

Court of Appeals No. 67954-6-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

JOHN K. DAHL

Plaintiff/Respondent,

v.

LEO GILLESPIE

Defendant/Appellant,

BRIEF OF APPELLANT

FILED
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STATE OF WASHINGTON
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ORIGINAL

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I. INTRODUCTION

This case presents a unique question. It addresses the unusual circumstance of when a tenant, who has a claim to title to real property for which it has possession, is subject to an eviction action before that title claim can be determined by a court. This question is presently not answered by any reported (or unreported case) in the State of Washington.

The facts are undisputed in this case. Rather, pure questions of law are presented.

In this case, Ms. Lillian Hagen as a part of a lease agreement, agreed to devise to Mr. Gillespie a property in which he resided. The lease was signed in February 2002. This lease provides in relevant part:

10. Additional Lease Terms: Landlord agrees to devise to the Tenant(s) the above mentioned property free and clear of any encumbrances in her Last Will and Testament together with all monies paid in rent, property taxes and repairs during the lease period.

CP 0048, 0053, 0170.

Ms. Hagen died in 2011. Her probate was initiated later that month. In June 2011, Mr. Gillespie filed a TEDRA action in Ms. Hagen's probate. In July, 2011, Mr. Dahl, as Personal Representative of Ms. Hagen's Estate, initiated an unlawful detainer action against Mr. Gillespie.

The trial court, by a Commissioner, entered judgment against Mr. Gillespie, terminating his tenancy and ordering him to

pay rent to continue his tenancy. On a Motion for Revision, the trial court affirmed the Commissioner.

In entering judgment against Mr. Gillespie, the trial court necessarily made the following rulings:

1. That he was a tenant;
2. That had not presented a viable legal or equitable defense to the entry of judgment against him; and,
3. That there was a default in rent.

The trial court erred. Mr. Gillespie has a contract with Ms. Hagen wherein she agreed to devise the Property to him. Written contracts to devise have long been recognized and enforced by Washington courts. *Schirmer v. Nethercutt*, 157 Wash. 172, 179, 288 P. 265 (1930); *see also, Krause v. Miller*, 173 Wash. 1, 21 P.2d 268 (1933); *Hagen v. Messer*, 38 Wn. App. 31, 31-32, 683 P.2d 1140 (1984).

Even oral contracts to devise have long been enforced by Washington courts. *Southwick v. Southwick*, 34 Wn.2d 464, 208 P.2d 1187 (1949) *citing Luther v. Nat'l Bank of Commerce*, 2 Wn.2d 470, 477, 98 P.2d 667 (1940); *see also Raab v. Wallerich*, 46 Wn.2d 375, 282 P.2d 271 (1955); *Jennings v. D'Hooghe*, 25 Wn.2d 702, 704-06, 172 P.2d 189 (1946); *Fischer v. Soames*, 196 Wash. 41, 81 P.2d 836 (1938); *McCullough v. McCullough*, 153 Wash. 625, 280 P. 70 (1929); *Wasmund v. Wasmund*, 145 Wash. 394,

260 P. 259 (1927); *Alexander v. Lewes*, 104 Wash. 32, 175 P. 572 (1918).

Mr. Dahl argued at the trial court that an unlawful detainer action is not the proper forum to resolve a claim to title citing *Puget Sound Investment Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (1998). That is true. However, Washington courts hold that title claims must be resolved before an unlawful detainer action can proceed. *Id.* The *Puget Sound* case addressed an unlawful detainer prosecuted by a purchaser at a tax sale against the owner of real property who had not properly perfected his title. The issue presented by this case involves the unusual situation when a claim of title is made by a tenant. Mr. Gillespie cannot find a Washington case addressing this question.

By entering judgment against Mr. Gillespie, the trial court has entered a judgment on the merits of his claim and thus, the matter is now arguably *res judicata*. By entering judgment in the unlawful detainer action, Mr. Gillespie has been denied an opportunity to present his claims to title.

The trial court should be reversed, the judgment vacated and the unlawful detainer action dismissed without prejudice.

II. ASSIGNMENT OF ERROR

The trial court erred by entering an Order to Show Cause for Issuance of Writ of Restitution and for Judgment

for Unlawful Detainer, and by denying Gillespie's Motion for Revision and Order for Disbursement of Funds.

III. ISSUES RAISED

Issue No. 1: Whether it is proper to enter final judgment in an unlawful detainer action before a residential tenant's claims to title have been resolved?

Issue No. 2: When a residential tenant presents a viable legal or equitable defense to claim for unlawful detainer, should the matter be set over for trial as stated in RCW 59.18.380?

