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NO. 72049-0

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

THOMAS BARTH and SANDRA A. BARTH,
his wife,

Respondents,

v.

PATRICK HAFEY and GINA LORAE HAFEY,
his wife,
Defendants

and

AMERICAN PENSION SERVICES, INC.,

*Defendant and
Petitioner.*

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

PETITIONER'S OPENING BRIEF

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II. STATEMENT OF THE CASE

This appeal is from a final Order of Distribution arising from a Partition Sale. No referee was appointed. CP 1.

On July 9, 2009, Tammy Hafey was divorced from Patrick Hafey. There were not enough liquid assets to divide equally, and the Court awarded Tammy a money judgment against Patrick for \$150,000.00. The judgment is commonly referred to as an owelty equitable lien. It was secured by a note and deed of trust on the family home and called for full payment within 2 years. CP 7, 12, 54.

On October 14, 2009, Tammy sought help to collect her judgment and assigned it to American Pension Services, Inc. for this purpose. American held the judgment as part of a self-directed federal pension plan for Manfred Scharig, an individual. This type of arrangement is authorized under Section 408 of the Internal Revenue Code.

Patrick Hafey failed to make his judgment payments and the first and second home mortgages were foreclosed for their non-payment. Out of the foreclosure sale proceeds, American collected \$44,253.00 based upon the Hafey judgment. CP 50, 7.

Sandra Barth and Patrick Hafey are brother and sister. Their mother died in August of 2002 and left her home to Sandra and Patrick as

tenants in common. Patrick lived a short time in the home after his mother's death. CP 1.

On August 31, 2012, Sandra filed a petition for partition of the property and division of the proceeds. She asked for ejectment of her brother from the home and repayment of the repairs and upkeep of the property. American joined in the partition seeking payment of its judgment balance from any sales proceeds. CP 1.

The sale proceeds came to \$219,348.07. CP 55, 34, 44. Sandra offered to pay American \$3,646.74 as the share Hafey was entitled to, after all offsets by Sandra. Appendix A, CP 53. At a court hearing on the distribution of the \$219,348.07, the court found that the owelty judgment of Hafey did not legally reach any of the proceeds and refused to award the \$3,646.74 to American. CP 53.

Several days later, however, the Court changed its mind and signed an Amended Order to Disburse which awarded the \$3,646.74 to American. CP 55. The Court refused to give the owelty judgment priority over Sandra's claimed offsets. It also awarded a rent offset to Sandra for possession by Patrick and permitted Sandra to offset all of the claimed money spent in connection with the sale. CP 55, 57.

In sum, out of a total of \$109,674.03, representing Patrick Hafey's one half of the total proceeds of sale of \$219,348.07, Hafey received a total of \$3,646.74 – 3.3%.

This appeal followed. CP 56.

III. ARGUMENT

A. AN OWELTY JUDGMENT CANNOT BE IMPAIRED BY PARTITION AND HAS PRIORITY OVER ALL OTHER CLAIMS TO PROCEEDS FROM A SALE IN PARTITION.

RCW 7.52.220 provides the manner in which partition proceeds of sale shall be divided by priority:

- (a) general costs of the action;
- (b) sales costs;
- (c) liens in order of priority;
- (d) balance to the owners.

RCW 4.56.190 provides that all judgments are liens on all real estate a judgment debtor may acquire:

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held bound to satisfy any judgment of..... the Superior Court.....of this state. (Emphasis Added)

Valid judgment liens cannot be impaired by partition of a co-tenancy.

Reed v. Fidelity Ins. Trust, 6A.163, 113 Pa. 574; Smith v. Smith, 42 Pac

2nd 436 206 Okl. 206; Pace v. Shields, 92 SE 755, 147 Ga. 36; 68 CJS, Partition, § 252; Stewart v. Alleghany National Bank, 101 Pa. 342 (1882).

