

70467-2

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No. 70467-2

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

THE CITY OF SEATTLE, a municipal corporation,

Respondent,

v.

145th AND LINDEN AVE, LLC, a Washington Limited Liability Co.,

Appellant.

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CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	2
A. The City Has Not Quieted Title to Woodland’s Street Access Rights	2
B. The City Has Not and Cannot Show that the Permit Was Signed by an Authorized Agent	7
C. There are Genuine Issues of Fact Regarding the City’s Assertion of Fee Simple Ownership of the Power Line Right of Way	9
III. CONCLUSION	11

TABLE OF AUTHORITIES

Case Law

<i>Columbia Community Bank v. Newman Park, LLC</i> , 166 Wn. App. 634, 649, 279 P.3d 869 (2012)	8
<i>Mission Springs, Inc. v. The City of Spokane</i> 134 Wn. 2d 947, 962, 954 P.2d 250 (1998)	5, 6

Statutes

RCW 7.28.010	3, 5
RCW 7.28.120	4
RCW 48.29.010(3)(c)	9
RCW 58.17.160	1
RCW 64.40	5
RCW 65.08.060(3)	5

I. INTRODUCTION

The City's Response Brief only underscores that the trial court erred in granting summary judgment. This is not an appeal from a simple money judgment (\$24,238). In addition to money damages, according to the City the summary judgment *purports* to terminate Woodland's street access rights. (CP 305) (Woodland "is directed to stop...occupying the City's Property"). It is one thing for the court to order Woodland to cease *landscaping* under City Light high voltage power lines. It is quite another to eliminate Woodland's primary street access.

Per the 1977 short plat, Woodland's access to Linden Avenue is by means of a 44' wide access across the subject power line right of way. (CP 128, 131). As set forth in its Response, the City now contends that this judgment eliminates Woodland's street access. However, there was no claim for quiet title nor any legal or factual basis to terminate street access and lock out some 100 resident families. As to the money judgment, the City has not and cannot show that the person who signed the Temporary Permit was authorized to do so.

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II. ARGUMENT

A. The City has not Quieted Title to Woodland's Street Access Rights

An elemental requirement for approval of a plat is access to public streets. RCW 58.17.160. (“Each and every plat...shall contain a statement of approval from the city...licensed road engineer...as to the layout of streets...and other rights-of-way”). In 1977, the City approved Short Plat No. 77-59 which includes a 44’ wide access across the power line right of way to Linden Avenue. (CP 128, 131) (plat map in which the 44’ wide access is labeled “easement”). It is undisputed, that the 102 Unit Woodland apartments were thereafter constructed in accordance with the Short Plat with primary street access to Linden Avenue.

Also, it is undisputed that the City’s complaint does not assert a claim for quiet title. (CP 1). Indeed, the Response Brief reiterates that the City did not raise “quiet title as a claim”. Response at 7. The City did not even mention termination of Woodland’s street access rights in the City’s opening or reply brief to the trial court.

The City’s Response only underscores that any *purported* termination of Woodland’s access rights is patent error. At the outset, it is worth noting that the City could easily have simplified this appeal by conceding that the summary judgment order does not terminate

Woodland's street access rights across the City Light right of way. Indeed, it is hard to imagine that a responsible municipal corporation would assert, as the City does here, that it has terminated, by summary judgment, the street access that it approved some 36 years ago and that it can now block street access to over 100 resident families.

But the City is not acting as a municipal corporation. In its own words **“here, the City is not acting in its sovereign capacity but rather in its capacity as landowner for its municipal electric utility”**. (CP 53) As a private business, City Light seeks to gain a patently erroneous and unsupportable business advantage. Notably, the Response does not dispute (or address) the fact that City Light threatened to “eliminate access” to Linden Avenue unless Woodland executed an amended Temporary Permit with a new rental rate bearing a punitive 300% increase. (CP 15-18, 124)

In its Response, the City's first argument is that neither party “raised quiet title as a claim or counterclaim”. Response at 7. But this only underscores that the judgment (as construed by the City), is plainly erroneous. If the City wanted to terminate the street access that it approved in the 1977 Short Plat, it was incumbent upon the City to plead and prove a claim for quiet title.

Rights in real property are not terminated by stealth. In Washington, termination of a real property right must be by means of a quiet title proceeding under RCW 7.28. As stated in RCW 7.28.010:

Any person having a valid subsisting interest in real property, and right to possession thereof, may recover the same by action in the superior court...**against the person claiming title or some interest therein**, and may have judgment in such action quieting title or removing a cloud on plaintiff's title.

