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No. 65968-5-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

HAROLD BRUCE MAGNUSSON, Appellant,

v.

ARNAR ROY MAGNUSSON & JACQUELINE MAGNUSSON,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
09-2-00572-5

REPLY BRIEF OF APPELLANT

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

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INTRODUCTION

Should appellant Bruce Magnusson have had one last chance to pay off his debt to his brother? This appeal boils down to two legal principles. First, Washington law gives Bruce one last chance to avoid forfeiture -- the right to cure his default on the 2002 agreement with his brother, Respondent Roy Magnusson. Second, once he cures default, Bruce is entitled to more than 6% of the proceeds from selling the 10 acres he owned in common with Roy.

Under both the Real Estate Contract Forfeiture Act and common law equity, Bruce had the right to pay his brother all he owed to avoid forfeiture. Had he been able to cure his default, Bruce's interest in the developed south 5 acres was worth substantially more than Roy's in the undeveloped north 5 acres. The trial court erred in this case when it refused to recognize Bruce's right to cure his default and redeem his equity in his home. This error undermined the subsequent partition and division of the proceeds.

Appellant Bruce Magnusson respectfully requests this Court to reverse the trial court, recognize Bruce's right to cure and remand to divide correctly the proceeds of sale.

I. TITLE 61 ENTITLES BRUCE TO ONE LAST CHANCE

Title 61 of the Revised Code of Washington creates three methods to require a purchaser to forfeit real estate: (1) judicial foreclosure, RCW ch. 61.12; (2) non-judicial foreclosure, RCW ch. 61.24; and (3) real estate contract forfeitures, RCW 61.30. All three methods give defaulting purchasers the equivalent of one last chance to save their property. Under RCW 61.12.060, a purchaser can stop judicial foreclosure by paying “the mortgage debt, with interests and costs, at any time before sale.” Under RCW 61.24.090, the purchase can stop non-judicial foreclosure “by curing the default or defaults set forth in the notice.” Finally, and most important for appellant here, a purchaser can prevent forfeiture of a real estate contract by making “all payments of money required of the purchaser by the contract.” RCW 61.30.010(2).

If Roy had accepted the \$60,300 payment, Bruce would have cleared the debt on his home. He would have paid Roy in full. But Roy refused his brother’s payment and sold the property instead. That choice, understandable given the family history, is at the heart of this appeal.

Roy had discretion to accept or reject the payment only if Bruce had no right to cure his default. On the other hand, if Bruce had the right to cure – the right to redeem his equitable interest from forfeiture – then Roy could not refuse his brother’s money and keep the profits from the sale. Although the dispute is personal to the Magnusson family, its legal significance extends to any equitable interest in property. These issues arise whenever real estate transactions go awry. Washington courts have traditionally used equity to protect parties from losing everything.

Both the Real Estate Contract Forfeiture Act and common law equity granted Bruce the right to cure his default. Roy could not reject Bruce’s full tender of the purchase price and forfeit Bruce’s equity in the south 5 acres.

A. The 2002 Agreement Contains The Essential Elements Of A Real Estate Contract

Although less than artfully drafted, the brothers’ 2002 agreement was a real estate contract to purchase a co-tenancy in the 10 acres. (2002 Agreement; Exhibit 13 at trial). A real estate contract needs only five elements to be binding and enforceable: (1) identity of parties; (2) covenants to sell and purchase; (3) land description; (4) payment of purchase price; and (5) promise to

convey. Stoebuck, 18 Washington Practice, Real Estate § 21.6 (2d Ed.). The 2002 agreement satisfies all five elements. It identifies the parties to the agreement, covenants to sell “ownership of the south 5 acres”, and gives a full legal description. (2002 Agreement; Exhibit 13). Furthermore, the agreement stated the purchase price -- \$32,000 with \$791 monthly payments – and had a promise to convey ownership of the south 5 acres and improvements. (2002 Agreement; Exhibit 13).

