

70313-7

70313-7

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 11, 2013, 1:30 pm
BY RONALD R. CARPENTER
CLERK

70313-7

~~Supreme Court No. 88015-8~~

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALASKA USA FEDERAL CREDIT UNION,

Respondent,

v.

DWIGHT M. HOLLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

**BRIEF OF RESPONDENT ALASKA USA FEDERAL CREDIT
UNION**

James W. Draper, WSBA No. 9249
Dane M. Woldseth WSBA No. 40891
Law Office of James W. Draper
400 108th Ave. NE, Suite 420
Bellevue, WA 98004
Tel: (425) 646-0104
Attorney for Respondent

 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... i - iv

TABLE OF AUTHORITIES v - vii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR1

 A. Whether the superior court erred in awarding Summary Judgment to Alaska on its breach of contract claim (Holland’s Assignments of Error Nos. 5-7)?.....2

 B. Whether the superior court erred in failing to dismiss Alaska’s Complaint due to a lack of standing (Holland’s Assignment of Error No. 1)?2

 C. Whether the superior court erred in failing to dismiss Alaska’s Complaint due to the trial court lacking subject matter jurisdiction (Holland’s Assignment of Error No. 2)?2

 D. Whether the superior court committed an abuse of discretion with its order entered at the hearing on Alaska’s Motion for a Prejudgment Order Awarding Possession Pursuant to RCW 7.64 (Holland’s Assignment of Error No. 3)?2

 E. Whether the superior court erred in refusing to grant Holland’s motion for recusal of the trial court judge pursuant to RCW 4.12.040 & .050, and Code of Judicial Conduct Canon 1 & 2 (Holland’s Assignment of Error No. 4)?2

III. STATEMENT OF CASE.....2

IV. ARGUMENT.....7

A. Whether the superior court erred in awarding Summary Judgment to Alaska on its breach of contract claim (Holland’s Assignments of Error Nos. 5-7)?	8
1. Standard of Review	8
2. Analysis	8
a. Summary Judgment Standard	9
b. Making of the Contract	10
c. Security Interest	10
d. Default	10
e. Amount Due	11
3. Holland’s Arguments against Summary Judgment	11
a. Holland’s Claim the Debt was Not in Default Based on “Accord & Satisfaction”	12
b. Lack of Notice of Acceleration	14
c. Remainder of Holland’s Arguments Against Summary Judgment	15
B. Whether the superior court erred in failing to dismiss Alaska’s Complaint due to a lack of standing (Holland’s Assignment of Error No. 1)?	16
1. Standard of Review	16
2. Analysis	16
C. Whether the superior court erred in failing to dismiss Alaska’s Complaint due to the superior court lacking subject matter jurisdiction (Holland’s Assignment of Error No. 2)?	18

1. Standard of Review	18
2. Analysis	18
D. Whether the superior court committed an abuse of discretion with its order entered at the hearing on Alaska’s Motion for a Prejudgment Order Awarding Possession Pursuant to RCW 7.64 (Holland’s Assignment of Error No. 3)?	18
1. The Superior Court’s July 13, 2012 Order is Not Subject to Appeal	18
2. The Superior Court’s July 13, 2012 Order is Moot...19	
3. If the Superior Court’s July 13, 2012 Order is Subject to Appellate Review, and is not moot, the Superior Court did not abuse its discretion with the Order.....	20
a. Standard of Review	20
b. Analysis.....	20
E. Whether the Superior court erred in refusing to grant Holland’s motion for recusal of the Superior court judge pursuant to RCW 4.12.040 & .050, and Code of Judicial Conduction Canon 1 & 2 (Holland’s Assignment of Error No. 4)?	21
1. Affidavit of Prejudice, RCW 4.12.040 and .050	22
a. Standard of Review.....	22
b. Analysis.....	22
2. Code of Judicial Conduct 1 & 2	23
a. Standard of Review	23
b. Analysis.....	23

V.	<u>REQUEST FOR ATTORNEY FEES PURSUANT TO RAP 18.1</u>	28
VI.	<u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

Washington Cases

<i>Beal v. City of Seattle</i> , 134 Wash.2d 769 (1998)	16
<i>Davis v. W. One Auto. Grp.</i> , 140 Wash.App. 449 (2007)	9
<i>Hisle v. Todd P. Shipyards Corp.</i> , 151 Wash. 2d. 853 (2004).....	8
<i>In re Estate of Black</i> , 116 Wn.App. 492, 66 P.3d 678 (2003).....	22
<i>In re Marriage of Farr</i> , 87 Wn.App. 177, 940 P.2d 679 (1997)	23
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989)	22
<i>Marquis v. City of Spokane</i> , 130 Wash.2d 97 (1996).....	9
<i>Polygon Northwest Co. v. American Nat. Fire Ins. Co.</i> , 143 Wn.App. 753 (Wash.App. Div. 1 2008)	19
<i>Puget Sound Mut. Sav. Bank v. Lillions</i> , 50 Wn. 2d 799 (Wash, 1957)	14
<i>Rhinehart v. Seattle Times Co.</i> , 51 Wn.App. 561, 754 P.2d 1243 (1988).....	22
<i>Seven Gables v. MGM/UA Entertainment</i> , 106 Wn.2d 1 (1986)	10
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995)	23
<i>Spokane Airports v. RMA, Inc.</i> , 149 Wn.App. 930, 206 P.3d 364 (2009), <i>review denied</i> , 167 Wn.2d 1017, 224 P.3d 773 (2010)	16, 18
<i>State ex rel. Sheehan v. Reynolds</i> , 111 Wash. 281, 190 P. 321 (1920)	22
<i>State v. Dominguez</i> , 81 Wn.App. 325 (Wash.App. Div. 3 1996)	24