The complaint seeking quiet title must be specific. RCW 7.28.120 provides:

The plaintiff in such action shall set forth in his or her complaint the nature of this or her estate, or title to the property and the **defendant may set up a legal or equitable defense** to plaintiff's claims; and the superior title, **whether legal or equitable**, shall prevail. **The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.**

A claim to terminate the primary street access approved by the City's 1977 short plat would have been absurd on its face and the City made no such claim. Nor does the summary judgment order even mention the 44' wide short plat street access. (CP 303). While of secondary importance to Woodland, the foregoing discussion is also true for the 20' wide easement recorded in 1949. (CP 126, 133)

The City's next assertion (that "there is no issue of fact" regarding termination of street access rights) is similarly without merit. As to the 44' wide short plat access, the City asks this court to accept the highly

simplistic notion that Woodland's primary street access cannot exist because the City did not grant an easement "in the form of a deed" when it approved the 1977 short plat. First, as discussed, there is no quiet title claim. Second, there is no mention of any purported right to terminate the short plat access in the summary judgment motion.

Following the City's logic, thousands of short plats having City-approved street access over City rights of way, actually have no "right or interest" in street access for want of a formal easement "deed". This is obviously not the law. Property rights in land are not limited to those rights acquired by "deed" nor can such rights be capriciously terminated. First, as discussed above, a quiet title action is necessary when there is a dispute over any "interest" in real property. RCW 7.28.010. Quiet Title jurisdiction--including equitable defenses--is not limited to interests under narrowly defined deed grants.

Obviously, the approved short plat (1977) and the previous recorded easement constitute "an interest" in real property. It is also worth noting that under Washington's recording statute, a "conveyance" is defined broadly to include every written instrument "by which title to any real property may be affected." RCW 65.08.060(3).

Furthermore, both Washington law and federal law recognize that a right or interest in real property is not narrowly limited to an interest

acquired by “deed”. As the Washington State Supreme Court explained in *Mission Springs Inc. vs. The City of Spokane*, 134 Wn. 2d 947, 962, 954 P.2d 250 (1998), even a grading permit is a “property right” that cannot be deprived without due process. After holding that the City of Spokane acted arbitrarily in refusing to process the applicant’s grading permit in violation of RCW 64.40 (**Property Rights, Damages for Governmental Actions**), the Court stated:

A similar result must follow under 42 U.S.C. sec 1983. A prima facie case under 42 U.S.C. sec. 1983 requires the plaintiff to show that a person, acting under color of state law, **deprived the plaintiff of a federal constitutional or state created property right** without due process of law.

Mission Springs had a constitutionally cognizable property right in the grading permit it sought. **The right to use and enjoy land is a property right.** *State ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R 654 (1928); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 50, 720 P.2d 782 (1986) (“**Although less than a fee interest, development rights are beyond question a valuable right in property.**”) (quoting *Louthan v. King County*, 94 Wash. 2d 422, 428, 617 P.2d 977 (1980)).

Woodland’s street access rights are an interest in real property for which no claim for quiet title was alleged or presented to the trial court.

Similarly, the City’s argument on appeal that landscaping under the power lines on the 20’ easement “is not within the scope of the 1949

easement grant” is unavailing when there was no claim for quiet title and the subject is entirely outside the scope of the pleadings.

Any *purported* termination of Woodland’s street access rights by summary judgment is error. There is no claim for quiet title and even assuming, *arguendo*, that a claim was pled, there are myriad issues of material fact.

B. The City Has Not and Cannot Show that the Permit Was Signed by an Authorized Agent

The Response only underscores that the City has not and cannot show the absence of material fact regarding agency authority. At the outset, the Response does not dispute (or address) the fact that the City’s summary judgment motion was silent on the subject of agency authority even though Woodland’s answer expressly denied that Mr. Dwyer was Woodland’s authorized agent. Woodland’s opposition to the motion showed that (1) Mr. Dwyer was not a member of 145th and Linden Ave, LLC (Appellant “Woodland”), (2) he was not the manger of Woodland which is managed by Stratford Development Company, and (3) he was not authorized to sign the Temporary Permit. (CP 123). Since there is no evidence that the principal (Woodland) authorized Dwyer to sign the Permit, the only purported basis is apparent authority. The Response does not dispute that apparent authority requires a showing of objective

manifestations made by the principal (Woodland) to the third person (City). There are none.