IV. STATEMENT OF THE CASE

The facts of this case are undisputed.

A. SUBSTANTIVE FACTS

Appellant Leo E. Gillespie ("Mr. Gillespie") and the now-deceased, Ms. Lillian L. Hagen ("Ms. Hagen"), were long-time friends. CP 0020. As part of that friendship, Ms. Hagen purchased a property for Mr. Gillespie and his then-partner, Mr. Petter Petterson ("Mr. Petterson")¹ as a residence. CP 0020. Ms. Hagen allowed Mr. Gillespie and Mr. Petterson to search and choose a property within the budget of \$250,000.00. CP 0020. Ms. Hagen eventually purchased the following property:

¹¹ Mr. Petterson passed away in October 27, 2005. CP 0022.

Lot 1, Block 8, LAGO VISTA, according to the plat thereof recorded in Volume 30 of Plats, Page 45, records of King County, Washington.

Being more commonly known as 20041 – 6th Avenue Northeast, Shoreline, Washington, 98155.

(“Property”). CP 0028-0043, 0150 – 0167.

On or about February 2, 2002, Ms. Hagen, Mr. Gillespie, and Mr. Pettersen entered into a residential leasing agreement relating to the Property (“Agreement”). CP 0047 - 0055, 0169 – 0177. The Lease provides in relevant part:

10. Additional Lease Terms: Landlord agrees to devise to the Tenant(s) the above mentioned property free and clear of any encumbrances in her Last Will and Testament together with all monies paid in rent, property taxes and repairs during the lease period.

CP 0048, 0053, 0170.

Additionally, on March 8, 2002, Ms. Hagen created a handwritten addition to her Will, in which she stated:

This is an addition to my will. I wish to give the house I own at 20041 – 6th Avenue NE, Lot 1, Block 8 Lago Vista Shoreline King County, Wash. 98155 to Petter M. Pettersen & Leo E. Gillespie present time renters to said house. Both good friends of mine and Olaf.²

3/18/02 /s/ Lillian L. Hagen.

CP 0057, 0179.

On October 2, 2003, Ms. Hagen executed the Last Will and Testament of Lillian L. Hagen. CP 0315 - 0318 (Supplemental

² Mr. Olaf Hagen was Mrs. Hagen’s husband. He predeceased her.

Designation of Clerk's Papers). In her will, Ms. Hagen did not devise the Property to Mr. Gillespie. Mr. Gillespie was also not mentioned in the will. On information and belief, Plaintiff/Respondent John Dahl ("Mr. Dahl") drafted Ms. Hagen's will. CP 0145. Mr. Dahl is the personal representative of Ms. Hagen's estate.

Prior to Mr. Pettersen's death on October 27, 2005, Ms. Hagen made the real estate tax payments. CP 0023. Upon information and belief, she used said payments as a deduction from her personal income taxes. CP 0023. After Mr. Pettersen's death October 27, 2005, Mr. Gillespie paid the real estate taxes for the remaining taxable years. CP 0023.

While residing in the Property, Mr. Gillespie and Mr. Pettersen made rent payments and repairs to the residence. CP 0022. Occasionally, Mr. Gillespie and Mr. Pettersen would miss a monthly rent payment. CP 0023. Ms. Hagen, did not at any time take any action to evict or demand payment from Mr. Gillespie or Mr. Pettersen for unpaid monthly rents or other monies which may have been due under the Lease. CP 0023. At the time of her death, \$6,000 in rent was unpaid. CP 0023.

On May 22, 2011, Ms. Hagen passed away. CP 0023.

B. PROCEDURAL HISTORY

**1. *In re Estate of Lillian L. Hagen,*
King County Superior Court
Cause No. 11-4-03257-1 SEA.**

On May 25, 2011, the Superior Court of King County entered an Order Probating the Will of Lillian L. Hagen, under Cause Number 11-4-03257-1 SEA ("TEDRA Matter"). CP 0132 – 0134.

On June 29, 2011, Mr. Gillespie filed a Verified Petition for Declaratory Judgment Determining Title to Real Property, asserting his right as legal owner of the Property. CP 0142 – 0189.

On July 12, 2011, Mr. Dahl, as Executor of the Estate of Lillian L. Hagen, was personally served with a copy of the TEDRA Petition. CP 0191. On July 21, 2011, Mr. Raymond Walters, counsel for Mr. Dahl, was provided a copy of the TEDRA Petition. CP 0193 – 0195.