<i>State v. Leon</i> , 133 Wn.App. 810, 138 P.3d 159 (2006).....	23
<i>State v. Link</i> , 136 Wn.App. 685 (2007)	16
<i>State v. Tarabochia</i> , 150 Wn.2d 59, 74 P.3d 642 (2003)	22
<i>State v. Turner</i> , 98 Wash.2d 731, 658 P.2d 658 (1983)	19
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wash.2d 16 (2005)	9
<i>Wash. Pub. Ports Ass'n v. Dep't of Revenue</i> , 148 Wash.2d 637, 62 P.3d 462 (2003)	22
<i>Weinberg v. Naher</i> , 51 Wash. 591(Wash. 1909)	14
<i>Whatcom County v. State</i> , 99 Wash.App. 237 (2000).....	15
<u>Cases from Other Jurisdictions</u>	
<i>McElroy v. Chase Manhattan Mortgage, Corp.</i> , 134 Cal.App. 4th 388; 36 Cal.Rptr. 3d 176 (2005).....	13
<i>In re Drexel Burnham Lambert</i> , 861 F.2d 1307 (2d Cir. 1988).....	24
<u>Washington Statutes</u>	
RCW 2.08.010	18
RCW 4.12.040	2, 21, 22
RCW 4.12.050	2, 21, 22, 23
RCW 7.64.035(1)(a)(i)	19
<u>Federal Statutes</u>	
15 U.S.C. 1692	5, 17
<u>Washington Rules</u>	

Code of Judicial Conduct (CJC) 1	2, 21, 23
Code of Judicial Conduct (CJC) 2	2, 21, 23
Code of Judicial Conduct (CJC) 2.11(A)	23
CR 17(a)	16, 17
RAP 2.2(a)	18, 21
RAP 2.3	19, 21
RAP 9.12	15
 <u>Federal Rules</u>	
Fed.R.Civ.P. 17(a) advisory comm.. nn. 1966 amend	17
 <u>Other Authorities</u>	
13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.3 (2d ed. 1984)	19

I. INTRODUCTION

This action arises from Appellant Dwight Holland's (hereafter "Holland") breach of a Retail Installment Sale Contract for the purchase of a 2006 Dodge Dakota vehicle (hereafter "vehicle"). Respondent Alaska USA Federal Credit Union (hereafter "Alaska") financed the purchase, is the assignee/owner of the Retail Installment Sale Contract, and holds a security interest in the vehicle. Holland sent to Alaska a "discharge instrument" in the form of a personal check payable to Alaska for \$6,100.00, but marked on the memo line "EFT only! For discharge of debt", and marked on the back "Not for Deposit, EFT Only, For Discharge of Debt". After sending this "discharge instrument" to Alaska Holland defaulted on his contract payments.

Alaska did not deposit the "discharge instrument" per its express instruction and brought suit as a result of Holland's default. Summary Judgment was entered in favor of Alaska on October 12, 2012. Holland thereafter sought direct review of the superior court's decision by this Court.

II. ASSIGNMENTS OF ERROR

Alaska will address the "assignments of error" raised by Holland in the following order:

A. Whether the superior court erred in awarding Summary Judgment to Alaska on its breach of contract claim (Holland's Assignments of Error Nos. 5-7)?

B. Whether the superior court erred in failing to dismiss Alaska's Complaint due to a lack of standing (Holland's Assignment of Error No. 1)?

C. Whether the superior court erred in failing to dismiss Alaska's Complaint due to the superior court lacking subject matter jurisdiction (Holland's Assignment of Error No. 2)?

D. Whether the superior court committed an abuse of discretion with its order entered at the hearing on Alaska's Motion for a Prejudgment Order Awarding Possession Pursuant to RCW 7.64 (Holland's Assignment of Error No. 3)?

E. Whether the superior court erred in refusing to grant Holland's motion for recusal of the superior court judge pursuant to RCW 4.12.040 & .050, and Code of Judicial Conduct Canon 1 & 2 (Holland's Assignment of Error No. 4)?

