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NO. 68539-2-1

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

MARY FUNG KOEHLER,

Plaintiff-Appellant,

v.

BLYTHE C. LAWRENCE, as Personal Representative of the
ESTATE OF REXFORD LAWRENCE, deceased,

Defendant-Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT OF
WASHINGTON CAUSE NO. 08-2-05568-0 SEA

(HONORABLE RICHARD A. EADIE)

REPLY BRIEF OF APPELLANT

MARY FUNG KOEHLER,
Appellant, Plaintiff, *Pro se*

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Comes now appellant, Mary Fung Koehler, and relies to respondent's brief based only on what she has discussed in her opening brief and makes the following:

MOTION

Motion for permission to submit pagination of the cases and authorities cited in Appellant's incomplete Opening and Reply Brief, and to have this Court base its opinion on the pleadings in the Clerk's Papers as well as the incomplete opening brief. All the interlocutory orders are void for lack of jurisdiction except for most of the July 21, 2008 Findings of Fact and Conclusions of Law.

Besides having continual virus, printer and computer problems, Koehler has been experiencing health problems arising out of her dominant right hand since June 2012. She had been advised that the trigger finger surgery on September 12, 2012 would only cause 2 days of disability and that she could resume normal activities.

Instead she was bedridden for almost 3 weeks, checked for infection by another available orthopedic surgeon, and

then worked on exercises arising out of four occupational therapy sessions.

Her status appeared to stabilize and then she started experiencing burning sensation in that hand in late December 2012, Revisiting her orthopedic surgeon, he referred her for nerve conduction electrodiagnosis tests with Randi Beck, MD in physical medicine and rehabilitation. Her examination revealed severe right carpal tunnel syndrome with weakness in the thumb and decreased sensation in Koehler's fingers explained her extreme decline in typing ability and the use of technology.

Koehler is scheduled for carpal tunnel surgery on February 13, 2013. Hopefully the right thumb nerve can be saved so she does not lose the use of that hand. The malignant hypertension she has been experiencing is probably due to the inflammation resulting from the nerve damage which has extended to swollen feet and ankles..

I. INTRODUCTION

What started out as a straight forward, special statutory proceeding in unlawful detainer that should have been granted

to plaintiff Koehler five years ago, morphed into a complex convoluted case. Defendant Lawrence, his counsel Blackmon, and the trial court, negligently and/or intentionally misapplied *stare decisis*, statutes, and the evidence in this matter by leaving out crucial, material word or phrases of the authorities they employed which will be demonstrate below.

Respondent acknowledges on page 21 of the response brief that the question of right to possession was resolved by the trial court following trial on June 16, 2008.

However, *Munden v. Hazenrigg*, 105 Wn.2d 39, at 47 (1985) requires resolution before trial as set forth below.

[2] proceedings. We also note that the trial court has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action. The court may require amended pleadings to convert the unlawful detainer to a civil suit. It may grant a continuance. In any event, once converted, the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.

The clear distinction between *Munden, ibid.*, and this case is that the tenants had vacated possession before commencement of the trial of the unlawful detainer action while Lawrence, then and now, his family were in possession as tenants and now the estate has questionable title as owner

on the basis of void transactions between them and Varnell,
the extra legal custodial receiver.

ii TIMELINESS OF APPEAL AND APPEALABILITY

There are two methods for seeking review of the trial court decisions. See RAP 2.1(a). Review by permission of the reviewing court is called "discretionary review". Review as a matter of right is called "appeal". Thus, the commonly used phrase "appealable as of right" is redundant. If a decision is reviewable as a matter of right it is simply "appealable".

RAP 2.2 determines whether a particular superior court decision is appealable. Of the 13 subsections of RAP 2.2(a) which specify appealable orders, subsection (a)(3) is controlling here. It provides, in pertinent part,

(a)(3) DECISION DETERMINING ACTION.

Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a judgment or discontinues the action.

