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Court of Appeals No. 73108-4-1

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION I

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GREGORY H. KIRSCH,
Appellant,

v.

CRANBERRY FINANCIAL, LLC,
a Delaware Limited Liability Company

Defendant/Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

In 2012 Gregory Kirsch sued Cranberry Financial, LLC because it refused to release a deed of trust, even though enforcement was barred by the statute of limitation. The deed of trust was a cloud on the title of a house that was to be transferred to his former wife in accord with a dissolution decree. Kirsch was required by the decree to use his "best efforts" to remove the cloud on title. In the interim, he was required to make the mortgage payments.

Before filing suit Kirsch contacted Cranberry, pointed out that the six year limitation period for enforcement of the deed of trust had run, and asked it to reconvey or otherwise cooperate in clearing its cloud on title. He informed Cranberry that he was suffering ongoing damages because the property could not be refinanced. Cranberry refused to reconvey or otherwise cooperate in clearing title.

Washington law permits a quiet title action to remove a deed of trust when its enforcement is barred by the statute of limitation. Quieting title should not have been contested, because the six year statutory period for enforcement had run. Cranberry, however, filed a counterclaim seeking enforcement of the deed of trust and repayment of the note. Kirsch

answered the counterclaims, seeking their dismissal, attorney fees, costs, and such other and different relief as the court deemed to be just and appropriate. CP 238.

Cranberry brought a motion for summary judgment. It convinced the trial court that although acceleration of the debt had been pled in a 2004 collections suit, the acceleration of the debt vanished when the collections suit was dismissed for want of prosecution, and therefore, the limitation period had not run against the most recent six years of missed installment payments or the remaining principal balance.

The trial court was reversed on appeal and the case was remanded with instructions to reinstate the quiet title action. Kirsch, supported by the Court of Appeal's decision, renewed his own summary judgment motion. This time the trial court granted the motion, and entered an order removing the Cranberry deed of trust.

Kirsch then moved to amend his complaint, seeking damages equal to the mortgage payments he was forced to make by Cranberry's wrongful refusal to release the time barred deed of trust. The trial court denied leave to amend the complaint, ruling that Kirsch could not amend or supplement his complaint because he had already been granted summary judgment on his quiet title claim.

Kirsch appeals from the denial of leave to amend, asserting that amendment should have been allowed in the interest of justice, and that Cranberry would not have been prejudiced by the amendment.

II. ASSIGNMENTS OF ERROR

1. Denying leave to amend or supplement the complaint was an abuse of discretion.
2. The trial court erred when it found the order granting quiet title resolved all claims, preventing amendment of the complaint.

Issues Pertaining To Assignment Of Error

1. When the party resisting amendment of a complaint fails to demonstrate actual prejudice, should leave to amend be granted?
2. Should filing an amended or supplemental complaint be allowed when a party seeks damages for conduct that occurred since the filing of the action?
3. When the basis of a claim for damages is known to the parties, but not evident in the complaint, should a motion to amend the complaint be granted?
4. Is a party that prevails on summary judgment absolutely barred

from amending its complaint?

III. STATEMENT OF THE CASE

A. Statute Of Limitation Runs On Personal Guarantee

In 1996 an El Nino event devastated squid fishing in California. Channel Marine, a small family owned squid handling business faced a prolonged period without earnings. However, the industry and the United States Government were confident the squid would return when ocean conditions changed. CP 64-65.

The Small Business Administration (SBA) pushed Economic Injury Disaster Loans to affected fishermen and businesses. Channel Marine accepted a loan. The SBA required that the personal guarantee of Channel Marine President Gregory Kirsch be backed by a deed of trust on the Kirsch home. CP 65-66, 69. Channel Marine defaulted in 2000. CP 66-67.

In 2004 Capital Crossing[1], as successor to the SBA, filed suit against Channel Marine and Guarantor Kirsch. Capital Crossing alleged that it had elected to accelerate the note and "to declare the entire principal sum and all accrued interest on the note due and payable." CP 68.

Channel Marine defended against the attempt to collect the

1 Cranberry Financial is the successor of Capital Crossing.

accelerated note by filing a counterclaim for the damages caused by the SBA, specifically alleging that damage caused by the SBA exceeded the amount Channel Marine would owe the SBA. CP 68. The suit was dismissed for want of prosecution in April of 2009, but the deed of trust remained as a cloud on the title to the Kirsch home. CP 43, 69.

B. <u>Kirsch Attempts To Clear Title To Residence</u>

In 2011, faced with a marriage dissolution, Kirsch commenced efforts to remove the cloud on title. Kirsch requested that Cranberry sign a reconveyance or otherwise release the time barred deed of trust. CP 69. Cranberry refused to release the deed of trust.

In February of 2011 the marriage of Gregory Kirsch and Susan Kucera was dissolved. The dissolution decree required Kirsch to "make a good faith effort to remove the liens" from the Y Road home. CP 69. Once the time barred deed of trust was released the property was to be transferred to his former wife, Susan Kucera upon her refinance of a Note and deed of trust held by Chase Bank. Until then Kirsch was required to make the mortgage payments to Chase Bank.

On May 19, 2011 Mr. Krell, legal counsel for Kirsch, sent Mr. Stratford, the representative of Capital/Cranberry,[2] a lengthy letter

2 Denis Stratford is a representative of both Capital Crossing and Cranberry Financial..

explaining the law in detail, supported by a declaration as to the facts. CP 157-161, 34-36. The letter warned Cranberry that if it continued to refuse to cooperate in removing the cloud on title a lawsuit would be filed. Cranberry responded by demanding payment before it would release the deed of trust.

On December 9, 2011 Krell again pointed out to Cranberry that it had no legal basis for its refusal, and **specifically that Kirsch was suffering continuing harm because Cranberry's refusal prevented the property's refinance and transfer to Kucera**. CP 162, ¶2. In the same email, Kirsch offered to pay $1,000, a sum sufficient to cover any costs Cranberry would have. CP 162, ¶3. Cranberry still refused to remove its cloud on title.