III. STATEMENT OF THE CASE

On or about May 30, 2009, Puyallup Auto Center and Holland entered into a written Retail Installment Sale Contract #****12 L1 (hereafter "contract") for the purchase of a 2006 Dodge Dakota

vehicle. (CP 96, Declaration of Michelle Banks (hereinafter “Decl. Banks”), Ex. A).

Puyallup Auto Center assigned its right, title and interest in the contract to Alaska. *Id.*

Alaska is the current owner and holder of the contract. (CP 96, Decl. Banks ¶ 2).

The contract states that Holland must make monthly payments and if he fails to make any payment when due, he will be in default (CP 99, Decl. Banks, Ex. A). A default in the terms of the contract entitles Alaska to accelerate the entire amount due and demand payment in full. “*IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES . . . You may have to pay all you owe at once.*” *Id.*

Holland made monthly payments on the contract from June 2009 until February 2012. (CP 97, Decl. Banks ¶ 7, Ex. F).

On or about January 24, 2012, Alaska received a non-negotiable “check”¹ for \$6,100.00 from Holland. (CP 97, Decl. Banks ¶ 4). On the front, on the “Memo” line, the “check” was marked “EFT Only; For Discharge of Debt”. (CP 102, Decl. Banks, Ex. C). On the

¹ Alaska is not using the term “check” in its strict legal sense here. See RCW 62A.3-104(f). It is using the term “check” because the document that was sent was in the form of a “check” although it was not a negotiable instrument.

back, the “check” was marked “Not for Deposit, EFT ONLY, For Discharge of Debt” and then it was endorsed by an “authorized representative”, dated January 18, 2012, and endorsed “WITHOUT RECOURSE”. *Id.*

Alaska did not deposit the “check”, did not negotiate the “check”, and did not apply the “check” as a payment on the contract. (CP 97, Decl. Banks ¶ 4).

On February 23, 2012 Alaska received a letter from Holland stating that Alaska had not returned the “check” for correction, and therefore, “...according to UCC rules and regs, the account MUST be discharged according to the face value of the instrument tendered.” (CP 97, Decl. Banks ¶ 5, Ex. D). The letter cited no specific authority for this proposition. In this letter, Holland also characterized the “item” as a negotiable instrument. *Id.*

In March 2012 Holland failed to make his monthly payment of \$243.87 due March 14, 2012. (CP 106, Decl. Banks Ex. F).

On April 10, 2012 Alaska received a letter from Holland and check #1102 for \$120.00. (CP 97, Decl. Banks ¶ 6, Ex. E). The letter stated, “Enclosed you will find the final payment of \$125.00 dollars, check #1102 with regards to my account...” *Id.* The check in the memo line stated, “Final Payment for Loan”. *Id.* Alaska did not

consider this check to be the final payment on the contract and therefore did not negotiate it. (CP 97, Decl. Banks ¶ 6).

As a result of Holland's actions, Alaska referred the matter to its counsel. On April 12, 2012, a demand letter was sent notifying Holland of Alaska's right to accelerate the indebtedness and demanding payment in full or surrender of the vehicle. (CP 130, Declaration of James W. Draper (hereinafter "Decl. Draper") ¶ 2, Ex. A).

Holland responded and disputed the debt. (CP 130, Decl. Draper ¶ 3, Ex. B). Alaska proceeded to verify and validate the debt per the Fair Debt Collection Practices Act; 15 U.S.C. §1692 et seq. (CP 130, Decl. Draper ¶ 4, Ex. C).

The debt having remained unpaid, Alaska thereafter proceeded with litigation, and Holland was served with Summons and Complaint on May 8, 2012. (CP 85).

Holland filed a pro se Answer on July 5, 2012. (CP 42-46).

On July 12, 2012 Holland filed a second Answer and Counterclaim. (CP 57-74). That pleading was never served on Alaska's counsel. (CP 131, Decl. Draper ¶ 8, Ex. G).

During this time Alaska also responded to Holland's Request for Admissions and motion to dismiss, and noted its own motion for prejudgment replevin. (CP 131-132, Decl. Draper ¶¶ 7, 10).

The superior court heard Alaska's motion for prejudgment order awarding possession of the vehicle on July 13, 2012. (RP Hearing to Show Cause Transcript (July 13, 2012)) (hereafter "Show Cause Tr.").

An Order Awarding Possession was entered at the above hearing granting Alaska the right to possession of the collateral; with the condition that if Holland made payment of \$6,100.00 by a date certain, the Order Awarding Possession would be vacated. (CP 76).

Holland did make the \$6,100.00 payment in a timely fashion. (CP 131, Decl. Draper ¶ 5, Ex. D). Alaska thereafter vacated the Order Awarding Possession. (CP 86).

After application of the \$6,100.00 payment, there remained due the principal amount of \$245.94, plus a nominal amount of accruing interest. (CP 97-98, Decl. Banks ¶ 8, Ex. G). Also due on the contract at the time of the \$6,100.00 payment were over \$2,200.00 in costs and reasonable attorney's fees incurred in the litigation. (CP 131, Decl. Draper ¶ 6, Ex. E).

