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NO. 92124-5

SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS BARTH and SANDRA A. BARTH
Respondents / Cross-Appellants / Plaintiffs

v.

PATRICK HAFEY and GINA L. HAFEY,
Defendants,

and

AMERICAN PENSION SERVICES, INC.,
Appellant / Cross-Respondent / Defendant.

**RESPONDENTS / CROSS-APPELLANTS'
ANSWER TO PETITION FOR REVIEW**

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I. IDENTITY OF RESPONDENTS / CROSS-APPELLANTS

Respondents/cross-appellants Thomas and Sandra Barth (the “Barths”) submit this answer to the Petition for Review filed by Appellant/cross-respondent American Pension Services, Inc. (“American Pension”).

II. STATEMENT OF THE CASE

This case involved an action for ejectment and partition of a single-family residential property located at 3017 120th Pl. SE, in Everett, Washington (hereinafter the “Property”), and the disbursement of proceeds from the court-authorized sale of the Property.

In 2002, siblings Sandra Barth and Patrick Hafey acquired title to the Property as tenants in common (each holding a one-half interest). Beginning in November 2009, Patrick Hafey disregarded all efforts by the Barths to manage or sell the Property, and exerted sole control of the Property to the exclusion of the Barths.

In August 2012, the Barths filed a complaint against Patrick Hafey for partition and ejectment. In May 2013, the trial court entered an order of default and default judgment against Patrick Hafey.

In November 2012, the trial court entered an order joining American Pension as an additional defendant. American Pension claimed an owelty or equalizing lien against the one-half interest of Patrick Hafey in the Property. In 2009, Patrick Hafey and Tammy M. Hafey had

dissolved their marriage. As part of their dissolution decree, Tammy Hafey had obtained an owelty lien in the amount of \$150,000 to equalize the distribution of their former family home awarded to Patrick Hafey. The former family home was located at 12020 52nd Ave. S.E., in Everett, Washington. In October 2009, Tammy Hafey assigned her interest in the owelty lien to American Pension.

As part of this partition action, the trial court authorized a private sale of the Property. The Property sold in November 2013, and sale proceeds amounting to \$219,348.07 were deposited into the registry of the court.

American Pension appealed from the Amended Order issued by Judge George F. Appel of the Snohomish County Superior Court entered on May 22, 2014, disbursing the proceeds from the court-authorized sale of the Property.

The Barths filed a cross-appeal from the trial court's ruling in the Amended Order that the owelty or equalizing lien, assigned to American Pension by Tammy Hafey (Patrick Hafey's ex-wife), attached to the one-half interest of Patrick Hafey in the real property at issue in this partition action. The trial court had initially ruled two days earlier, in its Order dated May 20, 2014, that American Pension's owelty lien did not attach to Patrick Hafey's half interest in the subject property. The Amended Order

changed the recipient of the \$3,646.75 (relating to Patrick Hafey's half interest) in sale proceeds from Patrick Hafey to owelty lien holder American Pension.

In a unanimous unpublished decision dated August 3, 2015, the Court of Appeals, Division One, affirmed the Superior Court's Amended Order (with the exception of accepting the Barth's position on cross-appeal that the trial court erred in finding that American Pension's owelty lien attached to the subject Property). See Opinion (American Pension's Petition for Review, Appendix A).

For purposes of this Answer, the Barths adopt and incorporate additional facts as set forth in the decision of the Court of Appeals.

III. ARGUMENT

A. None of the Grounds Warranting Acceptance of Discretionary Review Under RAP 13.4(b) are Present in this Case.

This Court should deny review of this matter because the issues raised in American Pension's Petition for Review do not satisfy any of the criteria for review under RAP 13.4(b).

Under RAP 13.4(b), this Court will accept a petition for review of a Court of Appeals decision only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

In this regard, American Pension's Petition for Review does not even cite RAP 13.4(b), let alone contain a statement or explanation as to how the Court of Appeals decision involves any of the criteria for review under this rule. Rather, American Pension makes conclusory statements that the issues raised on appeal are either issues of first impression or are "disputed on the basis of fair and reasonable equity failure." See Petition for Review, pp. 4, 6, 8).