Citing Kruse v. Hemp, 121 Wn.2d 715, 553 P.2d 1373 (1993), Roy argues that Washington courts require 13 elements in a real estate contract. But both Kruse and the case it relies on, Hubbell v. Ward, 40 Wn.2d 779, 246 P.2d 468 (1952), involved claims for specific performance of a real estate contract option. Kruse, 121 Wn.2d at 722 (“a contract to enter into a future contract (*i.e.*, an option contract) must specify all of the material and essential terms of the future contract before a court may order specific performance”); Hubbell, 40 Wn.2d at 781 (“trial court...entered a decree of specific performance directing defendant ‘to enter into a real estate contract’”). Not surprisingly, in both cases the Supreme Court required more detailed agreements to create an enforceable option.

Here, the 2002 agreement adequately describes and protects Bruce's equitable interest in the south 5 acres. The trial court's first summary judgment eliminated any claim for specific performance – the property was sold. The issue on appeal is whether Bruce had the right to cure his default and redeem his equitable interest in the south 5 acres. Nothing in Kruse or Hubbell excuses Roy for rejecting Bruce's payment of the past due amounts. The agreement carved out Bruce's interest in the south 5 acres and defined what Bruce had to pay for it.

Next, the Real Estate Contract Forfeiture Act governs the 2002 Agreement. In his response brief, Roy argues that the Act did not displace the law of real estate contracts. But the authorities he cites, Professors Stoebuck and Weaver, conclude that the Act rewrote the *procedures* for forfeiture.

[The Forfeiture Act] defines a "contract" or "real estate contract" *for purposes of the Act* as a "written agreement." Therefore, for any of the remedies of the Act to be used, be it forfeiture, foreclosure at the instance of the vendor, or public sale at the instance of the purchaser and other persons who are entitled to cure default, the contract must be "written." And, for a vendor to have the remedy of forfeiture, the contract also must contain an acknowledgment of the vendor's signature and must be recorded.

Stoebuck, 18 Washington Practice, § 21.5 (2d Ed.). Because the 2002 agreement falls within the scope of the Act, Bruce is entitled to the statutory protections against forfeiture.

Finally, the lack of a subdivided lot did not void the 2002 agreement. Depending on the ability to subdivide, Bruce would purchase either a fee simple estate in the south 5 acres, or co-tenancy in 10 acres, limited to the south 5.

At the time they signed the agreement, Bruce and Roy had contemplated subdividing the 10-acre parcel into two 5-acre lots. Although subdivision would have been expensive, it was not impossible. The agreement recognized this, providing for two possible outcomes. First, the parties might sell the entire 10 acres. Second, if subdivision is possible, Bruce would buy the south 5 acres outright. (2002 Agreement; Exhibit 13).

Because the parties did not subdivide, the agreement sold Bruce the estate in land to the south 5 acres. In effect, Bruce was purchasing a tenancy in common with a real estate contract. See Falaschi v. Yowell, 24 Wn. App. 506, 507, 601 P.2d 989 (1979) (“under terms of a real estate contract, Mrs. Falaschi sold an undivided one-half interest to Yowell and an undivided one-half interest to John J. and Joyce H. Cassidy, husband and wife”). Roy

may not have had the ability to convey 5 acres to him, but Bruce still owned the estate in his half of the property. Rather than purchase a lot, Bruce purchased interest in the south half. Therefore, if Roy had accepted Bruce's full payment, the agreement was enforceable. It would have entitled Bruce to the proceeds of sale rather than title.

In his response brief, Roy argues that the agreement created a tenancy in common, implying that it cannot be a real estate contract. (Response Brief at 9) ("if the Agreement is not a real estate contract, what is it?"). A vendor can use a real estate contract to sell a tenancy in common as much as a fee simple estate. Falaschi, 24 Wn. App. at 509 ("the essential attribute of a tenancy in common is unity of possession; titles are separate and distinct, and each tenant owns a separate estate"). A real estate contract is a method of purchasing and financing an interest in property. The critical factor is that the seller retains title until the purchaser pays off the contract.

Any defaulting party on a real estate contract, including Bruce, has one last chance to prevent losing an interest in property. The Legislature did not require perfectly drafted contracts to qualify for the Forfeiture Act's protection. Instead, it required only a

“written agreement for the sale of real property in which legal title to the property is retained by the seller as security...” RCW 61.30.010(1). The 2002 agreement fits this definition.

B. The Forfeiture Act Requires An Opportunity to Cure

Roy does not dispute that the Forfeiture Act requires notice and the opportunity to cure. RCW 61.30.020 (notice); RCW 61.30.090 (cure). Therefore, once the Court concludes the 2002 agreement is a real estate contract under the statute, Roy concedes that the trial court approved forfeiture in violation of the Act.