**2. *Dahl v. Gillespie*
King County Superior Court
Cause No. 11-4-03257-1SEA**

Mr. John K. Dahl initiated an eviction action against Mr. Gillespie on July 26, 2011, nearly a month after the TEDRA Action had been filed and two weeks after he had been served with a copy of the TEDRA Petition. CP 0001 – 0004. An Order to Show Cause as to why the Court should not issue a Writ of Restitution was entered on July 27, 2011 and July 28, 2011. CP 0014 – 0015, 0016- 0017. In his Response to Order to Show Cause, Mr. Gillespie moved the Court to consolidate this unlawful detainer

matter and the TEDRA Matter. In said Response, Mr. Gillespie contends that Mr. Gillespie's TEDRA Petition and Mr. Dahl's Complaint for Unlawful Detainer contain the common question of who is the rightful owner of the Property. CP 0119 – 0138.

On August 19, 2011, Mr. Gillespie's motion to consolidate was denied and an Order to Show Cause for Issuance of Writ of Restitution was entered. Commissioner James Marshall found that Mr. Dahl, as executor of the estate, was entitled to a judgment of \$1,000.00 and that Mr. Gillespie's tenancy at the Property was terminated. The Court also ordered that Mr. Gillespie had the right to reinstate his tenancy by depositing a sum of \$1,000.00 into the registry of the Court. It was furthered ordered that beginning September 1, 2011, Mr. Gillespie may remain in possession of the Property only if he makes \$500.00 monthly rental payments into the trial court's registry pursuant to the lease.³ CP 0201 – 0204. The Commissioner did not order the payment of the \$6,000 in past due rents or any other amount claimed by Mr. Dahl. CP 0202. Judgment was entered on these amounts. CP 0201 - 0204.

On August 29, 2011, Mr. Gillespie filed a Motion for Revision of Commissioner's Ruling with regard to the Court's denial of Mr. Gillespie's motion to consolidate and the granting of an Order to Show Cause for Issuance of Writ of Restitution. CP 0210 – 0229.

³ Mr. Gillespie has been making these payments.

The trial court denied denying the motion for revision on October 21, 2011. CP 0266 – 0268.

In the TEDRA Matter, Mr. Gillespie also offered a motion to consolidate the TEDRA Petition with the Complaint for Unlawful Detainer. CP 0269 – 0279. On November 4, 2011, Chief Civil Judge Laura Inveen denied the motion to consolidate the matters. CP 0299 – 0300.

On November 8, 2011, Mr. Gillespie filed a Notice of Appeal to Court of Appeals for the appellate review of 1) Order on Show Cause for Issuance of Writ of Restitution & for Judgment for Unlawful Detainer, and 2) Order Denying Motion for Revision and Order of Disbursement of Funds. CP 0301 – 0311.

V. ARGUMENT

A. THE STANDARD OF REVIEW AND RULES OF CONSTRUCTION

The appropriate standard of review in this matter is de novo.

On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner. RCW 26.12.215; RCW 2.24.050; *In re Marriage of Moody*, 137 Wn.2d 979, 992–93, 976 P.2d 1240 (1999). When an appeal is taken from an order denying revision of a court commissioner's decision, we review the superior court's decision, not the commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008).

Williams v. Williams, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Amren v.*

City of Kalama, 131 Wn.2d 25, 32, 929 P.2d 389 (1997). Additionally, the dispositive issue in this case is the procedural requirements under the unlawful detainer statutes. Issues of statutory interpretation are reviewed de novo. *Hartson P'ship v. Goodwin*, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000).

Housing Authority of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005).

This matter involves both RCW 59.12 and RCW 59.18 both of which relate to the landlord tenant relationship. Thus, they should be read together in a consistent fashion. "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other." *In re Detention of Coppin*, 157 Wn. App. 537, 552, 238 P.3d 1192 (2010). Further, both statutes are in derogation of the common law and therefore must be strictly construed in favor of Mr. Gillespie, the ostensible tenant in this matter. *Cf. Hous. Auth. v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990); *Truly v. Heuft*, 138 Wn.App. 913, 918, 158 P.3d 1276 (2007).

B. AN UNLAWFUL DETAINER CANNOT PROCEED UNTIL CLAIMS TO TITLE ARE RESOLVED

Mr. Dahl did not identify under which section of RCW 59.12 or RCW 59.18 he was proceeding. RCW 59.12 is the general unlawful detainer action and RCW 59.18 relates to the residential landlord tenant relationship. Mr. Gillespie asserts that the proper statute to have proceeded under was RCW 59.18.365 through RCW 59.18.410 and notes that Mr. Dahl used the form of

summons required by RCW 59.18.365. CP 0001 – 0002, 0008 – 0009, 0010 - 0011. This brief will address both statutes as Mr. Dahl relied primarily on cases addressing RCW 59.12. CP 0203, 0237 - 0238. Assuming that both statutes are in play, Mr. Dahl apparently proceeded under RCW 59.13.030(3) relating to default in rent and generally RCW 59.18 relating to an alleged default in rent.

