

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

Jul 20, 2016, 1:32 pm

RECEIVED ELECTRONICALLY

SC# 93364-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VAN NHU HUYNH, *Petitioner*

v.

LEUNG HING LI, *Respondent*.

**Appeal from the Court of Appeals, Division I
of the State of Washington
Cause No. 73457-1-1**

ANSWER TO PETITION FOR REVIEW

GLYN E. LEWIS
Attorney for Respondent
WSBA #45744

Glyn E. Lewis
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com

 ORIGINAL

TABLE OF CONTENTS

I. Alleged Assignments of Error and Summary of Argument. - 1 -
II. Statement of the Case. - 2 -
III. Argument..... - 5 -
 A. The Appellate Court correctly applied the higher standard proof to Huynh's adverse possession claim. - 5 -
 B. Division III's ruling in *Nicholas* did not establish any precedent for claims of adverse possession claims among co-tenants because the court in *Nicholas* did not apply the higher standard of proof for adverse possession among co-tenants. - 6 -
 C. The undisputed facts that Huynh was in possession, paid taxes and collected rent do not show clear and unequivocal acts of adverse possession because these acts are consistent with the rights of a co-tenant - 6 -
 D. Huynh cannot cite any statute or case requiring Li to claim Real Properties on his Federal Income Tax Returns - 8 -
IV. Conclusion..... - 9 -

TABLE OF AUTHORITIES

Cases

Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984)..... - 5 -
Hisle v. Todd Pac. Shipyards, 2004 Wash. LEXIS 448, 151 Wn.2d 853, 93 P.3d 108 (2004)..... - 2 -
Nicholas v. Cousins, 1 Wn. App. 133, 459 P.2d 970 (1969)..... - 5 -
See *Graves v. Graves*, 48 Wash. 664, 94 P. 481, (1908)..... - 7 -
Silver Surprise v. Sunshine Mining Co., 15 Wn. App. 1, 21 (1976 Wash.)..... - 5 -

Rules

RAP 13.4 - 1 -
CR 56(c) - 2 -

I. Alleged Assignments of Error and Summary of Argument.

Petitioner Van Nhu Huynh ("Huynh") states in her Petition for the Review (the "Petition") at page 10 that she is seeking review of the Appellate court's decision, dated April 25, 2016, (the "Decision") under RAP 13.4(b)(1,2, and 4). RAP 13.4(b)(1,2 and 4) provides as follows.

- (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
- ...
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Huynh is seeking review under RAP 13.4(1) on the grounds that the Decision conflicts with the Supreme Court's rulings on the inadmissibility of subjective belief and self serving statements and that the Decision failed to apply the correct standard of proof. Huynh herself put Respondent Leung Hing Li ("Li")'s subjective belief at issue when she predicated her motion for summary judgment for adverse possession on Li's alleged admission in his deposition that he believed Huynh was adversely possessing the Subject Properties. Huynh cannot now complain that Li introduced contemporaneous deposition testimony contradicting and clarifying his alleged admission.

Petitioner is seeking review of the Decision under RAP 13.4(b)(4) on the ground that the Decision conflicts with Division III's ruling in *Nicholas v. Cousins*, 1 Wn. App. 133, 459 P.2d 970 (1969) on the alleged irrelevancy of actual notice to a co-tenant of ouster. The court in *Nicholas* did not apply the higher standard of proof, clear and unequivocal acts, showing adverse possession because the case did not involve claim of adverse possession by one co-tenant against

another. *Nicholas* involved a claim of adverse possession against persons who were not aware of the alleged co-tenancy relationship and the clear and unequivocal acts standard of proof was not applied.

Under well established Washington State case law, possession, receipt of rents and payments of taxes do not constitute unequivocal acts of adverse possession against a co-tenant. The Decision correctly found that possession, receipt of rents and payment of taxes was the only undisputed basis for Huynh's claim of adverse possession against Li and that such a basis was insufficient to establish ouster because such acts are consistent with the rights of a co-tenant.

Finally, Petitioner is seeking review under RAP 13.4(4) on the ground that Respondent's alleged failure to report his ownership of the Subject Real Properties on his federal tax returns implicates an issue of substantial public interest. There is no requirement that a person "claim real properties" on their federal income tax returns and Huynh has repeatedly failed to cite any statute or case law requiring the same.

