66103-5

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NO. 66103-5-1

THE COURT OF APPEALS

DIVISION I

THOMAS AND SUSAN ARRINGTON, *Appellants,*

v.

VISUAL GRAPHICS AND BANK OF AMERICA, *Respondents.*

BRIEF OF RESPONDENT VISUAL GRAPHICS

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

Respondent makes no assignments of error.

B. STATEMENT OF THE CASE

Susan Arrington, while a trusted employee, embezzled over $330,000.00 from her long time employer, Visual Graphics, Inc., between January 2002 and June, 2008. CP. 194. She was charged with and pled guilty to first degree theft and was sentenced to twenty four months imprisonment on Nov. 16, 2009 and was incarcerated shortly thereafter. CP 225-237. She was incarcerated at the time of the foreclosure which lead to the lower court action.

She and her former husband Thomas were divorced in 1999. As part of that matter, Thomas was awarded "Occupancy and 50% Equity in the house...". CP 209. Susan was awarded 50% equity in the property.

Visual Graphics obtained a judgment against Susan for her thefts in the amount of $330,0023.20, plus interest, costs and fees. CP 221-223. The Judgment was recorded with the County Auditor. CP 194.

No declaration of homestead was filed by either Thomas or Susan. Visual Graphics asserted no claim against Thomas' 50% interest in the excess proceeds from the Trustee sale but claimed that Susan was not

entitled to any proceeds.

Judge Kurtz found that Susan was not entitled to assert the homestead because she was not residing on the premises and on equitable grounds. CP 1-3.

C. ARGUMENT

1. The lower court was correct in deciding that Susan was not entitled to the homestead because she was not residing on the property.

Respondent concedes that in most circumstances, the decision in the case of Sweet v. O'Leary, 88 Wn. App. 199, 944 P.2d 414 (1997) normally leads to the conclusion that homestead rights trump the claims of judgment creditors in distributing the excess proceeds of a Trustee's sale. However, Judge Kurtz decided that Susan had no homestead rights.

RCW 6.13.040 provides, in part,

> "(1) Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner ....

If an owner is not occupying the property as the homestead, the owner is required by RCW 6.13.040 to prepare and record a declaration of homestead. No such declaration was ever recorded. Susan was incarcerated

at the time of the Trustee's sale and was not occupying the premises as her homestead. Further, under the Decree of Dissolution, it was Thomas and not Susan who was entitled to occupy the house.

At the hearing, Appellant relied on an old case for the proposition that one who is imprisoned has not abandoned their homestead. Nelsen v. Mckeen, 165 Wash. 274, 5 P.2d 333 (1931). However, that portion of the opinion in Nelsen is pure *dicta*. In that case, Mr. and Mrs. Nelsen had both filed declarations of homestead and Mrs. Nelsen continued to reside on the property after Mr. Nelsen was jailed. The Court decided that the property was a homestead because of Mrs. Nelsen's actions. A determination of Mr. Nelsen's rights was completely unnecessary to the decision. The Court held at 165 Wash. 279-280:

> [I]t is of no concern to appellants what has become of John Nelsen or what his intention was. It is evident that Carla Nelsen lives upon the premises declared as a homestead...

In the present case, no one was occupying the premises at the time of the sale. The lower court decided to not believe the self serving testimony of Susan that she was residing on the premises.

2. Implicit in the decision was a finding that the assertion that the proceeds were exempt was not made in good faith and therefor not exempt under

RCW 6.13.070.

Proceeds from the sale of a homestead are not automatically and unconditionally exempt from the reach of creditors. The exemption of proceeds of a sale is governed by RCW 6.13.070(1), which provides:

> The proceeds of the voluntary sale of the homestead in good faith for the purpose of acquiring a new homestead, and proceeds from insurance covering destruction of homestead property held for use in restoring or replacing the homestead property, up to the amount specified in RCW 6.13.030, shall likewise be exempt for one year from receipt, and also such new homestead acquired with such proceeds....(emphasis added).

Although not clearly expressed, it is obvious that Judge Kurtz did not find the assertion of exemption to have been made in good faith for the purpose of acquiring a new homestead. No evidence whatsoever was presented to that effect and nothing was said or presented that Susan had any intent, plan or ability to use the proceeds for the purpose of acquiring a new homestead. One can not ignore the qualification made by the Legislature. The limitation is twofold: The claim must be made in good faith and it must be for the purpose of acquiring a new homestead. Susan was committed for 24 months on November 16, 2009. The sale took place on June 11, 2010. Susan was not scheduled for release until Nov. 2011,

well more than one year after the sale. Any belated claim by her that she intended in good faith to use the proceeds to acquire a new homestead while she is still in jail would and should be laughed out of Court. Indeed , she as much as admitted so in her Declaration, stating her direction to her attorneys: "In the event they are successful, I have authorized them to deposit my portion in their trust account to be disbursed in a manner of my choosing." CP 124.(emphasis added). It is clear that in her mind the money was hers to do with as she wished- hardly a declaration of a good faith intention to acquire a new homestead.

CONCLUSION

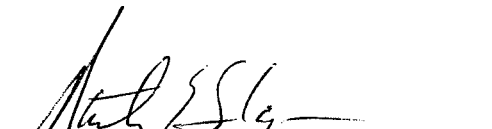
A trusted employee robs her employer blind, is sent to jail and then demands special treatment against the legitimate claims of her victims. The gall inherent in this scenario is equivalent to the old saw of the murderer of a parent who begs mercy because they are an orphan. When Mrs. Arrington pled guilty and was incarcerated for her crimes, it was her voluntary acts which led to her leaving the property. It was no longer her homestead at the time of the sale.

The statutory requirement for the exemption of sale proceeds is that they must be held in good faith for the acquisition of a new homestead. It

is clear from the record that the assertion of exemption was not made in good faith and was not for the purpose of acquiring another homestead.

On either grounds, the decision below should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that a copy of this document was deposited postage paid in the United States mail addressed to the attorneys of record on this 27th day of April, 2011.

Martin E. Snodgrass

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