On August 9, 2012, counsel for Alaska advised Holland of the above remaining amounts due, that Alaska would consider a discounted settlement on its costs and fees to resolve the litigation, and that if no proposal or payment was made within 10 days, Alaska would proceed with a motion for summary judgment. *Id.*

Holland responded in writing with a letter and Request for Production of Documents. (CP 131, Decl. Draper ¶ 7, Ex. F). Holland did not make payment or offer any other settlement proposal in response to Alaska's August 9, 2012 letter. *Id.*

On September 4, 2012 Alaska filed a Motion for Summary Judgment which was scheduled for hearing on October 12, 2012. (CP 83).

Holland untimely filed an Objection to Alaska's Motion for Summary Judgment. (CP 174-178). Holland did not file any Affidavits or Declarations in opposition to Alaska's Motion for Summary Judgment. *Id.* The hearing on Alaska's motion for summary judgment was held on October 12, 2012, and Summary Judgment was entered in favor of Alaska at that hearing. (CP 180).

IV. ARGUMENT

Alaska will respond to the assignments of error as raised by Holland and as summarized above.

A. Whether the Superior Court Erred in Awarding Summary Judgment to Alaska on its Breach of Contract Claim (Holland's Assignments of Error Nos. 5-7)?

Holland's assignments of error numbers five through seven regard the Summary Judgment entered October 12, 2012. Alaska will address them together.

1. *Standard of Review*

We review summary judgment orders de novo, performing the same inquiry as the superior court. Hisle v. Todd P. Shipyards Corp., 151 Wash.2d 853, 860 (2004).

2. *Analysis*

Alaska established why summary judgment was appropriate at the superior court level through its motion for summary judgment (CP 83-95), Declaration of Michelle Banks (CP 96-129), and Declaration of James W. Draper (CP 130-151). Alaska established the making of the contract, its security interest in the vehicle, the default on the contract, and the amount due on the contract.

Holland's response to the motion for summary judgment (CP 174-178) was untimely filed and did not include any supporting affidavits. Holland failed to establish any fact, let alone the existence of a genuine issue of material fact. Holland now asks this

Court to overturn the grant of summary judgment based on the same assertions made at the superior court level, as well as some issues not expressly argued to the superior court. Since this Court is required to perform the same inquiry as the superior court, Alaska will re-analyze why summary judgment is appropriate.

a. *Summary Judgment Standard*

Summary judgment is appropriate only if the pleadings, affidavits, depositions, interrogatories, and admissions on file demonstrate an absence of any "genuine issue [of] material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c); see also Davis v. W. One Auto. Grp., 140 Wash.App. 449, 456 (2007). We consider all facts submitted and all reasonable inferences from them in the light most favorable to the non-moving party. Marquis v. City of Spokane, 130 Wash.2d 97, 105 (1996). If reasonable persons could reach but one conclusion after reviewing all of the evidence, summary judgment is proper. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26 (2005). In order to defend on a motion for summary judgment, "[a] non-moving party . . . may not rely on speculation, conclusory allegations or argumentative assertions

that unresolved factual issues remain.” Seven Gables v. MGM/UA Entertainment, 106 Wn.2d 1, 13 (1986).

b. Making of the Contract

Alaska has produced a copy of the original contract bearing the signature of Holland. (CP 96, Banks Decl., ¶ 2, Ex. A). Holland has admitted to the contract in his appellate brief. (App. Br. 11). There is no issue as to the making of the contract.

c. Security Interest

The contract states at page 2, paragraph 2.c. that by signing the contract Holland granted Alaska a security interest in the vehicle. (CP 99, Banks Decl., Ex. A). Alaska has provided a record of the electronic title to the vehicle listing Alaska as lien holder on the vehicle. (CP 101, Banks Decl. Ex. B). Alaska has a perfected security interest in the vehicle.

d. Default

The contract states that Holland must make monthly payments and if he fails to make any payment when due, he will be in default. (CP 99, Banks Decl., Ex. A, pg. 2, ¶ 3). A default in the terms of the contract entitles Alaska to accelerate the entire amount due and demand payment in full. “IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES . . . You may have to pay all you owe at

once.” *Id.* Alaska’s business records show that there was a default in the monthly payments required by the terms of the contract which entitled Alaska to accelerate the entire amount due. (CP 106, Banks Decl., Ex. F).

e. Amount Due

Alaska proved the total amount due, principal, interest, and late charges, by the Declaration of Michelle Banks. (CP 97-98, Banks Decl., ¶ 8, Ex. G). Alaska’s contract with Holland states, “If we hire an attorney . . . to collect what you owe, you will pay the attorney’s reasonable fee and court costs as the law allows.” (CP 99, Banks Decl., Ex. A, page 2, ¶ 3.c). Alaska produced evidence of the amount of its costs and reasonable attorney’s fees through the Declaration of James W. Draper. (CP 130).

