient that the order signed on February 5, 2010 denied the motion to vacate the previously granted summary judgment.

The facts at the time remain as they are present, i.e. despite the misunderstanding of Appellant about the meaning of dividing by “interests” and the failure of the Plaintiff to properly proceed under CR 60, the Court felt constrained to deny the motion.

C. The Appellant’s Brief on Appeal

The briefing supplied by Appellant does nothing to clarify the situation. Rather, a number of extraneous and irrelevant materials are appended to the brief and to the extent this attempt to append irrelevant or extraneous materials into the record indirectly should be sanctioned, Respondent urges the Court to disregard any materials not directly related to the two matters subject to the appeal. ZDI Gaming Inc. v. State, ex rel. Washington State Gambling Commission, 151 Wash. App. 788, 816, 214 P.3d 938, 952 (2009).

In particular, Exhibits A, B, C, D, E, F, G, H, H (erroneously denominated as H, probably I), should be stricken from the brief because of lack of compliance with RAP 10.3.

Furthermore, no authorities are submitted for any of the suggested claims of error. State v. Brooks, 113 Wash. App. 397, 400—401, 53 P.3d 1048, 1050 (2002). See also State v. Gaddy, 114 Wash. App. 702, 709, 60 P.3d 116, 121 (2002).

IV. SUMMARY AND CONCLUSION

This Court should affirm in all respects

Respectfully submitted this 24 day of August, 2010

A handwritten signature in cursive script that reads "David L. Day". The signature is written in black ink and is positioned above a horizontal line.

DAVID L. DAY, WSBA #8361

Attorney for Respondent

P.O. Box 526

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RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 23, 2010

David Lawrence Day
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Everett, WA, 98204

CASE #: 64878-1-1
Sue Sherman, App. v. Dennis Diedrich, Res.

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on March 22, 2010:

Sue Sherman has filed a notice of appeal of a superior court order that directs her to sign documents to accomplish the sale of her interest in a parcel of property, and directing transfer of title to a purchaser if she fails to sign the transfer documents. This court raised the question whether the order is appealable. Respondent, Dennis Diedrich, did not appear or respond to the court's motion.

The limited materials provided to me do not reveal a clear picture of the nature of the proceedings in the superior court. It appears that the superior court appointed a referee in a partition action pursuant to RCW 7.52.100 and RCW 7.52.210. The referee recommended a sale of the property to the Department of Natural Resources for \$63,000. The superior court approved the referee's report and ordered Dennis Diedrich and Sue Sherman to "sign all documents necessary and incidental to closing the sale to the State

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EXHIBIT
1

of Washington, Department of Natural Resources for the sum of \$63,000.” The court also ordered that in the event either party fails or refuses to sign the documents necessary to convey the property within 10 days, “title shall be divested from Dennis Diedrich and Sue Sherman and shall be vested in the State of Washington, Department of Natural Resources. This Order and Judgment shall be deemed a conveyance of all right, title and interest in and to the described property pursuant to RCW 6.28.010 et. seq. and CR 70.”

The narrow question before me is whether this order is appealable even though there are remaining issues of the distribution of the proceeds to be completed after the sale/transfer. This ruling does not address the merit or lack of merit in Ms. Sherman’s arguments that the property should not be sold.

RAP 2.2(a) governs appeals as a matter of right, including “final judgments,” RAP 2.2(a)(1), and “[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” RAP 2.2(a)(3).

The Forgay-Conrad doctrine allowing appeals of orders directing the transfer of at least some forms of property may apply but the limits of that doctrine are also uncertain.^[1]

^[1] “In Gazin v. Hieber, 8 Wn. App. 104, 504 P.2d 1178 (1972), the court found that, in the circumstances of the case, CR 54(b) did not apply, but adopted as a rule of decision the so-called Forgay-Conrad rule, allowing an appeal when property is ordered by interim order to be delivered. But some aspects of the holding in Gazin have subsequently been called into question and it appears that CR 54(b) must be complied with when there are multiple claims only some of which have been resolved by a partial summary judgment. See Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878, 567 P.2d 230 (1977) (Supreme Court held that a single claim for relief, on one set of facts, is not converted into multiple claims, for purposes of CR 54(b), by the assertion of various legal theories in support of recovery.). The key question is whether there are multiple claims and thus CR 54(b) must be satisfied or if there are not multiple claims, in which case, under Gazin, a ruling compelling a conveyance of property may be appealable. It appears that CR 54(b)

Perhaps more helpful is the authority that an order partitioning property is appealable.^[2] If an order actually partitioning the property is appealable, then an order directing the sale of property as part of the partition action would also seem to be appealable.