Throughout this case, Lawrence and his counsel, Blackmon, have mischaracterized the business relationship of him as a tenant who had a lease and an option to purchase the

**Condo with that of the fee simple owner and landlord,
Koehler.**

When Lawrence used his problems with marital support enforcement and credit records to hide the true nature of his financial situation to induce Koehler and the mortgage broker to think Lawrence was ineligible for a 6% mortgage on the \$146,950 transaction, Koehler agreed to buy the property as owner and qualify for a mortgage of \$138,133. She leased it to Lawrence for monthly rentals consisting of the monthly mortgage payment and homeowner's dues, insurance, and real estate taxes, coupled with an option to purchase drafted by Lawrence, the exercise of which terminated the lease.

At closing of the purchase, Koehler was informed that Lawrence's elderly aunt in Holland had supplied \$50,000 of the down payment and closing costs so that Koehler ended up only borrowing \$95,517. Believing Lawrence was going to exercise the option in about 2 years, she allowed him to choose the form of the monthly mortgage payments that he was comfortable making. (CP 87-94)

From the inception of his occupancy, Lawrence paid the mortgage payments into Koehler's personal checking account

for 6 years until after Koehler's Chapter 11 reorganization plan was dismissed in 2005. Lawrence had never insured the Condo to protect Koehler and was unwilling to purchase a policy then as Allstate's cancellation of Koehler's homeowner's policy made coverage difficult to obtain. Had Lawrence not breached the lease the reorganization might not have been dismissed. Lawrence realized that he had only a leasehold interest in the Condo and no security interest in it..

Lawrence then set up a bank account in Koehler's name in trust for himself, and arranged to have the mortgage payments automatically be paid from that account. Koehler was agreeable as her finances had drastically changed due to her house becoming polluted and uninhabitable a year prior.

Judge Middaugh's Additional Finding in the prior litigation, *Lawrence v. Koehler*, King County Superior Court NO. 06-2-05945-0 SEA is excerpted as follows: (CP 119)

2. While the plaintiff notified the defendant that he was exercising his option he never actually applied for a loan to pay off the mortgage or make other payments, and , in fact his offer was not to pay off the current mortgage as required under the contract but to assume the mortgage or, if that could not be done, to pay off the plaintiff and the current mortgage a few months in the future.

Additional Conclusions of Law

3. As found by the court at Summary Judgment, the plaintiff exercised the option to purchase that was available to him by contract. The defendant failed to honor her obligation under the contract and therefore breached the contract.

At all times Koehler was at risk under the mortgage as the principal and only debtor as Lawrence was never at risk under that mortgage. This was to Koehler's detriment; she never received any benefit from owning the Condo monetarily above the minimal mortgage payments which slowly reduced, her legal obligation under the mortgage contract.

In spite of owning WaLaw Realty and as a real estate agent, Blackmon continues to reiterate his dead client's reasoning that Koehler has never paid a nickel towards the Condo. They never understood that Koehler borrowed money from the mortgage company that went to pay 2/3 of the price of the Condo. In return, she was obligated to make mortgage payments which were paid from the rent monies paid to her by Lawrence.

Hopefully, this court won't be misled by Blackmon's rhetoric and other misapplications of the law and evidence, and failure to insert actual timelines.

Koehler helped Lawrence, who she thought was a friend, live in a desirable Condo to allow his daughter to attend a better high school. Koehler homesteaded the Condo on April 23, 2008 after a \$109,000 judgment in favor of Lawrence was filed against her on March 18, 2008. (CP 254)

Pursuant to RCW 4.56.190, Blackmon recorded the judgment in the auditor's office after Koehler filed her Declaration of Homestead. (CP 633) Lawrence only had a judgment lien of the fair market value of the Condo stipulated in the Prior Litigation of \$256,000 (CP 116) less the \$125,000 exemption and the mortgage of about \$82,518. This meant that if Lawrence levied execution, that meant that he would have to raise enough money to pay Koehler her exemption; the existing mortgage; and the costs of appraisal and costs associated with levying execution in order to attempt to gain possession of the Condo. By electing money

damages , Lawrence extinguished any *inchoate* rights he may have had in the property.