In January of 2012 Kirsch filed suit to quiet title as allowed by RCW 7.28.300.[3] CP 4-52. Quieting title should have been a routine uncontested matter because the six year statutory period for enforcement had run. Cranberry, however, filed counterclaims seeking enforcement of the deed of trust and repayment of the note. CP 221-224. Kirsch

3 RCW 7.28.300. The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

answered the counterclaims, seeking their dismissal, attorney fees, costs, and such other and different relief as the court deems to be just and appropriate. CP 235-238.

Cranberry moved for summary judgment on its counterclaim. It convinced the trial judge that because the 2004 lawsuit had been dismissed the acceleration of the debt alleged in the 2004 complaint never happened. CP 250-252. Kirsch appealed from the resulting judgment.

On December 23, 2013 the Court of Appeals held that the 2004 acceleration was not wiped out by dismissal of the collections suit, and that the six year statute of limitation barred collection of any portion of the debt. The case was remanded with instructions to reinstate the quiet title claim.[4]

C. Kirsch Refuses To Waive Claim For Damages

After the Court of Appeals decision Cranberry continued its refusal to remove its cloud on title. In an attempt to get that portion of the case resolved Kirsch offered to reduce his attorney fee claim if Cranberry would reconvey immediately. A reconveyance would have stopped the damages from accumulating by allowing Kirsch to transfer

4 Appendix. Kirsch v. Cranberry Financial, LLC, 122313 WACA, 69959-8-I (2013)

the property in accordance with the dissolution decree, and stop making mortgage payments.

Cranberry responded that it would only reconvey if it was released from any claim for the damages caused by its long refusal to reconvey. Kirsch would not agree to release his claim for monetary damages. CP 114-115.

On February 20, 2014 Cranberry filed a motion attempting to convince the trial court that, because Kirsch had offered to waive some attorney fees in return for an immediate reconveyance, Kirsch should be ordered to release his claim for damages, to draft a Quiet Title Judgment, to sign a satisfaction of judgment with only the costs and fees on appeal paid, and sign a dismissal of the matter with prejudice. If it was granted this relief then Cranberry was willing to deliver a request for reconveyance to the trustee. CP 80-81.

Cranberry had been informed in prelitigation correspondence that Kirsch was suffering continuing harm because Cranberry's refusal prevented the property's refinance and transfer to his former wife. CP 162. Early in the litigation Kirsch filed a declaration referencing these damages. CP 69.

The attachments to the declaration of Cranberry's counsel further

document notice of the claim for damages. A February 3, 2014 letter from Kirsch to Cranberry states:

> Cranberry's conduct has inflicted substantial damage. Its wrongful and baseless refusal to release the Deed of Trust on the Kirsch home has forced Mr. Kirsch to pay over $1,700 per month rather than transfer the home to his former wife pursuant to their dissolution decree. At this point direct damages of over $62,000 have been inflicted by Cranberry's conduct. This amount will continue to increase until Cranberry reconveys title. Trial court fees and costs so far are approximately $20,000. This amount will increase as we return to the trial court to force Cranberry to reconvey, and to enter judgment based on the appellate decision.
>
> It is unfortunate that Cranberry refused to accept a very reasonable proposal. <u>If it wishes to discuss a settlement that includes compensating Kirsch for the damages inflicted by its conduct please contact me with an offer.</u>
>
> CP 115. Emphasis supplied.

At the hearing Cranberry argued that if a settlement was not imposed it would end up in "court arguing the same things that have been going for two years as he [Kirsch] doesn't want to release his claims." RP (March 28, 2014) 9.[5] Cranberry specifically sought an order of dismissal because such an order would end the lawsuit. RP (March 28, 2014) 10.

On March 28, 2014 the trial court rejected Cranberry's motion, finding that Kirsch had not agreed to settle his claim for damages. RP

5 Separate volumes of the the Report of Proceedings can be identified by the hearing date.

(3-28-14), 16, CP 142.

D. Kirsch Prevails On Quiet Title Claim

On April 18, 2014 Kirsch filed a motion for summary judgment seeking release of the deed of trust based upon the Court of Appeal's decision. CP 143-144. On May 30, 2014 the court signed an Order Quieting Title in Kirsch. CP 145-147.

E. Leave To Amend Complaint Denied

On November 10, 2014 the proposed Third Amended Complaint, exhibits, and a letter regarding amendment, were sent to Cranberry as attachments to an email requesting available dates for scheduling a hearing. CP 192. When Cranberry did not respond the motion was filed. CP 148-163.

The proposed amended complaint alleged Cranberry's refusal to allow the Kirsch title to be cleared was a violation of RCW 61.16, constituted slander of title, violated the Consumer Protection Act, RCW 19.86, was the result of a lack of good faith in violation of RCW 62A, and the duty implicit in all contracts, and constituted breach of contract. CP 164-155. It alleged that between February 2011 when the dissolution decree was entered, and the May 30, 2014 Order Quieting Title, Cranberry's cloud on title forced Kirsch to make mortgage payments to

Chase Bank totaling $73,984.58. CP 154.

Only Cranberry's actions prevented transfer of the Kirsch home to his former wife pursuant to the dissolution decree. An arbitrator in the dissolution ruled that his former wife was ready and able to refinance the property in accordance with the dissolution decree, but for the Cranberry cloud on title. CP 154 ¶17.

Cranberry opposed the amendment, arguing that the complaint could not be amended because Kirsch had obtained removal of the Cranberry's wrongful cloud on his title. Cranberry filed no declaration or other evidence of prejudice it would suffer from the amendment.

Kirsch argued that the interest of justice requires that a party's claims be litigated and that Cranberry would not be prejudiced by the amendment. CP 149, 91. The trial court refused to allow the amendment, finding that:

> The cause of action was resolved as to all claims in the Second Amended Complaint by the order of March 30, 2014, and the judgment was final as of that date.[6]
>
> CP 202-203.[7]

The trial court made no findings concerning prejudice. This appeal is

6 No order was entered on March 30, 2014. The Order Quieting Title was entered May 30, 2014. The trial court's oral comments refer to the Order Quieting Title. RP (1-16-15) 18-19.