The Response asserts as a purported “fact” that Craig Dwyer was Woodland’s “Vice President of Residential Property Management” based upon a 2007 Comcast cable easement. Response at 4 (CP 244). But that document was apparently located by the City in a search of public records in the course of preparing its summary judgment reply brief. The 2007 cable easement was not a manifestation by *Woodland* to the *City* nor is there any evidence that the City was even aware of the cable easement at the time of the Temporary Permit. See *Columbia Community Bank v. Newman Park, LLC*, 166 Wn. App. 634, 649, 279 P.3d 869 (2012) (review pending) (“An agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent’s authority “to a third person” ...To create apparent authority, a principal’s objective manifestations must (1) cause the one claiming apparent authority to actually believe the agent has authority to act for the principal, and (2) the claimant’s actual belief must be objectively reasonable”).

Nor, contrary to the Response, is there any evidence that “City staff were led to reasonably believe and assume that Mr. Dwyer had the authority to execute the Permit”. Response at 11. Indeed, there is no citation to the record for this conclusory statement. Notably, the Response

asserts that in 2008 “Mr. Dwyer applied for a permit” for the subject power line right of way. Response at 4. However, nothing in the 2008 application,¹ indicates that Mr. Dwyer is the manager or authorized agent of *Woodland*. (See CP 241)

Plainly, Mr. Dwyer’s authority to sign the Permit on behalf of 145th and Linden Ave, LLC is a material issue of fact.

C. There are Genuine Issues of Fact Regarding the City’s Assertion of Fee Simple Ownership of the Power Line Right of Way.

Since no one disputes that the City owns a *right of way* for the 50’ wide high voltage power line strip, the third issue is of far less significance. It does, however, illustrate the City’s failure to show the absence of material fact in its summary judgment motion. As discussed above, there is no claim for quiet title nor any mention of any right to terminate the 1977 short plat access or 1949 easement in the motion. Similarly, despite *Woodland*’s express denial of agency authority, the City’s motion was silent on the issue of agency authority.

While ignoring cardinal issues, the City’s motion took pains to assert that City Light is the fee simple owner of the power line strip. (CP 45) (The City “has owned the property in fee simple since 1951”.)

¹ Notably, the Response is silent regarding the fact that the 2008 application expressly states “**To be used when Seattle City Light has easement rights and is not the property owner. There are no application or rental fees.**” *Id.*

Ownership of the entire fee (vs. a right of way) was apparently intended to bolster the City's assertion "it is not acting in its sovereign capacity". (CP 53). But having asserted fee ownership of the power line strip as a material fact, the City's motion simply failed to show the absence of dispute.

The primary support submitted by the City in its motion was a title *commitment* (CP 61) which, as a matter of black letter law is not a representation as to the condition of title. RCW 48.29.010(3)(c). The City improperly attempted to meet its burden on rebuttal but that entire discussion (whether a use of the term "right of way" is an intended as an "easement" or "fee") does not eliminate the fact question. Notably, if the City actually owned the fee, it could have submitted a simple declaration to that effect by a qualified person. But it failed to do so.

Finally, the Response ignores the fact that the City's application form for temporary use of power line right of way clearly states "**To be used when Seattle City Light has easement rights and is not the property owner. There are no application or rental fees**". (CP 241) Clearly, the City failed to prove a material issue of fact that it owns the power line right of way in fee simple.

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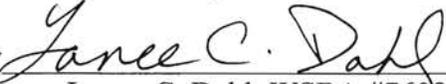
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III. CONCLUSION

If a private business asserted that a summary judgment order, obtained under the circumstances of this case, had the effect of terminating the street access of another business, the judgment would be seen for what it is: a misuse of the court to obtain an erroneous and unsupportable business advantage. In this case, the City should be treated as a private business. (CP 53) (“Here, the City is not acting in its sovereign capacity but rather in its capacity as landowner for its municipal electric utility”). The summary judgment must be reversed due to the existence of genuine issues of material fact and the absence of any claim for quiet title.

DATED this 26 day of November, 2013.

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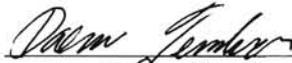
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CERTIFICATE OF SERVICE

I, Daena Temkova, legal assistant to Lance C. Dahl, hereby certify that on the date set forth below I caused a copy of the within REPLY BRIEF OF APPELLANT to be filed with the Court of Appeals of the State of Washington, Division One and to be hand delivered to counsel of record for the Respondent at the following address:

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DATED this 26th day of November, 2013.



Daena Temkova