RCW 59.12.030 defines an unlawful detainer by a tenant as one who is a holdover tenant, the tenancy has been terminated, there has been a default in rent, there is a breach of the agreement which is not a default in rent, when waste has occurred, a tenant is a trespasser or a tenant commits or permits gang activity. RCW 59.12.030

Under RCW 59.12, when there is an issue relating to title, that issue must be resolved before an unlawful detainer action can proceed. In *Puget Sound Investment Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (1998),⁴ a purchaser of property at a tax foreclosure sale conducted by the Internal Revenue Service began an unlawful detainer action against the former owner. The action was pursued under RCW 59.12. The court stated that the tax sale purchase could not proceed with an unlawful detainer as follows:

⁴ A case relied upon by Mr. Dahl at CP 0238.

Puget Sound may not proceed under subsection (6) of the unlawful detainer statute unless it can show that Bridges entered on the land “without permission of the owner and without having color of title thereto”. Bridges holds a statutory warranty deed. The deed gives Bridges color of title. Therefore, Puget Sound must establish superior title before it may proceed under RCW 59.12.030(6). The appropriate procedure is action in ejectment and quiet title under RCW 7.28.

92 Wn. App. at 527. This court also stated: “We hold that dispossession may not be achieved through an action for unlawful detainer when title has not been cleared.” *Id.* at 525. Further, this court stated that an unlawful detainer actions “do not provide a forum for litigating claims to title.” *Id.* at 526. There is no case in Washington addressing the situation when a tenant makes a claim to title as against a landlord. There is no reason why a tenant with a claim to title should not be afforded the same opportunity as that identified in the *Puget Sound* case

RCW 59.18 does not have such a specific definition of what is an unlawful detainer as RCW 59.12, but rather addresses the right of possession. RCW 59.18.370 provides in relevant part:

The plaintiff, at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, upon filing the complaint, may apply to the superior court in which the action is pending for an order directing the defendant to appear and show cause, if any he or she has, **why a writ of restitution should not issue restoring to the plaintiff possession of the property** in the complaint described, and the judge shall by order fix a time and place for a hearing of the motion, which shall not be less than seven nor more than thirty days from the date of service of the order upon defendant.

(Emphasis added.) RCW 59.18.380 provides in relevant part:

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and **assert any legal or equitable defense or set-off arising out of the tenancy.** ...

If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer.

(Emphasis added.).

Under this statute, the trial court was obligated to determine Mr. Gillespie presented a "viable legal or equitable defense to the entry of a writ of restitution" and if so, set the matter over for trial. *Leda v. Whisnand*, 150 Wn. App. 69, 83, 207 P.2d 4678 (2009).

As is shown below, the unlawful detainer action, under either statute, was premature. The trial court should be reversed, the judgment and orders vacated and the matter dismissed.

C. MR. GILLESPIE'S CLAIM TO TITLE IS A VIABLE LEGAL AND EQUITABLE THEORY WHICH MUST BE DECIDED FIRST

The Lease is a valid, enforceable contract to devise the Property to Mr. Gillespie. Contracts to devise have long been upheld by the Washington courts.

We have had many cases where agreements to devise or devise personal and real property to a favored beneficiary have been upheld. There is nothing illegal or against public policy in such contracts.

Schirmer v. Nethercutt, 157 Wash. 172, 179, 288 P. 265 (1930);
see also, *Krause v. Miller*, 173 Wash. 1, 21 P.2d 268 (1933)
(written contract to make mutual wills enforced); *Hagen v. Messer*,
38 Wn. App. 31, 31-32, 683 P.2d 1140 (1984) (written contract to
devise enforced).⁵

The rule is stated in 94 C.J.S. Wills, §111, p. 863

Although usually put in the form of an agreement to devise by will, that is not essential, it being sufficient that there is an agreement to leave the property or that the promisee shall have it at the death of the promisor; the fact that the mode whereby the disposition is to be effected is not specified does not impair the validity of the agreement.

Evans v. Laurin, 70 Wn.2d 72, 77, 422 P.2d 319 (1966).