7 Appendix. Order Denying Amendment of Complaint.

from the denial of leave to amend.

IV. ARGUMENT

A. Standard Of Review

A trial court's denial of a motion to amend a complaint will be reversed if the court abused its discretion or failed to exercise discretion. *Caruso v. Local Union No.* 690, 100 Wash.2d 343, 349, 670 P.2d 240 (1983). The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. Factors which may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *Herron v. Tribune*, 108 Wash.2d 162, 165-66, 736 P.2d 249 (1987). Failure to consider these factors is an abuse of discretion. *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207(1973).

B. Amendments To Complaints Are To Be Liberally Allowed

CR 1 requires Washington Courts to interpret the court rules in a manner "that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 498, 933 P.2d 1036 (1997). The court rules are intended to allow the court to reach the merits of an action. *Sheldon v. Fettig,* 129

Wash.2d 601, 609, 919 P.2d 1209 (1996). " '[W]henever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.' " *Griffith v. Bellevue,* 130 Wash.2d 189, 192, 922 P.2d 83 (1996) (quoting *First F. Sav. & Loan Ass'n v. Ekanger,* 93 Wash.2d 777, 781, 613 P.2d 129 (1980)). Procedural safeguards are to be narrowly construed in line with their general purpose. *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 153 Wn.2d 238, 103 P.3d 792 (2004).

A party is to be granted the relief to which a party is entitled, even if the party has not demanded such relief in his pleadings. *Bird v. Best Plumbing Group* 161 Wn.App. 510 529, 260 P.3d 209 (2011), CR 54(c). Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. They are designed to expedite litigation not to allow narrow constructions or technicalities to interfere with the merits of a legitimate controversy. *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979).

Leave to amend a complaint is to be "freely given when justice so requires." CR 15(a). When the new claim arises out of the conduct, transaction or occurrence set forth in the original pleading it relates back to the date of the original pleading. CR 15.(c). A pleading may be supplemented to set forth "transactions or occurrences or events which

have happened since the date of the pleading sought to be supplemented. CR 15(d). Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. CR 54(c).

The Supreme Court adopted CR 15(a) "to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Caruso v. Local Union No.* 690, 100 Wash.2d 343, 349, 670 P.2d 240 (1983), quoting *United States v. Hougham,* 364 U.S. 310, 316, ,81 S.Ct. 13 18, 5 L.Ed.2d 8 (1960). Pleadings can be amended after remand from the appellate court to include new causes of action. *Ennis v. Ring*, 56 Wn.2d 465, 353 P.2d 950 (1959).

The additional allegations and requests for relief in the proposed Third Amended Complaint[8] arose out of the prolonged refusal of Cranberry to allow removal of the cloud upon the Kirsch title. It described and quantified damages that commenced before the suit was filed and only concluded when the quit title order was entered. Amendments, even after the statute of limitations has run, should be liberally allowed when the amendment relates to the same facts as the original complaint. *Olson v.*

8 A "Second Amended Complaint" was filed only to substitute Cranberry as the correct defendant. Despite its name it was the first amendment of the complaint. The draft "Third Amended Complaint" would be the second, not the third, amendment of the complaint.

Roberts & Schaeffer Co., 25 Wn.App 225, 607 P.2d 319 (1980).

C. The Proposed Amended Complaint Was Based Upon The Same Facts As The Original Complaint

Kirsch sought to supplement the original complaint by clearly setting forth the allegations and causes of action upon which he expected to proceed to trial. CP 149, RP (January 16, 2015) 3,17. Because the damages were ongoing from before the complaint was filed until title was cleared, it may have been more appropriate to file the proposed complaint as a supplemental rather than an amended complaint.[9] But the requirement that leave be granted in the absence of actual prejudice to the opposing party applies to both amendment of complaints under CR 15(a) and supplementation of complaints under CR 15(d). *Herron v. Tribune*, 108 Wash.2d 162, 168, 736 P.2d 249 (1987).

Kirsch fully set forth the factual basis of his claim for relief in the proposed amended complaint. CP 152-154. A supporting exhibit documented notice to Cranberry of the potential claim for damages before the litigation was commenced. CP 162 ,¶2. Damages were ongoing until the cloud on title was removed.

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9 An amended complaint that states facts occurring after the original complaint was filed should be treated as a supplemental complaint authorized by Rule 15(d), rather than as an amendment. *Security Ins. Co. of New Haven, Conn. v. United States for Use of Haydis*, 338 F.2d 444, 448 (9th Cir. 1964)

Cranberry did not dispute the factual basis of the damages claim. Rather it sought procedural protection by asserting a technical flaw in the flow of pleadings. It demonstrated no prejudice, other than having to defend.

The trial court denial of leave to amend or supplement deprives Kirsch of ever getting a determination on the merits, and does so despite the fact the defendant would suffer no prejudice from the amendment. The trial court abused its discretion by depriving Kirsch of a decision on the merits.

D. Amendment Would Cause No Prejudice To Cranberry

A party should be allowed to amend freely as long as the opposing party is not prejudiced; a party should not be prevented from raising an issue that has not yet been considered by the court. *Pittman v. Pittman*, 64 Wn.2d 735, 393 P.2d 957 (1964). Refusing to allow an amended or supplemental complaint that added new causes of action and legal theories years after filing of the case is error when the opposing party is not prejudiced. *Rowe v. United States Fidelity & Guaranty Co.*, 421 F.2d 937 (4th Cir. 1970).

Factors which may be considered in determining whether

permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *Herron v. Tribune*, 108 Wash.2d 162, 165-66, 736 P.2d 249 (1987). None of these factors apply.

To be undue, delay must cause prejudice. Here, the amount of damages was dependent on when the Cranberry cloud on title was cleared. Quieting title required summary judgment motions, an appeal, and renewed summary judgment proceedings after remand. Monetary damages could not be quantified until quiet title was obtained.

Even when litigation has been going on for years, it is an abuse of discretion to deny an amendment adding claims three months before trial. *Walla v. Johnson*, 50 Wn.App. 879, 751 P.2d 334 (1988). Delay, excusable or not, in and of itself is not sufficient reason to deny a motion to amend, even a delay of over five years. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 343 (1983).