3. Holland’s Arguments against Summary Judgment

Holland raises several issues pertaining to his assignments of error on the summary judgment. Alaska believes they can be fairly characterized as claiming material issues of fact remaining as to: (1) whether the debt was in default based on “accord and satisfaction”; and (2) whether Holland received notice the debt had been accelerated (“lack of notice”). Alaska USA will address these

two points, and then conclude this section with a “catch all” section addressing several additional items raised in Holland’s brief.

a. *Holland’s Claim the Debt Was Not in Default Based on “Accord & Satisfaction”*

Holland’s brief argues the superior court judge erred in finding the debt was in default. (App. Br. 9-10). Holland bases this argument on his claim he discharged his obligation through a “negotiable instrument with a face value of \$6100 to Alaska”. (App. Br. at 20). Alaska will refer to it as the “EFT “check””. (CP 102, Banks Decl., Ex. C).

Alaska’s position is and has been that the EFT “check” is not payment on the contract. Alaska’s position is supported by Article 3 of the UCC as adopted by Washington (RCW 62A.3 et seq.). The relevant Article 3 definitions are as follows:

1. **‘Check’** “...means (i) a draft...payable on demand and drawn on a bank...an instrument may be a check even though it is described on its face by another term...” RCW 62A.3-104(f).
2. **‘Instrument’** “...means a negotiable instrument.” RCW 62A.3-104(b).
3. **Negotiable instrument’** “...means an

unconditional promise or order to pay a fixed amount of money...if it...is payable on demand or at a definite time and does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money..." RCW 62A.3-104(a)(1-3).

The EFT "check" from Holland is neither a "check", 'instrument', nor 'negotiable instrument'. It is not payable on demand. It is not an unconditional promise to pay. It does contain instruction in addition to the payment of money; it instructs Alaska not to deposit and to discharge debt. The EFT "check" does not fit within the Article 3 definition of "check", "instrument", or "negotiable instrument" due to the limiting language contained on it. As such it is nothing more than a piece of paper.

Holland's claim that Alaska's failure to return the "check" or object to the "check" has somehow resulted in a "discharge" of his obligation misstates the law. While Alaska has been unable to find any Washington cases directly on point, this position is supported by the California Court of Appeals decision McElroy v. Chase Manhattan Mortgage, Corp., 134 Cal.App. 4th 388; 36 Cal.Rptr. 3d 176 (2005) ("The McElroy's would have us hold that the tender of a

worthless document pays off a \$256,000 debt because the creditor fails to object to the 'tender'. We decline to do so.”). Holland requested from the superior court essentially the very same thing the McElroy’s were requesting in Chase Manhattan, and now he is asking it from this Court. Holland has continually failed to provide any relevant legal authority to support his request.

b. Lack of Notice of Acceleration

Holland argues he never received notice the debt had been accelerated. (App. Br. 26). This is untrue. Alaska accelerated the debt through the letter from its counsel dated April 11, 2012 demanding Holland pay the balance in full within ten days. (CP 133, Draper Decl., Ex. A); See Weinberg v. Naher, 51 Wash. 591, 594 (Wash. 1909) (stating that “Some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due.”). Holland again received notice the debt had been accelerated when served with the summons and complaint. See Puget Sound Mut. Sav. Bank v. Lillions, 50 Wn.2d 799, 803 (Wash. 1957). Holland received notice that the debt had been accelerated.

c. *Remainder of Holland's Arguments Against Summary Judgment*

In addition to the arguments addressed above, Holland's brief states that "[t]here are plenty of genuine material facts". (App. Br. 18-19). A party may not supplement the record on appeal of a motion for summary judgment with materials not presented to the trial court. RAP 9.12. "We consider only the evidence and issues considered by the trial court." Whatcom County v. State, 99 Wash.App. 237, 246 n.25 (2000). Holland's brief attempts to raise issues with regards to daily interest accrual, payoff figures, etc., which were not raised at the trial court level. His brief lists figures, such as a stated per diem interest of \$1.34, without clearly identifying where they are contained in the record. Counsel for Alaska would note that the record does show that when suit was brought against Holland the principal balance due on the obligation was alleged at \$6,136.15. (CP 2). The interest rate on the obligation is 7.95 percent per annum. (CP 99, Banks Decl., Ex. A). A per diem interest of \$1.34 is consistent with these figures ($.0795 / 365 \times \$6,136.15 = \1.336).

Holland failed to raise an issue of material fact at the superior court level, and he has failed to demonstrate that one exists in the record on appeal.

B. Whether the Superior Court Erred in Failing to Dismiss Alaska's Complaint due to a Lack of Standing (Holland's Assignment of Error No. 1)?

1. *Standard of Review*

Whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are reviewed de novo. Spokane Airports v. RMA, Inc., 149 Wn.App. 930, 939 (2009), *review denied*, 167 Wn.2d 1017 (2010).