RECEIVERSHIP STATUTE

Koehler asserts a custodial receiver only has limited powers.

Pursuant to RCW 7.60 Receivership Statute, the powers and authorization of a Custodian are specific and limited by statute, such as a receiver to conduct a sale to enforce a lien.

Under RCW 7.60.005 Definitions, the definitions in this section apply throughout this chapter unless the context requires otherwise. (Relevant sections are underlined here.)

(3) "Estate" means the entirety of the property with respect to which a receiver's appointment applies, but does not include trust fund taxes or property of an individual person exempt from execution under the laws of this state. Estate property includes any nonexempt interest in property that is partially exempt, including fee title to property subject to a homestead exemption under chapter 6.13 RCW.

(6) "Lien" means a charge against or interest in property to secure payment of a debt or the performance of an obligation.

(7) "Notice and a hearing" or any similar phrase means notice and opportunity for a hearing.

10) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person.

(11) "Receivership" means the case in which the receiver is appointed. "General receivership" means a receivership in which a general receiver is appointed. . "Custodial receivership" means a receivership in which a custodial receiver is appointed.

(12) "Security interest" means a lien created by an agreement.

Purpose -- 2004 c 165: "The purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein." [2004 c 165 § 1.]

The selections above are the relevant definitions that relate to this matter. The trial court had no authority to include Koehler's Condo as it was presumed exempt from execution by the filing of her Homestead Declaration on April 23, 2008 under the definition of Estate.

Applying the definition of "Lien", Lawrence had a small charge against the Condo when part of his judgment became a

judgment as there was little available equity to justify an execution pursuant to RCW 6.13.

Under the definition (7) above, the trial court afforded no Notice and Opportunity for a hearing before or after his “*sua sponte*” appointment of Varnell as a “Custodial Receiver;” Varnell was never was appointed a “General Receiver.”

There was no security interest in this instance as it is defined as a lien by an agreement. Any equitable lien that Lawrence may have had by volunteering such a large down payment without Koehler’s knowledge or consent might have been a potential equitable interest, but it was extinguished by operation of law upon the award of the judgment FOR DAMAGES..

The trial court chose the underlined words and phrases to justify his appointment of a custodial receiver under RCW 7.60.025 Appointment of receiver.

(1) A receiver may may be appointed by the superior court of this state in the following instances, . . .

(1) A receiver may be appointed by the superior court of this state in the following instances,

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action . . . or when the property or its revenue-producing potential is in danger

of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver's appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

(c) After judgment, in order to give effect to the judgment;

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either

before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;

(nn) In such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice.

These phrases were intended for foreclosure of deeds of trust and mortgages where the contracts give the creditor right to rents, profits, and/or possession upon abandonment, default or foreclosure to the trustee or mortgagee. The homestead exemption is not available against such agreements but is available in this case. Consequently, the appointment of the custodial receiver is void.

At the time of the trial court's '*sua sponte*' Order Appointing Custodial Receiver dated July 7, 2008: the Court had been informed on the date of trial on June 16, 2008; that Koehler had filed her intent to reside in the Condo and

recorded her Declaration of Homestead (CP 633) on April 23, 2008.

The court had absolutely no evidence that the Condo or its revenue-producing potential was in danger of being lost or materially injured or impaired; or that it had the right take possession.

(c) After judgment, in order to give effect to the judgment; (This court had not issued a final judgment.)

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer.

It is interesting to note that Respondent's Brief has totally ignored the use of the word "custodial"14 times in spite of the title, "Order Appointing Custodial Receiver ." (CP 610-613) Varnell has clearly used the words Custodial Receiver in most documents (CP 639-641), except when he and Blackmon drew up the closing papers to deed to Blythe, Koehler's Condo.