In Reed, a Mr. Egner owned an undivided interest of 1/7 in a parcel of land. He mortgaged his 1/7 interest and later brought an action for partition. The property was sold to Mr. Reed and charged by the court with an owelty of \$4,796, payable to Egner. The mortgage company, Fidelity Ins. Trust, paid Egner the entire sum due him and took an assignment of the purchaser's interest. The monies owed by Egner were ordered to be paid into court to allow Fidelity to receive the funds due to it. The case illustrates the rule that a partition is not permitted to trump owelty monies due, ahead of other priorities in a partition.

Similarly, Alleghany National Bank, protected owelty liens against claimed priority offsets to sales proceeds in partition. In this case, a father and son owned a 50 – 50 interest in real property as co-tenants. The father died, leaving his 50% to his co-tenant son and four other children. His 50% son placed a mortgage on his interest. That interest and mortgage was later assigned to the Alleghany Bank. The mortgage went into default and was foreclosed by the bank. The 50% son brought an action for partition of the property. Eva Stewart purchased the property on the partition sale and made a claim for all rents from the

property that had been collected by the bank. At distribution of the sale proceeds, the Court held that as a matter of law that the mortgage was an owelty lien and entitled to full payment prior to any other claims to the proceeds.

In Washington, our Court has addressed an owelty lien in a like manner. Hartley v. Liberty Park, 54 Wash. App. 434, 774 P.2d 40 (1989).

Hartley dealt with an owelty lien of \$40,000.00 awarded in a divorce. The wife was awarded the house and promptly borrowed \$120,000.00 from a bank on it, secured by a deed of trust. The bank recorded its deed of trust on May 2, 1986. The wife then secured a second loan with another deed of trust on May 5, 1986, from Liberty Park. The wife, at the request of her former husband, signed a deed of trust for him in July of 1986. The wife defaulted on her payments under an Alaska's teacher's note, culminating in a nonjudicial foreclosure of the property. A surplus from the foreclosure sale of \$52,646 was deposited into the registry of the Court.

The husband, and the two separate mortgagees, all claimed the surplus proceeds. The trial court awarded them to the husband as superior to the interest of the two banks. It was affirmed on appeal. On appeal, the Court found that the owelty judgment had priority over the

homestead act, and created a lien against a judgment debtor's nonexempt real property.

A judgment granted by a superior court creates a lien against the judgment debtor's nonexempt real property. RCW 4.56.190.

The Court found also that the Superior Court had the family home before it for partitioning. RCW 26.09.050:

A judgment for owelty is an equitable lien in the nature of a vendor's lien, which will prevail over a declaration of homestead.....An award of owelty will become a lien on partitioned property as established in RCW 4.56.190.
(Emphasis Added).

Based upon the foregoing, it was reversal error for the trial court to fail to give priority under RCW 7.52.220 and RCW 4.56.190 to Hafey's real property interest.

B. A CO-TENANT IS ENTITLED TO OCCUPY THE PREMISES AND CANNOT BE CHARGED RENT FOR MERE USE THE PROPERTY BY A CO-TENANT.

The trial court initially refused to allow any monies to be paid to American out of the sales proceeds, even though Barth recognized and agreed to pay \$3,646.74.

Upon further reflection, the trial court issued an Amended Order awarding \$3,646.74 to American, and recognizing Hafey's interest.

The trial court wrongly charged American for possession of the property by Patrick Hafey in the amount of \$30,653.63. In absence of an agreement, one co-tenant cannot charge another co-tenant rent for the possession and occupancy. Cummings v. Anderson, 94 Wash 2nd 135, 614 Pac. 2d 1283 (1980). In a co-tenancy, both tenants are entitled to possession of a moiety of the whole, not the whole of the moiety. Fulton v. Fulton, 57 Wash. 2d 336; Leake v. Hayes, 13 Wash. 213, 43 Pac. 48 (1895); Daniel v. Daniel, 106 Wash. 659, 181 Pac. 2d 215 (1919); Kahnovsky v. Kahnovsky, 67 R.I. 208, 21 A2d 569 (1941).