2. *Analysis*

"Standing is a 'party's right to make a legal claim or seek judicial enforcement of a duty or right.'" State v. Link, 136 Wn.App. 685, 692 (2007) (quoting Black's Law Dictionary 1442 (8th ed. 2004)). Every action shall be prosecuted in the name of the real party in interest. CR 17(a). CR 17(a) is identical to Federal Rule of Civil Procedure 17(a). Analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive. See Beal v. City of Seattle, 134 Wash.2d 769, 777 (1998). The function of Fed.R.Civ.P. 17 is "to protect the defendant against a subsequent

action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed.R.Civ.P. 17(a) advisory comm. nn. 1966 amend.

Alaska is the real party in interest. The Retail Installment Sale Contract shows that the contract was assigned from Puyallup Auto Center to Alaska. (CP 99, Decl. Banks, Ex. A). Alaska is the current owner of the Retail Installment Sale Contract and the real party in interest. (CP 96, Decl. Banks ¶ 2).

Holland appears to base his assignment of error on the theory that counsel for Alaska is defined as a "debt collector" under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq., counsel for Alaska did not have "standing at inception", and therefore Alaska does not have standing. Holland's theory misstates the facts and law. Counsel for Alaska is not a party in this action and whether he individually has standing is irrelevant. Alaska is the real party in interest under CR 17(a) and the superior court did not err in refusing to dismiss for a lack of standing.

C. Whether the Superior Court Erred in Failing to Dismiss Alaska's Complaint due to the Superior Court Lacking Subject Matter Jurisdiction (Holland's Assignment of Error No. 2)?

1. *Standard of Review*

Whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are questions of law that are reviewed de novo. Spokane Airports, 149 Wn.App. at 939.

2. *Analysis*

The superior court has original jurisdiction to hear all cases in law which the demand or the value of the property in controversy amounts to three hundred dollars. RCW 2.08.010. Alaska's Complaint demanded in excess of \$6,000.00. The superior court had subject matter jurisdiction.

D. Whether the Superior Court Committed an Abuse of Discretion with its Order Entered at the Hearing on Alaska's Motion for a Prejudgment Order Awarding Possession Pursuant to RCW 7.64 (Holland's Assignment of Error No. 3)?

1. *The Superior Court's July 13, 2012 Order is Not Subject to Appeal.*

Decisions of the superior court which may be reviewed as a matter of right ("appeal") are limited. See RAP 2.2(a). Replevin

show cause hearings under RCW 7.64 are interlocutory in nature “pending final disposition” of the dispute. See RCW 7.64.035(1)(a)(i) (“If the plaintiff establishes the right to obtain possession of the property pending final disposition...”). Interlocutory orders are not appealable as a matter of right. See Polygon Northwest Co. v. American Nat. Fire Ins. Co., 143 Wn.App. 753, 769 (Wash.App. Div. 1 2008) (stating interlocutory orders are not appealable as a matter of right, but only subject to discretionary review). The Superior Court’s July 13, 2012 order is not appealable and Holland did not seek discretionary review of it under RAP 2.3.

2. *The Superior Court’s July 13, 2012 Order is Moot.*

Even if the July 13, 2012 Order were subject to appeal, it was rendered moot by virtue of it being vacated and by the Summary Judgment that was subsequently entered. An issue is moot if the matter is “purely academic.” State v. Turner, 98 Wash.2d 731, 733 (1983) ; See also 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984) (“The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.”).

The July 13, 2012 Order was vacated on July 23, 2012. Further, any issues dealt with in the July 13, 2012 Order were subsumed into the Summary Judgment subsequently entered. The July 13, 2012 order is moot and no meaningful relief can be afforded as to it.

3. *If the Superior Court's July 13, 2012 Order is Subject to Appellate Review, and is not Moot, the Superior Court did not Abuse its Discretion with the Order.*

a. *Standard of Review*

The July 13, 2012 Order was a temporary order reviewable under an abuse of discretion. See Washington Fed'n of State Employees, Council 28 v. State, 99 Wash.2d 878, 887 (1983). (grant or denial of a preliminary injunction is reviewed for an abuse of discretion). A trial court abuses its discretion if its decision is "based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." Rabon v. City of Seattle, 135 Wash.2d 278, 284 (1998).

b. *Analysis*

The superior court did not abuse its discretion in the July 13, 2012 order. Holland had provided Alaska with a non-negotiable item and defaulted on his contract payments thereafter. Alaska

established Holland's default and its right to possession based on its contract and security interest in the vehicle. The July 13, 2012 order was an attempt by the superior court judge to allow Holland to keep the vehicle per his express wish. (RP Order to Show Cause Tr. 11:23-25). Holland voluntarily paid and was able to maintain possession of the vehicle as a result. The superior court's order was reasonable under the circumstances and did not constitute an abuse of discretion.

