

73808-9

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Case No. 73808-9

In the Court of Appeals of the State of Washington,
Division One

Performance Construction, LLC,

Appellant/Cross-Respondent

v.

Colette Glenn, Cobalt Mortgage, Inc., and
Mortgage Electronic Registration System, Inc.,

Respondents

and

David Keene,

Respondent/Cross-Appellant

Brief of Appellant

On Appeal from Snohomish County Superior Court
Case No. 15-2-01905-6
Hon. Joseph Wilson

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I. Introduction

After a sheriff's sale of real property, but before the end of the redemption period:

- (1) the sheriff issued his deed to the purchaser, complying with an ex parte court order to do so,
- (2) the purchaser sold the property to Respondent Glenn, and
- (3) Appellant Performance Construction made an upset offer to Glenn to purchase the property under RCW 6.23.120.

Did Performance Construction make a "qualifying offer" under the statute?

Is Glenn obliged to accept it?

II. Assignments of Error and Issues

A. Assignments of Error

The trial court erred to the extent that its order of summary judgment:

- (1) denied Performance Construction's motion for summary judgment and dismissed its claims,
- (2) granted respondents' motions for summary judgment,
- (3) declared that Colette Glenn is a bona fide purchaser of the subject property, and
- (4) quieted title to the property in Colette Glenn free and clear of any claims by Performance Construction.

CP 50-51. The trial court based its order on the following erroneous grounds:

- (1) "Colette Glenn is an innocent, bona fide purchaser of the Property and is entitled to have title to the Property quieted in her name."

(2) “Performance Construction failed to make a qualifying offer under RCW 6.23.120”

(3) “The Property was not listed for sale as required by RCW 6.23.120.”

CP 49.

B. Issues

1. When Colette Glenn acquired her interest in the property, did she have constructive notice of the rights of upset price offerors under RCW 6.23.120?

2. RCW 6.23.120 allows anyone to make an upset offer through “a broker listing the property.” Must the broker post a written advertisement for the property in order to qualify as “a broker listing the property”?

3. Did Performance Construction make the highest qualifying offer for the property under RCW 6.23.120?

III. Statement of the Case

This is an appeal from an order entered after the parties made cross-motions for summary judgment.

This case concerns a residential condominium commonly known as Apt T-104, 18930 Bothell-Everett Hwy, Bothell, WA 98012, and legally described as:

Unit 104, Building T, Brookwood Place Condominium, according to the declaration thereof recorded under Snohomish County Rec. No. 200606210170, and any amendments thereto, located on Survey Maps and Plans recorded under Rec. No. 200606215001, and any

amendments thereto, records of Snohomish County,
Washington.

("the subject property"). CP 228.

In 2013, the property was owned by Slighter Property II, LLC. CP 220. On June 12, 2013, the Brookwood Place Condominium Association commenced a judicial foreclosure action in Snohomish County Superior Court under cause number 13-2-05481-5 to collect delinquent assessments. CP 227. On June 19, 2013, Brookwood filed a lis pendens. CP 335. The case named as defendants Slighter Property II, LLC and its members, Thomas and Bonnie Slighter, who appeared, and two lender defendants, Nationstar Mortgage, LLC and Greenpoint Mortgage, I., who defaulted. CP 337, 341. The Association prevailed on summary judgment. CP 235. The order of summary judgment specified a redemption period of one year and ordered the Snohomish County Sheriff to issue a sheriff's deed at the termination of the 12-month period. CP 237-38.

On November 4, 2013, the sheriff recorded his levy on the subject property. CP 344. On January 3, 2014, the sheriff sold the property at public auction for \$36,000 to D & J Shires, LLC whose members are David Keene and John Stefanchik. CP 245, 363. On January 31, 2014, the court confirmed the Sheriff's sale. CP 244.

On March 4, 2014, David Keene filed an ex parte motion for an order directing the sheriff to issue him a sheriff's deed. CP 247. On March

4, 2014, the court entered an ex parte order directing the sheriff to issue a deed to David Keene “free and clear of any rights of redemption of any and all parties.” CP 264. On April 9, 2014, the sheriff issued his deed to D&J Shires, LLC. CP 242. On May 6, 2014, D&J Shires sold its interest in the property to Colette Glenn, conveying with a statutory warranty deed. CP 218.