Powers of the custodial receiver and the general receiver are specific. RCW 6.7. The court treated Varnell as a

general receiver and conferred on him powers of a general receiver knowing that the court had only appointed him as a custodial receiver. The court was further advised by Blackmon in a letter dated June 16, 2010 that only a general receiver has the power and not the custodial receiver to sell the condo other than in the normal course of business. (CP 254-255) This is generally when the judgment debtor wants to sell the property free and clear of liens. This is not the situation here.

At that time Koehler's Homestead Declaration was still presumed valid. Consequently, the trial court had no authority besides the lack of jurisdiction in a statutory summary proceeding to contemplate a private sale allowing the Estate to credit bid its judgment without obeying RCW 6.13, the special procedure set forth to sell homestead property with equity in excess of the \$125,000 homestead exemption and the mortgage balance of at least \$70,000 at the time in a declining real estate market.

Both types of receivers must obey RCW 6.13 requiring them to employ that procedure when exempt homestead property is involved. Without following the requirements of

the RCW 6.13 provisions, the trial court has abused its discretion in the following instances in appointing the custodial receiver; paragraphs 12 and 13 of the Findings of Fact and paragraph D of the Conclusions of Law dated July 21, 2008, it and every subsequent interlocutory order is void for lack of jurisdiction in this summary unlawful detainer action.

Estate is now claiming that Koehler doesn't have the funds to reimburse it for paying off the mortgage \$64,553.30 if the sale is voided as it should be. With a free and clear title, Koehler can obtain another mortgage with a lower interest rate easily.

In addition, the Estate has paid \$1450/ month for 39 months to Varnell amounting to just short of \$60,000. The \$42,416 Lawrence paid on the down payment has saved him \$62,500 from March 3, 1999 to September 22, 2005. (\$121,600 - \$58,800 actual rent paid). Rent of \$1450 since 1999 is a reasonable then and at the commencement of the unlawful detainer. It is evidence for this court to use to determine reasonable rent from Lawrence's exercise of his option to purchase to the present amounts to \$108,750.

Double damages to Koehler as set forth in her complaint for unlawful detainer would wipe out any judgment; Koehler would have no judgment lien to avoid if the trial court's interlocutory orders are voided; and that her bankruptcy case can be closed. It is being held open on the issue of whether the trial court had any authority to invalidate her homestead exemption especially after Blackmon had acknowledged in open Bankruptcy court on July 8, 2011 that Koehler's Homestead Declaration was valid to which there is a Bankruptcy order to that effect.

EQUITABLE LIEN

The other issue keeping the bankruptcy open is whether the trial court had the authority to determine whether Lawrence had an equitable lien when he opted for damages when Koehler proved that he could not obtain specific performance because he set no purchase price in the option he drafted.

On March 3, 1999, Mrs. Koehler obtained a fee simple interest in her purchase of the Condo subject only to the mortgage of \$95,917 which she had executed. Mr. Lawrence had possession through the lease agreement and only an

inchoate right to purchase the unit. There could not have been any equitable lien of any kind in favor of Mr. Lawrence as he had adequate legal remedies against Mrs. Koehler, if he had any performance problems with her at the time of purchase.

She never asked him for more funds than the 6% down payment and did not know that \$57,000 was paid on the day of closing believing for 8 years that his aunt was alive and thought the aunt should be protected on some papers in the future.

Equity only comes into play at a time when a party, with “clean hands,” has no other legal recourse. Consequently, there was never any simultaneous attachment of any equitable lien by Mr. Lawrence at the time of the purchase.

On February 15, 2006, Mr. Lawrence filed his complaint for specific performance or damages. He finally admitted August 13, 2007, at page 2 of Plaintiff’s supplemental Answers to Defendant’ Ist Set of Interrogatories and Requests for Production of Documents, Interrogatory #17 the following:

“Without waiving any prior objection, plaintiff supplements his earlier answer to this interrogatory as follows: My aunt’s name was Renee Hijman. She died in the Netherlands in 1997. I inherited the funds from her at the time of her death. The name of the solicitor

who handled the affairs of her estate was Geboers. His office address at last contact was Prins Hendrikplein 13, the Hague.