E. Whether the Superior Court Erred in Refusing to Grant Holland's Motion for Recusal of the Superior Court Judge Pursuant to RCW 4.12.040 & .050, and Code of Judicial Conduct Canon 1 & 2 (Holland's Assignment of Error No. 4)?

Holland did not seek discretionary review of the order under RAP 2.3 and the order is not appealable under RAP 2.2.

That said, Holland based his request for recusal of the superior court judge on RCW 4.12.040 and .050, and Code of Judicial Conduct (CJC) 1 and 2. Holland's two bases will be analyzed separately.

1. *Affidavit of Prejudice, RCW 4.12.040 and .050*

a. *Standard of Review*

The interpretation of a statute is a question of law, which is reviewed de novo. Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wash.2d 637, 645, 62 P.3d 462 (2003). A trial court's denial of an affidavit of prejudice is reviewed de novo. See State v. Tarabochia, 150 Wn.2d 59, 64-65, 68, 74 P.3d 642 (2003); In re Estate of Black, 116 Wn.App. 492, 496, 500, 66 P.3d 678 (2003).

b. *Analysis*

Under RCW 4.12.040 and .050, each party may file a timely motion and affidavit of prejudice to remove one superior court judge. For the motion to be timely, the party must file the motion "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050(1). Filing a timely motion and affidavit divests the judge of authority to pass on the merits of the case. LaMon v. Butler, 112 Wn.2d 193, 201-02, 770 P.2d 1027 (1989). But the statute does not compel a change of judge when the motion is untimely or when a party submits a second motion. Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 578-79, 754 P.2d 1243 (1988); see State ex rel. Sheehan v. Reynolds, 111 Wash. 281, 284-85, 190 P. 321 (1920).

In the instant case, Holland brought his motion and affidavit of prejudice on September 19, 2012. The superior court judge had made several discretionary rulings prior to Holland's motion, including rulings on Alaska's motion for an Order Awarding Possession under RCW 7.64 and Holland's motion to dismiss. (CP at 76-80). The superior court judge properly denied Holland's motion as untimely under RCW 4.12.050.

2. *Code of Judicial Conduct 1 & 2*

a. *Standard of Review*

A trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion. State v. Leon, 133 Wn.App. 810, 812, 138 P.3d 159 (2006) (citing In re Marriage of Farr, 87 Wn.App. 177, 188, 940 P.2d 679 (1997)).

b. *Analysis*

The rule for recusal is set forth in the Code of Judicial Conduct, Canon 2, which provides in relevant part that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." CJC 2.11(A). In determining whether recusal is warranted, actual prejudice need not be proved; a "mere suspicion of partiality" may be enough to warrant recusal. Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d

355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Id.* at 206 (quoting In re Drexel Burnham Lambert, 861 F.2d 1307, 1313 (2d Cir. 1988)).

On appeal, Holland fails to direct the Court to any portions of the record which indicate partiality of the superior court judge. "A party claiming bias or prejudice must, however, support the claim; prejudice is not presumed..." State v. Dominguez, 81 Wn.App. 325, 328 (Wash.App. Div. 3 1996). Holland claims the superior court was prejudiced against him because it "appeared to be confused as to what a redelivery bond is". (App. Br. at 28). Holland further claims the superior court was prejudiced because it "became part of the adversary and spoke on behalf of the Alaska and Draper". (App. Br. at 29).

Holland fails to explain exactly how the sections of the record he focuses on are indicative of prejudice. The superior court judge asking a question to counsel as to the redelivery bond or stating that an item had been lost are simply not signs of prejudice. Those portions of the record which Holland selectively cites do not,

and could not, lead a reasonable person to conclude that the superior court judge was prejudiced against Holland.

A more detailed review of the record suggests Holland bases his claim of bias on the fact the superior court judge ruled against him. To wit:

MR. HOLLAND: 56. Okay. All right. So, and then you have my opposition to motion to recusal, because I felt that you were prejudicial and biased towards the hearing on July 13th.

THE COURT: You know, Mr. Holland, I am not really surprised. Because what I was trying to do on July 13th is allow you to keep your truck. You know? That was the purpose of my working with you, I thought, was if you aren't – if you didn't want them to take your truck, which they could have just done right then and there, I was trying to find a way for you to keep your truck, so you would have some transportation to get to and from work or wherever you have to go.

And that seemed to be a reasonable solution. They vacated the order. Otherwise, you would have lost your car right then and there. I'm not sure how you think that I was showing prejudice to you in doing so.

MR. HOLLAND: Well, it was just in the statement when I stated that argument for documentation that it was an instrument, you referred to it as a check. It was –

THE COURT: Why would I –

MR. HOLLAND: Why would I? I'm looking. That's why.

THE COURT: Why would you give someone a payment and then on the back of the check write "do not deposit". Why would you do that?

MR. HOLLAND: Well, because it's a discharge instrument.