II. Statement of the Case.

The relevant undisputed facts are recited in the Decision at pages 2 and 3. In her Petition Huynh references numerous disputed facts. Huynh cannot use these disputed facts to support her claim for adverse possession. Summary judgment is proper under CR 56(c) where there is no genuine issue of material fact, the moving party is entitled to summary judgment as a matter of law, and a material fact is one upon which the outcome of the litigation depends, in whole or in part. *Hisle v. Todd Pac. Shipyards*, 2004 Wash. LEXIS 448, 151 Wn.2d 853, 93 P.3d 108 (2004).

Because Huynh has referenced numerous disputed facts in her Petition it bears worth noting which facts are disputed by the parties. In her Petition at page 4 Huynh alleges that in 1990 Huynh and Li agreed that Huynh would own and operate their joint business Asia Discount Center and that Li would own and operate their other joint business, United Imports. Li never agreed that Huynh could own and operate Asia Discount Center. Huynh has provided no document signed by Li agreeing to any such arrangement. The undisputed fact is that in 1987 Huynh and Li agreed in writing that Asia Discount Center would be sold and the proceeds divided between Li and Huynh half-half. See Divorce Decree attached as Exhibit "2" to the Li Dec, CP 66-70.

In her Petition at page 5 and 6, Huynh argues that Li admitted in his deposition that Huynh was adversely possessing the Subject Properties. Huynh selectively cites portions of Li's deposition testimony where he states he was upset with Huynh for taking the Subject Properties. The portions of Li's deposition testimony not cited by Huynh is where Huynh's counsel asks when Li became upset with Huynh for taking the Subject Properties. Li testified at his deposition that he trusted Huynh to handle his financial affairs until Huynh filed the above captioned lawsuit against him to quiet title in August 2012. See Li Deposition Transcript at page 75, lines 6-8- "up until the point when she served me with the complaint, then her true self started to show. Because, before that, I still thought she was helping me.", attached as Exhibit "2" to the Declaration of Glyn E. Lewis, CP 140.

It is undisputed that between 1998, when Huynh sent Li the Property Expense Breakdown for the Subject Properties, and 2011, when Huynh sent Li a letter requesting transfer of the Properties, the parties never discussed the Subject Real Properties. See Huynh Depo. at page 54, line 8 to page 57, line 10, Ex. "1" to Lewis Dec., CP 125-128, and Li Dec. at paragraph

14, CP 57. Based on the foregoing, the point in time at which Li became aware that Huynh was adversely possessing the Subject Properties is a disputed fact.

Elsewhere in her Petition at page 16, Huynh argues that the powers of attorney that Huynh signed for Li are irrelevant. Huynh does not dispute that she acquired a general power of attorney to manage Li's financial affairs in 1987. Huynh also does not dispute that in 2012, her former attorney, Mr. Tall, specifically referenced the general power of attorney as being in effect in a letter to Li. See letter from Mr. Tall, Ex. 9 to LI Dec, CP 85-86.

Huynh argues in her Petition that she never used the general power of attorney. This is a disputed fact which Li was never able to complete discovery on. However, it is undisputed that Huynh and Li never expressly revoked the power of attorney. See Li Dec at paragraph 25, CP 60-61, and Huynh Depo at page 134, lines 7-10, Ex. "1" to Lewis Dec., CP 136.

Li also gave Huynh a special power of attorney in June 1998 to sell one of their jointly owned properties. See Special Power of Attorney, dated June 25 1998, signed by Li for Huynh attached to the Li Dec as Exhibits "12", CP 93. The fact that Huynh was in fact managing and participating in Li's financial affairs in 1998, directly contradicts her claim that she ousted Li from the Subject Properties in 1997. In a footnote on page 16 of her Petition Huynh argues that the fact Li gave Huynh a special power of attorney in 1998 shows that the 1987 general power of attorney was revoked. A special power of attorney is needed to transfer real property, which was admitted by Huynh's previous attorney. Therefore, the fact that Li gave Huynh special power of attorney in 1998 to sell real property does not demonstrate that the 1987 general power of attorney was revoked.

III. Argument

A. The Appellate Court correctly applied the higher standard proof to Huynh's adverse possession claim.

In her Petition at page 10, Huynh argues that the standard for adverse possession set forth in *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984) was the correct standard of proof for adverse possession to apply in the instant case and that the Decision failed to apply this *Chaplin* standard to Huynh's adverse possession claim.