C. Bruce Preserved The Argument

As documented in Bruce’s opening brief, his trial counsel characterized the agreement as a real estate contract in both his trial brief and opening statement. (Opening Brief at 17). Roy does not dispute this, but argues it was not sufficient to raise the issue. (Response Brief at 7). It was sufficient.

Plaintiffs may have framed their argument more clearly at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court.

Bennett v. Hardy, 113 Wn.2d 912, 917-918, 784 P.2d 1258 (1990).

The Supreme Court's opinion in Bennett strongly supports this Court reviewing Bruce's statutory arguments. Even if Bruce had failed to mention the Forfeiture Act, this Court appropriately applies all relevant statutes to the controversy.

[N]o mention of RCW 49.44.090 is found in plaintiffs' memorandum opposing summary judgment. However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal. State v. Fagalde, 85 Wn.2d 730, 732, 539 P.2d 86 (1975).

Bennett, 113 Wn.2d at 918. The Forfeiture Act has undeniable relevance to Bruce's right to cure his default.

Furthermore, this Court has discretion under RAP 2.5(a) to consider a new argument, including a new claim of error on appeal.

[A]pplication of RAP 2.5(a) is ultimately a matter of the reviewing court's discretion. Even if there was a question regarding the application of one of the above discussed exceptions, in this instance we would exercise our discretion and consider whether RCW 49.44.090 supplies a basis independent from RCW Ch. 49.60 for plaintiffs' cause of action because it is necessary to our rendering a proper decision. Falk v. Keene Corp., 113 Wn.2d 645, 659, 782 P.2d 974 (1989) ("[a]n appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision").

Bennett, 113 Wn.2d at 918-919. The Court appropriately decides the issue first presented to the trial court – did Roy violate the Forfeiture Act by failing to accept Bruce's cure of his default.

Although not titled so, Bruce and Roy's 2002 agreement amounts to a real estate contract to purchase a tenancy in common for the south 5 acres. The Real Estate Contract Forfeiture Act required Roy to give Bruce notice and the opportunity to cure before foreclosing on Bruce's interest. Because Roy failed to do so, and the trial court upheld forfeiture in dividing the proceeds from sale, Bruce received far less in the partition than he was legally due. By refusing to allow Bruce to cure default, the trial court invalidated its partition of Bruce's and Roy's interests in the 10 acres.

II. EQUITY ALSO REQUIRES ONE LAST CHANCE

The trial court has discretion to partition property, but it must apply the proper legal principles to value the parties' interests.

The statute requires that all of the parties' rights be determined in such suit and, since the trial court is one of general jurisdiction, equitable rights as well as legal rights are adjudicated. It is the duty of the court, in a partition suit, to determine title when that issue is presented.

Witzel v. Tena, 48 Wn.2d 628, 631, 295 P.2d 1115 (1956).

Under Washington common law, Bruce had an equitable right in the partition action to cure his default and avoid forfeiture.

Pardee v. Jolly, 163 Wn.2d 558, 574, 182 P.3d 967 (2008). Roy's

response carefully avoids discussing Pardee, claiming instead that “Bruce requested partition of the proceedings from the sale of the property, and cannot now be heard to complain.” (Response Brief at 11). If this argument were correct, no plaintiff could appeal a partition decision – the party asking for partition could not dispute its outcome.

Bruce did not invite error from the trial court. He challenges the specific division of proceeds from the sale, not that the court partitioned the properties. Once the court approved a sale, rather than physical partition, the only question was whether the trial court correctly divided the proceeds.

Roy’s failure to address the equitable right to cure is an important concession. By tendering full payment of his debt to Roy, Bruce fulfilled every part of the 2002 agreement, preserving his equity in the south 5 acres. The right to cure makes Bruce’s earlier misdeeds irrelevant. It may have been frustrating to accept full tender, but under the contract, that is all Roy could reasonably demand. The contract did not entitle Roy to punish his brother for failing to pay earlier.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DIVIDING THE PROCEEDS

The trial court had discretion to divide the proceeds of sale appropriately. But that discretion was not unlimited. The court's failure to apply the correct legal standard was an abuse of discretion.