There could be no unfair surprise as the damage claim was known to Cranberry before the litigation was filed, and before its attempt to have the claim cut-off by its motion to impose a settlement. When Cranberry's counsel claimed it may be surprised by the claim the trial court remarked "Everybody knows what the, Mr. Kirsch has been complaining about all along." It then went on to note that the damages claim was in prior

pleadings, and "certainly would have been foreseen by anybody" involved in the case. RP (January 16, 2015) 13.

There could be no jury confusion as a trial date had not even been set when leave to amend was sought.

Cranberry did not submit a declaration or other evidence supporting the claims of prejudice it made in its response to the motion. CP 176-182. Even a declaration making general claims of prejudice, unrelated to any ***actual*** prejudice, is insufficient to support denial of leave to amend. *Caruso v. Local 690*, 100 Wash.2d 343,349, 670 P.2d 240 (1983). The trial court did not make any finding of prejudice. CP 202-203. Denying leave to amend when the opposing party would suffer no actual prejudice by the amendment was an abuse of discretion.

E. Precluding Kirsch From Ever Having A Hearing On The Merits Was An Abuse Of Discretion

Cranberry argued that leave to amend should be denied to preclude Kirsch from having his damages claim heard in either the present or a future suit, thereby protecting Cranberry from having to defend. CP. 174. The trial court opined that its ruling would preclude the damage claim from ever being resolved on the merits. RP (January 16, 2015 18) 20.

This ground for refusing leave to amend was rejected in *United*

States v. Vorachek, 563 F.2d 884 (8th Cir. 1977). *Vorachek* reversed the refusal to allow plaintiff to amend its complaint 11 months after a summary judgment ruling in its favor. The court specifically held that the fact amendment would prevent the defendant from later asserting the defense of res judicata was not a legitimate reason to deny leave to amend. *Vorachek* at 887.

However, allowing amendment of a complaint to avoid another lawsuit is not an abuse of discretion. *Kiecker v. Pacific Indem. Co.*, 5 Wn.App. 871, 878, 491 P.2d 244 (1971). Indeed doing so is consistent with the intent of the civil rules; to reach a just determination in every action. CR 1. It is an abuse of discretion to refuse leave to amend in order to bar a party from ever having a claim resolved on the merits.

F. Summary Judgment Does Not Prevent Amendment Of The Complaint

The trial court incorrectly determined that the complaint could not be supplemented or amended because summary judgment was granted on the quiet title claim. It believed that summary judgment is the equivalent of a jury trial "in terms of the outcome". RP (1-16-15) 19.

The Order Quieting Title in Plaintiff was entered May 30, 2014.[10] CP 202-203. It does not recite that it is a final judgment, and does not

10 Appendix. Order Quieting Title In Plaintiff.

order dismissal of the case.[11] It deals only with the quiet title cause of action. The order was presented by, and is on the pleading paper of, counsel for Kirsch. As Kirsch had forcefully asserted his claim for damages when resisting the attempt by Cranberry to impose a settlement agreement, it would make no sense for him to propose an order that would cut-off the very claim he fought to preserve. There is no language in the order cutting off the claim, or dismissing the case.

Resolution of the quiet title claim does not bar the resolution of other claims. It is error to deny leave to amend when the opposing party is not prejudiced, even after summary judgment proceeding has occurred. *Estate of Randmel v. Pounds*, 38 Wn.App. 401,685 P.2d 638 (1984).

It has long been the rule in Washington that new issues may be introduced by an amended complaint. The true test of whether to allow the amendment is whether the opposing party is, or can be, prepared to meet the new issues. *In re Campbell*, 19. Wn.2d 300, 142 P.2d 492 (1943). Cranberry had adequate time to prepare to meet the claim; no trial date had been set.

A plaintiff may amend the complaint after a summary judgment ruling. *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207(1973). In

11 It does dismiss with prejudice the counterclaims of Defendant Cranberry against Guarantor Kirsch. CP 146.

Tagliani, as in this case, the trial court denied the motion to amend, reasoning that a summary judgment ruling is equivalent to a trial and therefore ends the case. In rejecting this reasoning the court relied on the reasoning in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

In *Foman* an amendment was allowed after a judgment of dismissal for failure to state a claim on which relief could be granted had been formally entered. The *Tagliani* court quoted with approval from *Foman*:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.
>
> *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230

Even if the Order Quieting Title in Kirsch could could be construed as an

order of dismissal, *Foman* would support amendment of the complaint.

In agreement with *Foman*, the *Tagliani* court held denial of a motion to amend made after a summary judgment was an abuse of discretion. Both courts observed that the outright refusal to grant leave to amend, without any justifying reason, is not an exercise of discretion; it is an abuse of discretion and inconsistent with the spirit of the civil rules.

G. Kirsch Is Entitled To Attorney Fees And Costs

Both the trial and appellate court have previously awarded costs and fees pursuant to the provisions of the deed of trust and underlying note. For a second time, Cranberry has convinced the trial court to make a ruling that is unsupported by law or fact. Kirsch should be awarded attorney fees and costs for this appeal.

V. CONCLUSION

The trial court abused its discretion when it failed to consider whether amendment of the complaint would prejudice the defendant by causing undue delay, unfair surprise, or jury confusion. The matter should be remanded to the trial court with instruction to allow amendment of the complaint. Kirsch should be granted attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 15 day of October, 2015.