As set forth in Huynh's own Petition for Review at page 11, the court must apply a higher standard of proof for adverse possession where one co-tenant is claiming adverse possession against another co-tenant. A co-tenant must prove clear and unequivocal acts showing adverse possession. *Silver Surprise v. Sunshine Mining Co.*, 15 Wn. App. 1, 21 (1976 Wash.) The court in *Chaplin* did not apply the higher standard of proof, clear and unequivocal acts, showing adverse possession because *Chaplin* did not involve claim of adverse possession by one co-tenant against another, but instead was a boundary dispute between neighbors.

Huynh does not dispute the fact in her Petition that Li and Huynh were in a co-tenant relationship for the Subject Real Properties and that the higher standard of proof applies to Huynh's adverse possession claim. The Decision at page 1 specifically held that Huynh failed to present "undisputed facts clearly and convincingly establishing ouster." Thus the Decision applied the correct standard of proof. Huynh merely disagrees with the application of this higher standard of proof by the appellate court. Huynh's disagreement with the application of the standard of proof does not establish that the court applied the incorrect standard of proof to Huynh's adverse possession claim.

B. Division III's ruling in *Nicholas* did not establish any precedent for claims of adverse possession claims among co-tenants because the court in *Nicholas* did not apply the higher standard of proof for adverse possession among co-tenants.

In her Petition at page 12, Huynh argues that the Appellate Court failed to follow Division III's ruling and *Nicholas v. Cousins*, 1 Wn. App. 133, 459 P.2d 970 (1969). Huynh cites vague verbiage in the opinion as to what constitutes adverse possession by a co-tenant and alleges that the Decision did not apply this vague standard. The court in *Nicholas* did not apply the higher standard of proof, clear and unequivocal acts, showing adverse possession because the case did not involve claim of adverse possession by one co-tenant against another. *Nicholas* involved a claim of adverse possession against persons who were not aware of the alleged co-tenancy relationship and the clear and unequivocal acts standard of proof was not applied. Therefore, *Nicholas* does not establish any precedent for adverse possession claims among co-tenants because the court in *Nicholas* did not apply the higher standard of proof for co-tenants.

C. The undisputed facts that Huynh was in possession, paid taxes and collected rent do not show clear and unequivocal acts of adverse possession because these acts are consistent with the rights of a co-tenant

In her Petition at page 16 Huynh argues that Li created disputed issues of fact by making self serving statements that he trusted Huynh until 2012 when Huynh filed the complaint against Li. Li argues that Li's subjective belief is not "reasonable" because of the way Huynh treated the properties since 1997 should have put Li on notice about her adverse possession. The only undisputed evidence presented by Huynh of adverse possession was the fact that she paid the property taxes and collected rent on one of the Subject Properties. Washington State case law has established what evidence does not constitute clear and unequivocal acts of adverse possession

by a co-tenant. Possession, receipt of rents and payments of taxes do not constitute unequivocal acts of adverse possession against a co-tenant. See *Graves v. Graves*, 48 Wash. 664, 94 P. 481, (1908) The court in *Graves* stated that:

"The mere receipt and retention by one cotenant in possession of all the rents and profits does not of itself constitute an adverse possession, and will not ripen into title as against the others, though continued for the statutory period."

The facts in *Graves* are not distinguishable in a material way from the instant case. The claimant in *Graves* claimed he was adversely possessing the real property jointly owned by the parties because he was in actual possession, and paid taxes and collected rent. The only undisputed facts that Respondent has offered to support her adverse possession claim are possession, payment of taxes and receipt of rent. Respondent was not even in actual possession of two of the three real properties she claims to have adversely possessed.

Moreover, Li's subjective belief that Huynh was not adversely possessing the properties was also objectively reasonable because he was entitled to rely on the fact that his name was recorded on the title to the Subject Properties. Li's subjective belief was also objectively reasonable because after Huynh allegedly "kicked Li out of the house" in 1997, Huynh sent Li an expense breakdown for the Subject Properties in 1998 and subsequently split the sales proceeds of one of their jointly owned properties in 2000. Therefore, Li could reasonably expect Huynh to split the sales proceeds of the Subject Properties if they were sold.