American Pension's discontent with the Courts' rulings and distribution of the sale proceeds in this partition action does not qualify for discretionary review under RAP 13.4(b). Accordingly, since none of the grounds for review set forth under RAP 13.4(b) are present, this Court should deny further review.

B. The Court of Appeals Decision is Consistent with Well Established Washington Law and Does Not Warrant Further Review.

In its Petition for Review, American Pension raises an issue concerning the application of equitable principles related to the distribution of the sale proceeds in this partition action.

In its opinion, the Court of Appeals emphasized a key consideration in partition matters:

A partition action is an equitable one wherein the court has great flexibility in fashioning appropriate relief for the parties. Friend v. Friend, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998); Cummings v. Anderson, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980). A court has broad power respecting liens against real property to provide equitable remedies. McKnight v. Basilides, 19 Wn.2d 391, 408, 143 P.2d 307 (1943); see MGIC Financial Corp. v. H.A. Briggs Co., 24 Wn. App. 1, 6, 600 P.2d 573 (1979).

See Opinion, p. 6. Furthermore, the court reviews an equitable remedy for abuse of discretion. Id.

Here, the Court of Appeals correctly affirmed the trial court's exercise of its broad equitable powers in fashioning appropriate relief for the parties under the factual circumstances presented.

- 1. The Court of Appeals correctly affirmed the trial court's ruling that American Pension's owelty lien was subordinate to the Barths' claims of offsets and reimbursements against Patrick Hafey's one-half interest in the property.**

The Court of Appeals found that the the trial court properly exercised its broad equitable powers in concluding that American Pension's owelty lien was subordinate to the Barths' claims against Patrick Hafey's one-half interest in the Property. The basis for that conclusion is clear and reasoned as set forth in the Court of Appeals opinion.

RCW 7.52.220 provides authority for the distribution of sale proceeds in a partition sale:

The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:

- (1) To pay its just proportion of the general costs of the suit.
- (2) To pay the costs of the reference.
- (3) To satisfy the several liens in their order of priority, by payment of the sums due, and to become due, according to the decree.
- (4) The residue among the owners of the property sold, according to their respective shares.

RCW 7.52.220. Importantly, the Court of Appeals noted:

‘[A] court in the exercise of its equitable powers may fashion remedies to address the particular facts of each case, even if the partition statute does not strictly provide for such a remedy.’ Kelsey v. Kelsey, 179 Wn. App. 360, 369, 317 P.3d 1096, review denied, 180 Wn.2d 1017, 327 P.3d 54 (2014) and cert. denied, 135 S. Ct. 451, 190 L. Ed. 2d 330 (2014). Thus ‘[w]hile the statutory provision provides guidance to a court in a partition action, it does not mark the outer limits of a court’s exercise of its equitable powers. Kelsey, 179 Wn. App. at 368.

See Opinion, p. 7.

Here, the Court of Appeals correctly determined that “[t]he trial court here properly exercised its broad equitable powers in finding that American’s claims to Patrick’s one-half interest in the proceeds were subordinate to the Barth’s claims.” See Opinion, p. 7. The trial court had appropriately fashioned an equitable remedy and distribution based on the specific factual circumstances presented in this case. The Court of Appeals noted that: “Patrick [Hafey] was exclusively in control of the

Property for 44 months, benefited from possession and left the Property in disrepair.” See Opinion, at 7. Moreover, and as the Court of Appeals found, the trial court then fashioned an equitable remedy of reimbursing the Barths for (1) the enhanced value of the Property resulting from the Barths’ improvements to the Property; (2) the reasonable rental value of Patrick Hafey’s ongoing possession of the Property; (3) property taxes and insurance; and, (4) attorney fees incurred in litigating the action. The trial court did not abuse its discretion in finding that the Barths’ offsets were superior to American’s owelty claim. See Opinion, p. 8.