K. GARL LONG, WSBA #13569
Attorney for Plaintiff/Appellant

APPENDIX

A. **Kirsch v. Cranberry Financial, LLC**
122313 WACA, 69959-8-I (2013)

B. **Order Quieting Title In Plaintiff**

C. **Order Denying Amendment of Complaint**

FILED
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STATE OF WASHINGTON

2013 DEC 23 AM 9:23

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GREGORY H. KIRSCH, Appellant, v. CRANBERRY FINANCIAL, LLC, a Delaware limited liability company, Respondent.	)))))))))))	NO. 69959-8-I DIVISION ONE UNPUBLISHED OPINION FILED: December 23, 2013

LAU, J. — This case involves a collection action under a promissory note and personal guaranty.[1] Gregory Kirsch appeals from summary judgment dismissal finding him liable for missed payments under an installment note for the years 2006 to present and dismissing his quiet title action as moot. He contends the statute of limitations bars Cranberry Financial LLC's collection action. Because a 2004 complaint filed by Cranberry's predecessor in interest contained an express notice of intent to accelerate the balance of the note and a subsequent clerk's dismissal for want of prosecution had no effect on this notice, the six-year statute of limitations bars its collection. We reverse summary judgment in Cranberry's favor and remand with instructions to vacate the

[1] Note holder Cranberry Financial LLC asserted the collection action in a counterclaim to Gregory Kirsch's quiet title action.

judgment and reinstate Kirsch's quiet title action. We also award Kirsch appellate attorney fees and costs under RAP 18.1.

FACTS

Note, Guaranty, and Deed of Trust

On August 14, 1998, Channel Marine Ltd. obtained a loan from the U.S. Small Business Association (SBA) in the principal sum of $387,800. Channel's president, Gregory Kirsch, signed a promissory note in the principal sum of $387,800.

The promissory note was later modified to increase the principal sum to $780,400.[2] The note's maturity date is August 14, 2023. Under its terms, Channel agreed to pay annual installments of $51,394—with the first payment due February 14, 2000, and successive payments due on February 14 each year until the maturity date—plus annual supplementary payments equal to 10 percent of its net income.

Kirsch personally guaranteed Channel's obligations under the note.[3] At the same time, Kirsch granted the SBA a deed of trust on his personal residence located at 4365 Y Road in Bellingham as security for the note. By successive assignment, Cranberry succeeded to and currently owns and holds all of the SBA's right, title, and interest in the note, guaranty, and deed of trust.

Default and 2004 Lawsuit

Channel made its first and only payment under the note on February 14, 2000, leaving unpaid the annual installments for the years 2001 to the present.

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[2] We refer to the promissory note and the modification of promissory note collectively as the "note."

[3] We refer to the guaranty and its subsequent amendment collectively as the "guaranty."

On August 5, 2004, Cranberry's predecessor Capital Crossing Bank[4] (CCB) sued Channel and Kirsch for breach of the note and guaranty and foreclosure of the deed of trust. Relevant to this case, the complaint stated:

> Election to Accelerate. CCB has elected to declare the entire principal sum and all accrued interest on the Note due and payable. Under the Note, all past due installments of interest, late charges, default rate interest, attorneys' fees, advisor's fees and expenses incurred by CCB in connection with the default shall be added to the principal balance, and the principal balance shall bear interest at the Note rate of 4 percent on all amounts due.

CCB alleged Channel owed the unpaid principal balance, plus interest, and stated it was "entitled to a money judgment against [Channel] for all amounts due and owing, including attorneys' fees and costs, under the Note." CCB requested (1) "judgment against [Channel and Kirsch] . . . in the principal sum of $748,343.63, together with accrued unpaid interest of $133,218.27 as of August 4, 2004"; (2) that the deed of trust be foreclosed and the real property sold and its proceeds applied toward payment of the judgment; and (3) that the Bank be awarded a deficiency judgment against Channel and Kirsch to the extent the judgment exceeded the foreclosure sale proceeds.

Kirsch answered the complaint and denied any payments were due. Regarding CCB's "Election to Accelerate," Kirsch answered, "Defendant lacks knowledge and therefore neither admits or denies." Kirsch pleaded several affirmative defenses.

In April 2009, after nearly five years of inactivity, the 2004 lawsuit was dismissed without prejudice on the court clerk's motion for want of prosecution under CR 41.

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[4] Capital Crossing Bank was successor in interest to SBA and predecessor in interest to Cranberry in the note, guaranty, and deed of trust.

2012 Lawsuit

In April 2012, Kirsch filed a complaint against Cranberry, seeking a declaratory judgment to quiet title to the 4365 Y Road property incident to his marital divorce proceedings.[5] Cranberry filed its answer, affirmative defenses, and a counterclaim against Kirsch for breach of the guaranty. In its counterclaim, Cranberry alleged that (1) Channel failed to pay installments under the note from 2001 to present; (2) Cranberry succeeded to and owns all of the SBA's right, title, and interest in the note; and (3) "Cranberry Financial has elected to declare the entire principal sum and all accrued interest on the Note due and payable."

On May 17, 2012, Kirsch moved for summary judgment, arguing that RCW 4.16.040's[6] six-year statute of limitations barred Cranberry from enforcing the note against Channel or Kirsch. Kirsch also sought an order "quieting title against the lien of the deed of trust pursuant to RCW 7.28.300."[7] CP 30-37. He claimed:

> [S]ums due under the subject note were accelerated by virtue of the lawsuit in 2004. As such there was a demand for the entire sum owing and payments due under the note were no longer contemplated. Consequently, even if there were an argument that an installment note has a different treatment with regard to application of the statute of limitations than some other written promise to pay,

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[5] Kirsch originally filed his complaint against CCB in January 2012, but Cranberry had succeeded to CCB's interest by that time. By stipulation, CCB was dismissed from the action and Cranberry was substituted as a defendant.

[6] RCW 4.16.040 requires actions on written contracts to be brought within six years after accrual.

[7] "When an action for foreclosure on a deed of trust is barred by the statute of limitations, RCW 7.28.300 authorizes an action to quiet title." Westar Funding, Inc. v. Sorrels, 157 Wn. App. 777, 785, 239 P.3d 1109 (2010).

> that argument is moot because the note ceased being the basis for collection of the obligation when the sums were accelerated.

Cranberry argued both at the summary judgment hearing and in its opposition briefing that the annual installment payments for the years 2006 to present were not barred under RCW 4.16.040 because the statute of limitations runs separately against each installment at the time it becomes due.[8] The court granted in part and denied in part Kirsch's motion. The court ruled that the annual installment payments under the note for the years 2001 to 2005 were barred by RCW 4.16.040's six-year statute of limitations. But the court also ruled that RCW 4.16.040 did not bar enforcement of installment payments under the note for the years 2006 to present. Accordingly, the court denied Kirsch's quiet title claim.