Conversely, Huynh subjectively believed that she was not adversely possessing the Subject Properties. The Appellate court at page 10 of the Decision found that Huynh's 2011 request that Li quitclaim his interest in the Subject Properties to Li implies recognition on her part that he[Li] had an interest to convey." Huynh didn't even have the presence of mind to

allege that she was adversely possessing the Subject Properties when she filed her complaint for quiet title against Li in 2012. The basis of her complaint for quieting title in the Subject Properties was that Huynh had contributed the funds for their purchase. Huynh's attorneys then subsequently changed the theory of her case to adverse possession after taking Li's deposition.

The Appellate Court correctly followed the decision in *Graves* and reversed the trial court's decision granting summary judgment for adverse possession. As the Decision succinctly stated at page 9 "Huynh's argument that her collection of rents, exclusivity of possession, management of the properties and payment of taxes establish that her possession of the property was hostile to Li rests on a false premise. These facts do not show hostility because the acts asserted are entirely consistent with her rights as a co-tenant of the property."

Huynh also argues on page 16 and 17 of the Petition that Li's subjective belief regarding Huynh's possession of the Subject Properties is irrelevant. Huynh's motion for summary judgment was predicated on Li's subjective belief and alleged admission in his deposition that Huynh was adversely possessing the Subject Properties. Huynh put Li's subjective belief at issue. It is therefore disingenuous for Huynh to now argue that Li's subjective belief is irrelevant.

D. Huynh cannot cite any statute or case requiring Li to claim Real Properties on his Federal Income Tax Returns

In her Petition at Brief at page 19 Huynh argues that Li should somehow be "estopped" from claiming that the Subject Real Properties are his because he did not claim the real properties on his federal tax returns after 1998. There is no requirement that a person "claim real properties" on their federal income tax returns and Huynh, as in her motion for summary judgment and Opening Appellate Brief, again fails to cite any statute or case law requiring the same. If Li had incurred out of pocket expenses for the Subject Real Properties he could have

claimed deductions on his federal tax returns. Li did not incur any out of pocket expenses after 1998 so there was no requirement for him to claim any real property expense deductions on his tax return.

Huynh further makes the unusual argument at page 18 of her Petition that adoption of the federal income tax by the United States in 1913 should cause a revision of the law for adverse possession to provide more "certainty". As stated above, Huynh fails to even establish that Li was obligated to claim the Subject Real Properties on his federal tax return. Therefore, there is no reason adoption of the federal income tax should cause of revision of the law regarding adverse possession. What Huynh is actually asking this court to do is to apply a lower standard of proof for adverse possession claims among co-tenants and overturn decades of Washington State case precedent regarding the same.

IV. Conclusion

Based on the foregoing and in the interest of justice Li respectfully requests that the court deny Huynh's Petition.

RESPECTFULLY SUBMITTED this 20th day of July 2016.

By: /s/ Glyn E. Lewis

Glyn E. Lewis, WSBA No. 45744
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

Via email to:

Vic Lam
Law Offices of Vic S. Lam PS
701 Fifth Avenue, Suite 4200
Seattle, WA 98104-4047

Attorney for Petitioner and Plaintiff Van Nhu Huynh
vicslam@gmail.com

DATED this 20th day of July 2016

By: /s/ Glyn E. Lewis

Glyn E. Lewis, WSBA No. 45744
Law Office of Glyn E. Lewis
1100 Dexter Ave. N., Ste. 100
Seattle, Washington 98109
TEL (206) 661-5773
glyn@glynelewis.com

OFFICE RECEPTIONIST, CLERK

To: glyn@glynelewis.com
Cc: 'Crystal Wang'
Subject: RE: Van Nhu Huynh v Leung Hing Li - Appeal Case No. 73457-1-l- Answer to Petition for Review

Received 7-20-16

Supreme Court Clerk's Office

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.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Glyn Lewis [mailto:glyn@glynelewis.com]
Sent: Wednesday, July 20, 2016 1:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Crystal Wang' <crystal@glynelewis.com>
Subject: Van Nhu Huynh v Leung Hing Li - Appeal Case No. 73457-1-l- Answer to Petition for Review

Dear Clerk of the Court

Please find attached Respondent Leung Hing Li's Answer to the Petition for Review filed in the Appeal from the Court of Appeals, Division 1, cause no. 73457-1-l.

Regards

Glyn E. Lewis
WSBA #45744

LAW OFFICE OF GLYN E. LEWIS, PLLC
1100 Dexter Ave. N., Ste. 100
Seattle, WA 98109
Phone: (206) 661-5773
E-mail: glyn@glynelewis.com
<http://www.glynelewis.com>