In its Petition for Review, American Pension disregards the broad equitable powers of the courts and attempts to characterize this as an issue of first impression in Washington. See Petition for Review, p. 7. American Pension then relies on unpersuasive authority (two Pennsylvania opinions issued in the 1880’s) for its assertion that “priority of owelty liens over other claims in a partition action should be adopted in Washington.” See Petition for Review, p. 7. Moreover, American Pension’s dissatisfaction with the result and plea that “it seems only fair, legally and equitable, to give owelty a priority against other later claims and creditors” is not a basis for review, and does not demonstrate an abuse of discretion. See Petition for Review, pp. 7-8.

Here, the trial court did not abuse its discretion in finding that American Pension's owelty lien was subordinate to the Barths equitable liens and claims of offsets against the one-half interest of Patrick Hafey in the Property. Review is not warranted under any of the criteria set forth under RAP 13.4(b).

2. The Court of Appeals correctly affirmed the trial court's award to the Barths of one-half the reasonable rental value.

The Court of Appeals correctly affirmed the trial court's award to the Barths of one-half the reasonable rental value of \$30,653.63 during the time period of ouster or active exclusion (November 2009 through June 20, 2013), as an offset against cotenant Patrick Hafey's one-half interest.

Washington law on co-tenant rental liability is clear and well established. As stated in the Court of Appeals opinion:

In Cummings v. Anderson, our Supreme Court stated: 'It is the rule in Washington that, in the absence of an agreement to pay rent, or limiting or assigning rights of occupancy, a cotenant in possession who has not ousted or actively excluded the cotenant is not liable for rent based upon his occupancy of the premises. In order for ouster to exist, there must be an assertion of a right to exclusive possession.'⁹⁴ Wn.2d 135, 145, 614 P.2d 1283 (1980)(internal citations omitted).

See Opinion, p. 8. As an equitable remedy, a cotenant is entitled to the reasonable rental value of the time period during which the other tenant

effects an ouster. See Yakavonis v. Tilton, 93 Wn. App. 304, 309, 968 P.2d 908 (1998); See Opinion, p. 8.

As the Court of Appeals properly concluded, the evidence indicates that through his words and acts, Patrick Hafey excluded the Barths from possession of the Property. See Opinion, p. 8. American Pension's statement of dissatisfaction that the rental award is disputed on "the basis of fair and reasonable equity failure" does not warrant review under RAP 13.4(b). See Petition for Review, p. 8. Here, the trial court record was replete with evidence of ouster and exclusion from the Property by co-tenant Patrick Hafey. Furthermore, the Barths presented uncontested evidence establishing a reasonable rental value.

The trial court was well within its discretion, under its equitable powers and well-established Washington law, to award the Barths one-half of the reasonable rental value of \$30,653.63 during the time period of ouster or active exclusion. There was no error on this issue.

3. The Court of Appeals properly affirmed the trial court's award of the enhanced value of the Property to the Barths.

The Court of Appeals correctly affirmed the trial court's award to the Barths of \$53,700 for the enhanced value of the property, which was the result of the Barths' sole efforts, expenditures, and labor in repairing and improving the Property.

Washington law regarding co-tenant property improvements and enhanced value is clear and well established. As stated in the Court of Appeals opinion:

[I]t is well established law in Washington ‘that improvements placed upon the property by one cotenant cannot be charged against the other cotenant unless they were either necessary or actually enhanced the value of the property.’ Cummings, 94 Wn.2d at 144; see also Kelsey, 179 Wn. App. at 365 (‘If one cotenant improves property, the trial court has discretion to reimburse him or her for the improvement values.’).

See Opinion, p. 9 (emphasis added). This principle reflects the just concept that “a cotenant should not be permitted to take inequitable advantage of another’s investment.” Cummings, 94 Wn.2d at 142.

Here, the Barths presented evidence that established their investment of time and money enhanced the value of the Property by \$53,700, which was realized upon the sale of the property. American Pension did not rebut, dispute, or contest in any manner the evidence at trial court that the Barths’ improvements added \$53,700 in value to the Property. Furthermore, American Pension’s assertion in its Petition for Review that “[t]he Appellate Court confused the sum of \$53,700 referred to in its footnote (Decision Ex. 1, p. 6) and as a result gave no credit to Patrick for ½ the enhanced value of \$53,700” is misleading and not supported by the record. See Petition for Review, p. 10.