Kirsch moved for reconsideration, again arguing the Note was accelerated. Cranberry argued in opposition that the note's acceleration clause was permissive and no evidence indicated that Cranberry or its predecessors ever exercised the acceleration option. After oral argument, the court denied Kirsch's motion, concluding that the note's acceleration clause was permissive and Cranberry had not accelerated the debt under the clause. In its oral ruling, the court indicated:

> I think that the initial lawsuit did not effectively accelerate the note, because the lawsuit was dismissed and not pursued. . . . [S]ince it has not been accelerated, then the Court is willing to determine that any payments that have not, that are not more than six years past due are still part of this lawsuit.

RP (Aug. 27, 2012) at 12.

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[8] Cranberry conceded that the annual installment payments due under the note for the years 2001-2005 were barred under RCW 4.16.040's six-year statute of limitations.

In January 2013, Cranberry moved for summary judgment against Kirsch requesting (1) judgment against Kirsch on the breach of guaranty counterclaim, (2) a determination that Cranberry's deed of trust is enforceable, and (3) dismissal of Kirsch's claims as moot. Kirsch opposed the motion and "renew[ed] [his] prior motion for summary judgment based on the statute of limitation, equitable estoppel, and laches." Kirsch argued, "Acceleration of the debt on or prior to the 2004 lawsuit caused the cause of action for the entire balance to accrue, and bars the present collections suit."

Kirsch submitted a "second declaration" supporting his argument. He described Channel's default and explained it resulted in acceleration of the SBA loan:

> 13. The economic disaster, the SBA's improper conduct, and a complete lack of working capital caused Channel Marine to miss the February of 2000 annual loan payment. <u>The SBA responded to the missed payment by declaring the loan delinquent and accelerating the debt in April of 2001 in accordance with the terms of the Note</u>.
> 14. Extensive correspondence between the parties, both before and after acceleration, discussed the reasons for the default, and outlined Channel Marine's claims against the SBA. The correspondence included demands by the SBA for immediate payment of the entire balance.
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> . . .
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> 21. <u>I also received a "demand" letter from [SBA successor] Capital Crossing in which it stated that the debt had been accelerated and the entire amount, including principal and interest, was immediately due</u>.
> 22. In 2004 Capital Crossing, consistent with its demand letter, sued Channel Marine, my wife and I, and others. . . . <u>In the complaint Capital again alleged that it had elected to accelerate the note and "to declare the entire principal sum and all accrued interest on the Note due and payable</u>."
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> . . .
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> 27. We engaged in discovery, litigated, and discussed the issues from before the filing in August of 2004 until Capital Crossing chose not to pursue the collection in about 2005. Counsel for Capital Crossing withdrew in February of 2008. Counsel for Channel Marine also withdrew. A dismissal for want of prosecution was entered in April of 2009.
> 28. I relied on the decision by Capital Crossing to abandon its claims. My records related to the SBA loan and the litigation, were no longer of importance and were discarded or lost. Witnesses would not be very difficult or impossible to locate, and memories (including mine) have certainly dimmed with time.

(Emphasis added.)

Cranberry moved unsuccessfully to strike Kirsch's second declaration as untimely and irrelevant. The trial court considered Kirsch's second declaration. The court granted Cranberry's summary judgment motion in all respects, entered judgment against Kirsch for $785,900.42, plus costs and expenses, and dismissed Kirsch's claims as moot. Kirsch appeals.

ANALYSIS

Standard of Review

We review summary judgment de novo and consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Bulman v. Safeway, Inc., 144 Wn.2d 335, 351, 27 P.3d 1172 (2001). The nonmoving party cannot rely solely on the allegations in his or her pleadings, on speculation, or on argumentative assertions that unresolved factual issues remain. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Such assertions must be supported by evidence. Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

Statute of Limitations

Kirsch contends that, at the latest, Cranberry or its predecessors accelerated the remaining debt in 2004 and, thus, the statute of limitations barred all amounts due under the Note. Cranberry responds that no acceleration occurred and, thus, the statute of limitations bars only those payments due before 2006.

Generally, actions based on written contracts must be commenced within six years after breach. RCW 4.16.040. The general rule for debts payable by installment provides, "A separate cause of action arises on each installment, and the statute of limitations runs separately against each . . . ." 31 RICHARD A. LORD, WILLISTON ON CONTRACTS § 79:17, at 338 (4th ed. 2004); see also 25 DAVID K. DEWOLF, KELLER W. ALLEN & DARLENE BARRIER CARUSO, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 16:20, at 196 (2012-13 Supp.) ("Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due"); Hassler v. Account Brokers of Larimer County, Inc., 274 P.3d 547, 553 (Colo. 2012) (same); Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 208-09, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997) (same).[9] But if an obligation that is to be repaid in installments is accelerated—either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause—the entire remaining balance of the loan becomes due immediately and the statute of limitations is triggered for all installments that had not previously become due. 31 Richard A. Lord, supra, § 79:17, at 338; §

[9] Kirsch contests this rule, arguing that Cranberry cites distinguishable family law cases for the proposition that the statute of limitations runs against each installment separately. Though some of Cranberry's cited cases are family law cases, they describe a general proposition of contract law applying to all contracts in which installment payments are due. Further, some of those family law cases cite 82 A.L.R. 316 (1931), which addresses in general terms, "[w]hen Statute of Limitations begins to run against an action to recover upon contract payable in instal[l]ments" and describes the general rule: "The general rule in such a case is similar to the general rule herewith noted in the case of contract obligations, it having been held that the Statute of Limitations begins to run from the expiration of the period fixed for the payment of each instal[l]ment as it becomes due, for the part then payable." See Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945).

clerk's dismissal of the 2004 complaint for want of prosecution under CR 41 nullified the acceleration's effect for purposes of the statute of limitations.[11]