In *Hagen v. Messer*, the daughters of Mr. Cleopas Messer brought suit to enforce a property settlement agreement he signed with his ex-wife (their mother). In that agreement, Mr. Messer agreed to “leave by will any property or interest that he can legally pass by testamentary disposition” to the daughters. The property settlement agreement was signed in 1949. Mr. Messer remarried in 1956 and conveyed a life-estate to his second wife in some real property he owned. Mr. Messer died in 1978 and the daughters brought suit seeking to enforce the agreement. This court concluded that the written contractual obligation to devise was

⁵ In 1999, this court addressed a similar case involving a written contract to obtain life insurance for a disabled adult child. *Clark v. Clark*, 1999 WL 106898 (Docket # 41798-3-1). However, as this case is not published it is not cited as authority. GR 14.1(a).

enforceable but also that the life-estate given to the second wife was also valid and did not violate the prior property settlement agreement. *Id.* at 32-34.

In addition to enforcing written contracts to devise, oral contracts to devise are enforced in Washington.

It is well settled in this state that oral contracts to devise and devise real and personal property are enforceable if they are established by evidence that is conclusive, definite, and beyond all legitimate controversy, and if there has been sufficient performance to remove the bar of the statute of frauds.

Southwick v. Southwick, 34 Wn.2d 464, 208 P.2d 1187 (1949) citing *Luther v. Nat'l Bank of Commerce*, 2 Wn.2d 470, 477, 98 P.2d 667 (1940); see also *Raab v. Wallerich*, 46 Wn.2d 375, 282 P.2d 271 (1955); *Jennings v. D'Hooghe*, 25 Wn.2d 702, 704-06, 172 P.2d 189 (1946); *Fischer v. Soames*, 196 Wash. 41, 81 P.2d 836 (1938); *McCullough v. McCullough*, 153 Wash. 625, 280 P. 70 (1929); *Wasmund v. Wasmund*, 145 Wash. 394, 260 P. 259 (1927); *Alexander v. Lewes*, 104 Wash. 32, 175 P. 572 (1918).

Mr. Gillespie set forth a viable legal and equitable claim to title in the trial court. He asserts an ownership right in the Property based upon Ms. Hagen's contractual obligation to devise the property to him as stated in the Lease. CP 0021, 0047 – 0055, 0169 - 0177. Mr. Dahl did not provide any authority that Mr. Gillespie's claim was not recognized and enforced by Washington law. He cited no cases contradicting Mr. Gillespie's claims. As Mr.

Gillespie met his burden, the matter should have been set over for trial. The trial court erred.

D. THE FINAL JUDGMENT ARGUABLY RENDERS MR. GILLESPIE'S CLAIMS RES JUDICATA

In entering judgment against Mr. Gillespie, the trial court necessarily made the following rulings:

1. That he was a tenant;
2. That had not presented a viable legal or equitable defense to the entry of judgment against him; and,
3. That there was a default in rent.

By entering the judgment, the trial court rejected Mr. Gillespie's claims and thus, it appears that *res judicata* may apply. The judgment on an unlawful detainer necessarily means that the court has concluded that Mr. Gillespie did not offer a valid legal theory to defend the claim. That is a decision on the merits in this case and thus has *res judicata* effect.

The elements of *res judicata* are:

Res judicata is a doctrine of claim preclusion. It bars relitigation of a claim that has been determined by a final judgment. *Res judicata* applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication.

(Citations omitted.) *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-731, 254 P.3d 818 (2011).

Here, as is stated in *Puget Sound Investment Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (1998), title claims must

be resolved prior to the initiation of an unlawful detainer. Part of the purpose for such a rule is to avoid the *res judicata* effect that a final judgment in the unlawful detainer would have on any defense offered by the tenant. Here, as a final judgment has been entered against Mr. Gillespie, he is apparently now barred from asserting it in the TEDRA Matter. In short, the trial court decided the issue without considering the merits. That was error.

VI. CONCLUSION

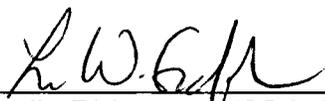
For the above stated reasons, the trial court should be reversed, the judgment vacated and the matter dismissed without prejudice.

Dated this 5th day of March, 2012.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 
Catherine C. Clark, WSBA 21231
Attorney for Leo Gillespie

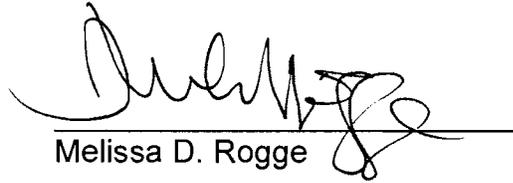
RIDGWAY GAFKEN, P.S.

By: 
Sheila Ridgway, WSBA 14759
Lisa Gafken, WSBA 31549
Attorney for Leo Gillespie

Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 5th day of March, 2012:

Via Messenger Hand Delivery
Raymond J. Walters, WSBA 6943
9728 Greenwood Ave. N., Ste A
Seattle, WA 98103



Melissa D. Rogge