In the absence of any arguments in opposition, I conclude that the superior court ruling is appealable as a matter of right.

I want to point out to Ms. Sherman that this ruling does not stay the effect of the trial court order. Because the order is a decision affecting real property, she will need to apply to the superior court for a supersedeas order under RAP 8.1(b)(2). It may be that the trial court will conclude that the value of the property itself is adequate security to supersede the transfer of the property, but the court may consider all the factors under RAP 8.1(c)(2), including the reasonable value of the use of the property during an anticipated appeal, to determine the amount of any bond required to supersede the transfer of the property.

Therefore, it is
ORDERED that this matter is appealable as a matter of right and the clerk shall set a perfection schedule

Sincerely,

displaces Forgay-Conrad if CR 54(b) is properly applicable. However, if, as in Gazin, the court rules that there are not multiple claims, Forgay-Conrad could still apply. In the latter circumstance, certification would not be necessary or appropriate; the order by its nature would be appealable." 2 Lewis H. Orland & Karl B. Tegland, Washington Practice: Rules Practice RAP 2.2, AT 487 (5th ed. 1997).

^[2] Order partitioning real property is final judgment appealable as matter of right. Anderson & Middleton Lumber Co. v. Quinault Indian Nation 79 Wash.App. 221, 901 P.2d 1060, review granted 128 Wash.2d 1021, 913 P.2d 815, affirmed 130 Wash.2d 862, 929 P.2d 379. (1995)

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal line extending to the right.

Richard D. Johnson
Court Administrator/Clerk
TWG

APPENDIX

RCW 4.64.030(b) Entry of judgment — Form of judgment summary.

(b) If the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment page number where the full legal description is included, if applicable; or the assessor's property tax parcel or account number, consistent with RCW 65.04.045(1) (f) and (g).

CR 60(b)(3)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

... (balance of rule omitted for brevity)

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

RAP 10.3

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

- (1) *Title Page.* A title page, which is the cover.
- (2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.
- (3) *Introduction.* A concise introduction. This section is optional. The introduction need not contain citations to the record or authority.

(4) *Assignments of Error*. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) *Statement of the Case*. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) *Argument*. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) *Conclusion*. A short conclusion stating the precise relief sought.

(8) *Appendix*. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

FILED
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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUE SHERMAN,)	No. 64878-1-I
)	
Appellant,)	Skagit County Superior Court
)	Case No.: 08-2-00439-5
vs.)	
)	DECLARATION OF
DENNIS DIEDRICH,)	MAILING
)	
Respondent.)	

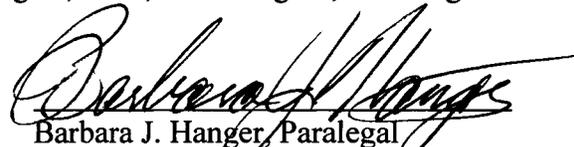
Barbara J. Hanger, under penalty of perjury declares the following:
That on the 26th day of August, 2010, she caused to be deposited in the United States mail at Burlington, Washington, postage prepaid, a copy of the Respondent's Reply Brief and a copy of (this) Declaration of mailing addressed to the following:
Sue Sherman
614 106th Pl. SW
Everett, WA 98204

//
//
//

ORIGINAL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 26th day of August, 2010, at Burlington, Washington.

A handwritten signature in black ink, appearing to read "Barbara J. Hanger", written over a horizontal line.

Barbara J. Hanger, Paralegal
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