First, there is no genuine fact dispute that Cranberry's predecessor CCB unambiguously exercised its option to accelerate in 2004. As the above cases establish, acceleration occurs upon notice to the debtor that the creditor intends to declare the entire sum due and payable. CCB filed a complaint in which it declared that it had "elected to declare the entire principal sum and all accrued interest on the Note due and payable." Kirsch's answer to this acceleration election stated "Defendant lacks knowledge and therefore neither admits or denies."[12] CCB provided clear notice to

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[11] The trial court below apparently assumed the 2004 lawsuit accelerated the debt but ruled that the subsequent dismissal reversed the acceleration. See Report of Proceedings (RP) (June 22, 2012) at 15 ("The [2004] lawsuit doesn't toll the statute of limitations, but it also once dismissed doesn't stand for the proposition . . . that the previous determination to call the note due still stands, because once it is dismissed, then nothing that happened in that lawsuit has any validity."); RP (Aug. 27, 2012) at 10-12 ("If the party brings a lawsuit, and as part of that lawsuit says we're entitled under the note to receive full payment which is essentially an acceleration . . . I would say that's probably evidence of their intent to do so. However, if the lawsuit is dismissed and not pursued, then I don't think that is effective . . . . I think that the initial [2004] lawsuit did not effectively accelerate the note, because the lawsuit was dismissed and not pursued."); RP (Feb. 8, 2013) at 16 ("Cases were cited to this Court [at the first summary judgment proceeding], and the Court determined that the abandonment of [the 2004 case] meant that that acceleration, that was wiped out at that point in time"); RP (Feb. 8, 2013) at 22 ("So any acceleration that occurred as a result of [the 2004] cause of action evaporated when the cause of action ended."); RP (Feb. 8, 2013) at 23 ("[W]hen that [2004] lawsuit was abandoned, then there is no acceleration in effect at that time."), RP (Feb. 8, 2013) at 25 ("[W]hen a lawsuit is allowed to go defunct, then that, everything that underlies it is gone, and so . . . that means the acceleration that was created by the filing of that [2004] lawsuit also is no longer in effect."), RP (Feb. 8, 2013) at 32 (in answering Kirsch's counsel's question "are you saying if [Cranberry's predecessors] made a demand for full payment prior to 2004, it's meaningless because they filed a 2004 lawsuit?", court answered, "Yes, it expired in that lawsuit.") (all emphasis added).

[12] Cranberry repeatedly asserts that "In his Answer, Kirsch denied the allegation of acceleration under the Note." Resp't's Br. at 6. Kirsch neither admitted nor denied

Kirsch of its intent to accelerate the debt. Thus, CCB took "affirmative action . . . by which the [creditor] makes known to the [debtor] that he intends to declare the whole debt due." Weinberg, 51 Wn. at 594. Cranberry cites no contrary authority. CCB's affirmative action accelerated the debt.[13] We conclude that no material issues of fact exist over whether Cranberry's predecessors exercised their option to accelerate the debt.

We next address whether dismissal of the 2004 complaint for want of prosecution nullified the acceleration for purposes of the statute of limitations. CR 41(b)(2)(A) authorizes involuntary dismissal on the clerk's motion:

> In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to either party.

"'[I]n ruling on a motion to dismiss pursuant to CR 41 [for want of prosecution], the trial court may not generally consider the merits of the case nor the hardship which application of the rule may bring.'" Foss Maritime Co. v. City of Seattle, 107 Wn. App.

CCB's "election to accelerate." And regardless of how Kirsch responded to CCB's election to accelerate, the complaint clearly gave Kirsch notice of CCB's intent to do so. This triggered acceleration.

[13] We note that the trial court considered evidence indicating the debt was accelerated even earlier than 2004. Kirsch's second declaration, quoted above, indicates that the SBA sent Kirsch a demand letter in 2001 calling the entire debt due and that CCB sent Kirsch a similar demand letter after succeeding to the SBA's interest in the note, guaranty, and deed of trust. This declaration was before the court at oral argument on Cranberry's summary judgment motion, and Kirsch's statements regarding the earlier demand letters were unrebutted. See RP (Feb. 8, 2013) at 3-36. However, even if we use the later 2004 date as the acceleration date, the statute of limitations still bars collection of the debt as discussed below.

669, 675, 27 P.3d 1228 (2001) (quoting Snohomish County v. Thorp Meats, 110 Wn.2d 163, 168, 750 P.2d 1251 (1988)). "The primary function of an involuntary dismissal by a clerk's motion is to clear the clerk's record of inactive cases." Vaughn v. Chung, 119 Wn.2d 273, 277, 830 P.2d 668 (1992). "It is an administrative provision that creates a 'relatively simple means by which the court system itself, on its own volition, may purge its files of dormant cases.'" Vaughn, 119 Wn.2d at 277 (quoting Miller v. Patterson, 45 Wn. App. 450, 455, 725 P.2d 1016 (1986)).

When a case is dismissed involuntarily without prejudice under CR 41, refiling is permitted so long as the statute of limitations has not expired. The time limit for refiling is computed as if the first case had never been filed and is not tolled by the commencement of the first action. Fittro v. Alcombrack, 23 Wn. App. 178, 180, 596 P.2d 665 (1979).

As discussed above, the 2004 lawsuit was dismissed without prejudice on the clerk's motion for want of prosecution. The dismissal resolved no substantive issues. Cranberry relies on CR 41 and cases interpreting it to argue that CCB's notice of acceleration should be ignored when the case was dismissed for want of prosecution. See Spice v. Pierce County, 149 Wn. App. 461, 204 P.3d 254 (2009); Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 158 P.3d 1271 (2007); Beckman v. Wilcox, 96 Wn. App. 355, 979 P.2d 890 (1999); Steinberg v. Seattle-First Nat'l Bank, 66 Wn. App. 402, 832 P.2d 124 (1992); Cork Insulation Sales Co. v. Torgeson, 54 Wn. App. 702, 775 P.2d 970 (1989); Logan v. North-West Ins. Co., 45 Wn. App. 95, 724 P.2d 1059 (1986); Fittro, 23 Wn. App. 178; Gould v. Bird & Sons, Inc., 5 Wn. App. 59, 485 P.2d 458 (1971). We disagree. None of those cases control in the context of knowledge or

notice between two parties and the unique circumstances present in this case. Cranberry cites no authority for its argument that a mere administrative dismissal disestablishes the fact of notice conveyed from one party to another.[14] Our observation in Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 343, 160 P.3d 1089 (2007), applies here: "Once rung, the bell is not unrung."[15] We are unpersuaded by Cranberry's reliance on the CR 41 dismissal.