Interrogatory #18, . . ."I did not receive or inherit any funds from my aunt since the purchase of the condo, as her death preceded that purchase. I inherited funds from my aunt upon her death"

While the judgment of March 18, 2008 was filed, a lien does not attach until it is recorded in the county auditor's office. There was no equitable lien on Koehler's property as Lawrence had an adequate remedy at law. When he elected to take money damages in lieu of specific performance of the option around August 20, 2007, any and all rights became extinct. Lawrence had volunteered in making the down payment so large. Koehler never expected more than about \$9,000 fo the 6% down payment that she qualified for. There was no fraud on the part of Koehler or any unjust enrichment. The benefit to Lawrence was that only Koehler was legally obligated for the mortgage; received no benefit of possession for the past 13 years; and had to make the payments when he failed to.

The harm to Koehler was that Lawrence failed to purchase any insurance on the Condo itself until he finally purchased one in May 2007, after he initiated Prior Action in 1996 . This was discovered in June 2005, when Mrs. Koehler had filed chapter 11 to give her time to sell her office building for \$890,000. The trustee asked for the Condo policy and that was when Lawrence's fraud of only buying renter's insurance was exposed.

In May 2005 even though the premium was paid to October 2005, Allstate was willing to reinstate coverage on Koehler's polluted house to satisfy the trustee in bankruptcy. However, the trustee in the Chapter 11 moved to convert it to Chap 7 and Judge Thomas dismissed it, so that Koehler lost her sale and about \$400,000 gain.

By electing his remedy at the trial of *Lawrence v. Koehler*, his legal rights were fixed. while not admitting the existence of an equitable right, if he had one, it arose at that time – not when the contracts were first entered into.

If an equitable lien did come into existence at the time of the purchase, the election to receive money damages in lieu of

specific performance extinguished all such rights as, by operation of law, attach to the elected remedy.

NOTICE OF TERMINATION OF TENANCY BY SUFFERANCE

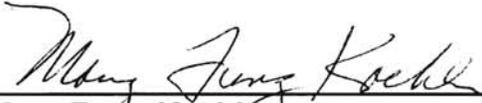
On August 31, 2010, Koehler as the undisputed owner of the Condo gave Notice of Termination to the Lawrence family and to Blythe as the Personal Representative of the estate of Lawrence, the Tenancy by Sufferance that may have been created by the extra legal act of Varnell . (CP 297)

They were given until October 31, 2010 to vacate or be subject to an action for Ejectment guaranteeing Koehler the right to a jury trial.

On September 1, 2010, Blackmon filed a Status Report on behalf of Blythe as defendant and himself as Attorney for defendant knowing full well that there was no competent defendant of record for over 2 years and no substitution was in effect. It stated that Koehler refuses to recognize the authority of the court, the receiver, and to abide by or acknowledge the legitimacy of the court's prior orders. She did not wish to incur additional legal fees and would not object to any actions taken by the court in regards to future actions

of Koehler such as sanctions or orders of prohibition. (CP
295-297)

Respectfully submitted,



Mary Fung Koehler
Petitioner, Plaintiff, Pro Se

Declaration of Mary Fung Koehler

I hereby confirm that all the statements in support of my
motion above are true and correct and are made subject to
penalty of perjury under the Laws of the State of Washington.

Dated this 4th day of February, 2013, at Seattle, Washington.



Declarant
Mary Fung Koehler

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under
the laws of the State of Washington that on February 4, 2013, I
personally caused to be served upon counselor by e-mail to
craig@blackmonholmes.com per agreement of the parties as a
true and correct copy of the Reply Brief of Appellant.

Craig D. Blackmon,
Blackmon Holmes PLLC

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(206) 357-4222

Dated this 4th day of February, 2013, at Seattle, Washington.


Mary Fung Koehler