Three steps are included in this analysis: first, the court has acted on untenable grounds if its factual findings are unsupported by the record; *second, the court has acted for untenable reasons if it has used an incorrect standard*, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.

State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)
(emphasis added).

The trial court abused its discretion by not recognizing Bruce's right to cure. As a result, the trial court substantially undervalued Bruce's ownership interest in the property, reimbursing him only for what he paid. Roy, on the other hand, recovered not only what he paid for the property, but also the equity in the full parcel. Rather than divide the profits from the sale, the trial court awarded them all to Roy.

At no point did Bruce abandon his interest in the property, either. Roy suggests that in Cummings v. Anderson, 94 Wn.2d 135, 614 P.2d 1283 (1980), the Supreme Court upheld a partition award that reimbursed a co-tenant only for contributions to the property. But in Cummings, the co-tenant abandoned her contractual obligations, as opposed to defaulting on them.

The trial court correctly held that the respondent, having abandoned her obligations under the contract, could no longer be heard to say that her interest was equal to that of the petitioner, who alone made the payments necessary to preserve the equity existing at that time and avoid forfeiture.

Cummings v. Anderson, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980).

Here, there was no contract with a third party that Bruce abandoned. The only contract was with Roy, his co-tenant. In addition, Bruce never left the property nor did he ever disavow his ownership. He defaulted on the contract, which is different from abandoning it. Unlike in Cummings, Roy could not reasonably assume that "any further payments by him would inure to his sole benefit." Cummings, 94 Wn.2d at 144. He paid the mortgage on Bruce's property, knowing that Bruce claimed it.

The appropriate division of sale proceeds would award Roy the equity in the north 5 acres and Bruce the equity in the south 5, less deductions. The property sold for \$276,000 with the net proceeds totaling \$240,560. (Finding of Fact ¶ 19; CP 78). In its original findings, the trial court allocated tax liability based on the ratio of assessed value of the land and improvements.

For purposes of apportioning annual real estate taxes, the Court adopts the Accounting attached as Exhibit A reflecting a 32:68 ratio between the value of the 'north 5 acres' and the improved five acre remainder of the property.

(Finding of Fact ¶ 20; CP 78).

Using this ratio on the sale proceeds, the north 5 acres returned \$76,979.20 ($.32 \times \$240,560$) and the south 5 returned \$163,580.80 ($.68 \times \$240,560$). Out of Bruce's share, \$163,580.80, would come the unpaid balance on the 2002 agreement, \$60,300, unpaid taxes, \$11,736, and replacement costs for appliances and repairs, \$5,316, for a remainder of \$86,228.80. (Supplemental Findings of Fact ¶¶ 13-14; CP 24). Added back would be prejudgment interest of 6% on the sales proceeds from date of deposit.

The trial court's failure to recognize Bruce's right to cure was a significant error. Rather than receive \$86,228.80 from the sale of

his home, Bruce received \$15,148.00. The difference represents the value of his equity in the property, value that Bruce forfeited to Roy.

CONCLUSION

The trial court erred by not recognizing Bruce Magnusson's right to cure his default on the 2002 agreement with his brother. As a consequence, the trial court abused its discretion by awarding Bruce only \$15,148 from the sale of his home. Appellant Bruce Magnusson respectfully requests the Court to vacate the trial court's judgment and remand for redivision of the sale proceeds.

DATED this 5 day of July, 2011.

BURI FUNSTON MUMFORD, PLLC

By 

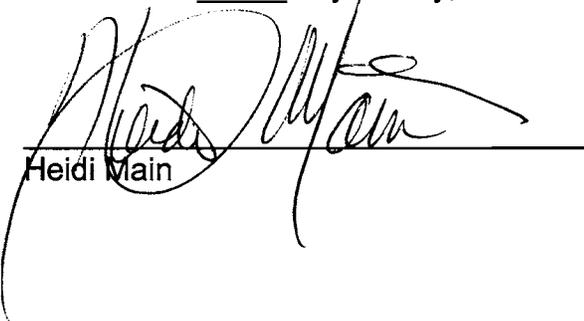
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Reply Brief of Appellant to:

Jeffery Solomon
Belcher Swanson Law Firm
900 Dupont Street
Bellingham, WA 98225

DATED this 5th day of July, 2011.



Heidi Main