THE COURT: Well, that's not payment. How would you like to receive money and someone writes on the back of the check, do not deposit? Would you consider that payment?

MR. HOLLAND: It's just as much payment as the federal reserve going bad.

THE COURT: All right. Well, so, that's where we were last time. And here we are now.

MR. HOLLAND: Uh-huh.

(RP Motion for Summary Judgment Transcript 8:15 through 10:1 (October 12, 2012)) (hereafter "S.J. Tr."). The superior court judge's refusal to accept Holland's argument that he had

discharged \$6,100.00 through a “discharge instrument” is not evidence of prejudice. It is not prejudicial to tell someone they are wrong when they are wrong.

Holland ignores several portions of the record which suggest a lack of prejudice against Holland. At the hearing on Alaska's Motion for an Order Awarding Possession Holland stated he wished to keep the vehicle. (RP Show Cause Tr. 11:23-25 (July 13, 2012)). The superior court judge made it clear she was trying to allow Holland to keep his truck. (*Id.* at 15:8-19). Ultimately, the superior court entered an order awarding possession of the vehicle to Alaska, but stayed the Order until July 19, 2012 and gave Holland a chance to provide Alaska with an unmodified cashier's check of \$6,100.00. (CP at 76-78). This was all done in an effort to allow Holland to keep his vehicle, per his expressed wish. The record does not support a finding that the superior court judge was prejudiced against Holland. In fact, at several points the record suggests the opposite. (*Id.*; *see also* S.J. Tr. 17:21-25, 20:7-12, 21:9-16).

The superior court judge did not abuse her discretion in denying Holland's motion to recuse for violation of CJC 1 and 2.

V. REQUEST FOR ATTORNEY FEES PURSUANT TO RAP

18.1

Alaska requests an award of its costs and reasonable attorney fees incurred in responding to Holland's appeal. Alaska's contract with Holland states, "*If we hire an attorney . . . to collect what you owe, you will pay the attorney's reasonable fee and court costs as the law allows.*" (CP 99, Banks Decl., Ex. A, page 2, ¶ 3.c). Alaska has incurred significant costs and attorney fees in responding to Holland's appeal, and they are recoverable by Alaska. See Leen v. Demopolis, 815 P.2d 269, 62 Wn.App. 473 (Wash.App. Div. 1 1991) ("Leen's contract with Demopolis stated as follows: 'Should collection efforts on any fees or costs due from Client be needed, Client agrees to pay all attorney fees and other collection costs incurred by Attorneys.' That contractual provision logically encompasses fees incurred on appeal.").

VI. CONCLUSION

Wherefore Alaska requests:

- (1) An order denying Holland's appeal and all relief requested therein;
- (2) An order affirming the decisions of the superior court;

(3) An order awarding Alaska its costs and reasonable attorney fees incurred in responding to this appeal.

Should this Court reverse on one or more issues, Alaska requests:

(1) Remand to the Superior Court with an identification of those specific errors and/or remaining issues of fact requiring further adjudication;

(2) An Order directing the Superior Court to issue a new case schedule providing Alaska the opportunity to engage in further discovery.

DATED: March 11, 2013

/s/ James W. Draper
James W. Draper
WSBA No. 9249
Attorney for Alaska USA
Federal Credit Union

CERTIFICATE OF MAILING

I certify that on this day a true and correct copy of the Brief of Respondent Alaska USA Federal Credit Union and this Certificate of Mailing was mailed via U.S. Mail, first class, postage prepaid, to:

Dwight Holland
325 Washington Ave. So.
#332
Kent, WA 98032

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

DATED: March 11, 2013
Bellevue, Washington

/s/ Melanie N. Baskins
Melanie N. Baskins

OFFICE RECEPTIONIST, CLERK

To: jwdraper7@aol.com
Subject: RE: Alaska USA Federal Credit Union v. Dwight M. Holland; Supreme Court No. 88015-8;
Respondent Alaska USA's Brief

RECEIVED 3-11-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: jwdraper7@aol.com [<mailto:jwdraper7@aol.com>]

Sent: Monday, March 11, 2013 1:30 PM

To: OFFICE RECEPTIONIST, CLERK

Subject: Alaska USA Federal Credit Union v. Dwight M. Holland; Supreme Court No. 88015-8; Respondent Alaska USA's Brief

Attached please find Respondent's brief for filing in the following case:

- Alaska USA Federal Credit Union v. Dwight M. Holland
- Case No. 88015-8

Proof of service is attached to the brief.

This document is being filed by:

James W. Draper
(425) 646-0104
WSBA No. 9249
jwdraper7@aol.com

James W. Draper
Attorney for

NOTICE: This email may contain confidential or privileged material and is intended for use solely by the above-referenced recipient. Any review, copying, printing, disclosure, distribution, or other use by any other person or entity is strictly prohibited. If you are not the named recipient, or believe you have received this email in error, please reply to the sender and delete the copy you received. Thank you.