Because Cranberry's predecessors accelerated the debt and the 2004 lawsuit's dismissal had no effect on the notice given to Kirsch, Cranberry or its predecessors were required to file suit "within six years after the accelerated due date . . . ." RCW 62A.3-118. Cranberry failed to do so. We conclude the six-year statute of limitations bars Cranberry's collection of all portions of the debt at issue here.[16]

Attorney Fees

Both parties request an award of attorney fees and costs under RAP 18.1 and the Note's attorney fees and costs provision.[17] Under the terms of the Note and upon

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[14] We reemphasize that mandatory involuntary dismissal under CR 41(b)(2)(A) benefits the court's docket management. It is not intended to confer any tactical or substantive advantage to either party.

[15] Kirsch's second declaration quoted above makes clear that Cranberry's predecessors in interest treated the debt as having been accelerated. Its present claim is unpersuasive based on this unrebutted evidence.

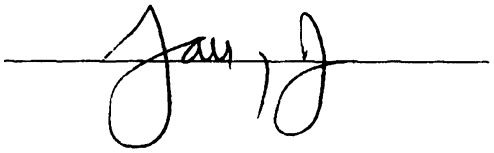
[16] Given our disposition, we need not address Kirsch's remaining arguments.

[17] The note provides that the debtor (here, Channel/Kirsch) shall pay the note holder's (here, Cranberry's) expenses of any nature, including reasonable attorney fees and costs, incurred to enforce the note's provisions. Similarly, Kirsch, as the prevailing party on appeal, is entitled to reasonable attorney fees and costs under the note's attorney fees and costs provision. See RCW 4.84.330.

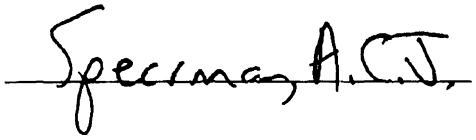
compliance with RAP 18.1, Kirsch is entitled to reasonable attorney fees and costs on appeal.

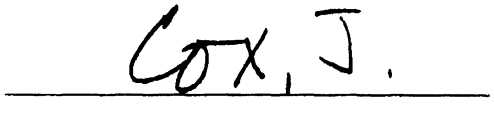
CONCLUSION

For the reasons discussed above, we reverse the summary judgment order in favor of Cranberry and remand with instructions to vacate the judgment and reinstate Kirsch's quiet title action. We also award Kirsch reasonable attorney fees and costs on appeal upon his compliance with RAP 18.1.



WE CONCUR:





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WHATCOM COUNTY
WASHINGTON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM

GREGORY H. KIRSCH, Plaintiff, v. **CRANBERRY FINANCIAL, LLC,** a Delaware Limited Liability Company, Defendant.	**No. 12 2 00142 8** **ORDER QUIETING TITLE IN PLAINTIFF**

THIS MATTER having comes before the Court after the receipt of the mandate from the Court of Appeals, and this court having reviewed the opinion of the Court of Appeals reversing the summary judgment order in favor of Defendant Cranberry, and the Court of Appeals having remanded with instructions to vacate the judgment in favor of Defendant Cranberry, and to reinstate Guarantor Kirsch's quit title action, and the Court having reviewed the files and pleadings herein, and ~~listened to the arguments of counsel~~, and considered the following documents:

BLC GRD

1. Second Amended Complaint and Exhibits A – G thereto
2. Declaration of Gregory Kirsch (Exhibit F to Amended Complaint)
3. Declaration of Timothy G. Krell in Support of Plaintiff's Motion For Summary Judgment (5-12-12)
4. Declaration of Timothy G. Krell re: Promissory Note (7-20-12)

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5. Declaration of Denis B. Stratford (Exhibits only) (1-7-13)

6. Supplemental Declaration of Denis B. Stratford in Support of Defendant/Counter-claimant's Motion for Summary Judgment

7. Second Declaration of Gregory Kirsch (1-28-13)

AND THE COURT having on July 27, 2013 granted partial summary judgment to Guarantor Kirsch on all quiet title issues except "as to payments under the note for the years 2006 to present", and the decision to except the payments for the years 2006 to present having been reversed by the Court of Appeals;

THE COURT HEREBY grants judgment to Guarantor Kirsch and dismisses with prejudice the counterclaims of Defendant Cranberry against Guarantor Kirsch, denies Cranberry any relief, and quiets title in the property commonly known as 4365 Y Road (Parcel Number 380407 446324 0000) against the claims of Cranberry and/or any entity from which it received, or claims to have received, any security position.

IT IS HEREBY FURTHER ORDERED that upon filing this order with the Whatcom County Auditor the Deed of Trust, Assignment of Deed of Trust and Loan Documents (Whatcom County Auditor File Nos. 1980802401, 2030602609) are extinguished and expunged as liens against the title to 4365 Y Road (Parcel Number 380407 446324 0000) as legally described in the complaint filed herein, all in accordance with RCW 7.28.300.

DONE IN OPEN COURT this 30 day of March, 2014.

THE HONORABLE CHARLES R. SNYDER

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

The Plaintiff is ~~granted~~ denied leave to file the Third Amended Complaint attached to his Motion. This cause of action was resolved as to all claims in the Second Amended Complaint by the order of March 30, 2014, and the judgment was final as of that date.

DONE in open Court this 16 day of January, 2015.

HONORABLE CHARLES R. SNYDER

Presented by:

K. GARL LONG, WSBA #12569
Attorney for Plaintiffs

Approved for Entry:

PHILIP S. BROOKE III, WSBA #39270
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