This was a straightforward and simple analysis. The other co-tenant (or, in this case, the owelty lien holder attempting to claim all of the co-tenants interest) was properly not allowed to take inequitable advantage of the fruits of the Barths' expenditures and industry. Since the Court of Appeals correctly applied well-established Washington law in affirming the trial court's award of the enhanced value of the Property to the Barths, this Court should deny review of this matter.

4. The Court of Appeals properly accepted the Barths' Position on cross-appeal that American Pension's owelty or equalizing lien did not attach to the subject property.

The Court of Appeals properly accepted the Barths' position on cross-appeal that the trial court erred in finding that the divorce owelty or equalizing lien (assigned to American Pension by the ex-wife of co-tenant Patrick Hafey) attached to Patrick Hafey's interest in the subject Property. The Court of Appeals correctly found that an owelty lien is more focused and limited in scope than a general judgment lien and that "[b]ecause the owelty lien attached only to Patrick's former family home, and not the property at issue in this separate partition action, we accept the Barths' position on cross-appeal that the trial court erred." See Opinion, pp. 1-2.

In its Petition for Review, American Pension relies on RCW 4.56.190, and attempts to frame this issue as one of first impression and states that it is not supported by case law:

[T]he Appellate Court singled out an owelty judgment lien as narrow in scope and unlike other general judgment liens under RCW 4.56.190. The Court cites no case law for this proposition, or statutory authority. It basically relies on the equitable powers of the Court as a legal format for ruling.

See Petition for Review, p. 4.

As stated in the the Court of Appeals opinion, however, Washington case law “holds that owelty liens are more limited in scope than judgment liens, and attach only to property at issue in the partition, which, in this case, was the former family home.” See Opinion, p. 9.

Furthermore, the Court of Appeals stated:

But the owelty lien in this case is distinguishable from a general judgment lien in that it only attached to the former family home, not to the Property, or any other property owned by Patrick. ‘The owelty lien is like a vendor’s lien in that it attaches to a particular piece of real property to assure payment of a debt related to that property.’ Wintermute, 70 Wn. App. at 745. ‘By attaching to a particular piece of real property to secure an equalizing award of money, an owelty lien is significantly more focused and limited in scope than a general judgment lien. It is a compensating device tailored by the court or the parties to address a specific situation.’ Wintermute, 70 Wn. App. at 745-56’

See Opinion, pp. 10-11.

The consequences in this case of the Court of Appeals properly concluding that the owelty lien held by American Pension is more focused and limited in scope than a general judgment lien, and did not attach to the subject property, are limited. As a result of this ruling,

American Pension must return the \$3,646.74 it was awarded out of the sale proceeds to the Court Registry. Co-tenant Patrick Hafey is now entitled to that sum.

C. The Barths Should be Awarded Attorney Fees for the Preparation and Filing of this Answer.

Pursuant to RAP 18.1(j) and RCW 7.52.480, the Barths request an award of reasonable attorney fees for the preparation and filing of this answer to American Pension's Petition for Review.

IV. CONCLUSION

For the foregoing reasons, the Barths respectfully request that this Court deny further review of this case, and award them their attorney fees in connection with the filing and preparation of this Answer. American Pension has failed to satisfy any of the criteria governing review under RAP 13.4(b), and the record and case law demonstrate that the Court of Appeals, Division One, correctly decided the issues presented.

RESPECTFULLY SUBMITTED this 21st day of September, 2015.

SNELL LAW OFFICES, P.S.

By: 
William N. Snell, WSBA #3684
Matthew Snell, WSBA #40460
Attorneys for Respondents / Cross-Appellants
Thomas and Sandra Barth

CERTIFICATE OF SERVICE

I hereby certify that on September 21st, 2015, I caused the foregoing *Answer to Petition for Review* to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

Attorney for Defendant American Pension Services, Inc. Robert H. Stevenson Attorney at Law 810 Third Avenue, Suite 228 Seattle, WA 98104 (206) 682-3624	<input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic
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Dated this 21st day of September, 2015.


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