In Cummings, a man and wife purchased a residence together as tenants in common. Each owed the balance of the purchase price. The parties were later divorced and the husband remained in the home and made house payments. The wife left the home and brought an action for partition alleging she was a co-tenant and entitled to offset her

husband's duty to pay rent for his possession during his occupancy and before the property was sold. The Court disallowed the offset:

It is the rule in Washington that in the absence of an agreement to pay rent....a co-tenant in possession, who has not ousted or actively excluded the co-tenant, is not liable for rent based on his occupancy of the premises.

Accord: Hunter v. Schultz, 24 Cal App. 2d 24 (1966). (Disallows rent claimed in a partition like Washington).

C. THE COURT WAS IN ERROR WHEN IT PERMITTED BARTH TO OFFSET THE ENTIRE "ENHANCEMENT" AND REPAIR COSTS OF \$53,700.00 AGAINST AMERICAN'S CLAIM

Partition is an equitable proceeding. A court of equity may equitably consider improvements placed on the property that enhances the value in a partition action. Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317. The general rule, however, is that one co-tenant may not in his own partition suit, recover for improvements placed upon the common estate without the request and consent of his co-tenant. Bishop v. Lynch, 8 Wash 2d 278, 111 Pac 2d 996 (1941).

The final order of the trial awards Barth all of the cost of the improvements, and "enhanced value" of the property. This order determines the respective rights of the parties and is reviewable by this Court. Bishop, supra. (Partition reviewable without referee's report).

Basically, the award of the whole sum or cost of \$53,700.00 is inequitable and unfair to American. All other costs were divided equally. There is no reasonable reason for the offset of the entire amount and should be vacated by the trial court on remand and fixed at ½ of the \$53,700.00 - \$26,850.00. The present offset defeats the equitable rights of the co-tenant.

The trial court has great flexibility in fashioning equitable relief, but he who seeks equity must also do equity.

**D. AMERICAN SHOULD BE GRANTED
ATTORNEY'S FEES ON APPEAL
BASED UPON RCW 7.52.480.**

RCW 7.52.480 provides, in part, that where litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto or any of them.

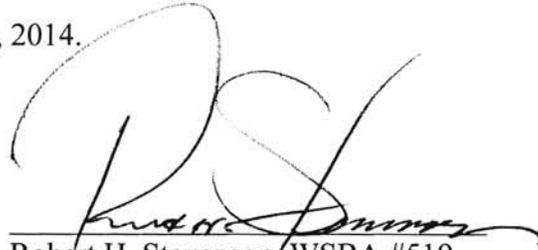
American respectfully asks this Court to award reasonable attorney's fees and costs of this appeal if this appeal is successful.

E. CONCLUSIONS

1. No offset should be allowed against American's owelty judgment;
2. No rent should be charged to American for Patrick Hafey's temporary occupation;

3. No claim should be permitted for all of the cost of “enhancement” and repairs when one half is an equitable and reasonable amount;
4. The order disbursing proceeds should be amended; remand with this court’s instructions.
5. Attorneys’ fees should be granted.

Dated this 5th day of July, 2014.

A handwritten signature in black ink, appearing to read "Robert H. Stevenson", written over a horizontal line.

Robert H. Stevenson, WSBA #519
Attorney for Petitioner

APPENDIX A

	100%	50%
Total held in Court	\$219,348.07	\$109,674.03
Attorney Fees	-30,732.00	-15,366.00
More Attorney Fees	-2,000.00	-1,000.00
Costs of Partition Lawsuit	-2,687.31	-1,343.65
Real Estate Taxes & Insurance	-7,928.02	-3,964.01
Rent charged to co-tenant	-61,307.26	-30,653.63
Costs of Fix Up	-53,700.00	-26,850.00
“Enhancement Value”	-53,700.00	-26,850.00
Amount to American (3.3% of ½).....	\$3,646.74