On January 3, 2015, two days before the end of the redemption period, Performance Construction delivered to Colette Glenn an upset offer to purchase the subject property under RCW 6.23.120. CP 589. Ms. Glenn did not respond to the offer. Performance then commenced this action, naming as defendants Colette Glenn and her lender, Cobalt Mortgage. CP 601. Performance sought to void the sheriff’s deed, so it amended its complaint to add David Keene as a defendant since he had obtained the order for the deed’s issuance. CP 584. Colette Glenn filed a third-party claim against her grantor, D&J Shires, LLC, for breach of statutory warranties and indemnity. CP 571

Slighter Property II, LLC and Thomas and Bonnie Slighter conveyed to Performance Construction, LLC all of their right, title and interest in the subject property, including their right to excess proceeds under RCW 6.23.120(2)(c). CP 455, 459. Performance agreed to take all steps necessary to obtain the excess proceeds for Slighter and Slighter

assigned a portion of those proceeds to Performance. CP 453.

The parties brought cross-motions for summary judgment. CP 192, 320, 489, 523. On June 30, 2015, the trial court entered an order granting Performance Construction's motion in part, but denying most of it, and granting defendants' motions. The order of summary judgment:

- 1) vacated the ex parte order for issuance of the premature sheriff's deed,
- 2) voided the sheriff's deed,
- 3) declared that Performance Construction did not make a qualifying offer under RCW 6.23.120,
- 4) declared that Colette Glenn was a bona fide purchaser, and
- 5) declared the deed from Slighter to Performance Construction, LLC to be void because of an error in the legal description.

CP. 47. On the first two points, the trial court ruled correctly. On the third and fourth points, the trial court ruled in error. The fifth point is moot because the legal description has been corrected by a correction deed. CP 44.

The order contained language satisfying the requirements of CR 54(b). CP 49-50. The order did not address Colette Glenn's third-party claim for breach of warranty against her grantor, D&J Shires, LLC. Given the trial court's disposition of the main claim, the third-party claim is reduced to a claim for attorney fees.

On July 10, 2015, Performance filed a motion for reconsideration.

CP 32, which the trial court denied on July 28, 2015. CP 11. On July 30, 2015, Performance filed its notice of appeal. CP 1. David Keene filed his notice of cross-appeal on August 10, 2015.

IV. Argument

A. This court's review of an order of summary judgment is de novo.

An appellate court reviews a summary judgment order de novo.

Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is appropriate if the evidence in the record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Performance Construction contends that its summary judgment motion should have been granted in full and the defendants' motions should have been denied in full.

B. The purpose of RCW 6.23.120 is to generate funds for judgment debtors who lose their residential property at sheriff sales.

RCW 6.23.120 creates an incentive for third parties to offer an upset price to the successful sheriff's sale purchaser or redemptioner. The offeree is fairly treated, receiving 20% more than if the judgment debtor had redeemed. RCW 6.23.120 (2)(a). The real estate broker handling the offer receives a commission. The balance goes to the judgment debtor. RCW 6.23.120 (2)(c). The statute encourages high bids for homes sold at sheriff's sales because a successful low bidder risks losing the property to

an upset offer.

RCW 6.23.120 provides in full:

- (1) Except as provided in subsection (4) of this section, during the period of redemption for any property that a person would be entitled to claim as a homestead, **any licensed real estate broker within the county in which the property is located may nonexclusively list the property for sale whether or not there is a listing contract.** If the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then the property owner shall accept the highest current qualifying offer upon tender of full cash payment within two banking days after notice of the pending acceptance is received by the offeror. If timely tender is not made, such offer shall no longer be deemed to be current and the opportunity shall pass to the next highest current qualifying offer, if any. Notice of pending acceptance shall be given for the first highest current qualifying offer within five days after delivery of the sheriff's deed under RCW 6.21.120 and for each subsequent highest current qualifying offer within five days after the offer becoming the highest current qualifying offer. **An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property** and is at least equal to the sum of: (a) One hundred twenty percent greater than the redemption amount determined under RCW 6.23.020 and (b) the normal commission of the real estate broker or agent handling the offer.
- (2) The proceeds shall be divided at the time of closing with: (a) One hundred twenty percent of the redemption amount determined under RCW 6.23.020 paid to the property owner, (b) the real estate broker's or agent's normal commission paid, and (c) any excess paid to the judgment debtor.
- (3) Notice, tender, payment, and closing shall be made through the real estate broker or agent handling the offer.
- (4) This section shall not apply to mortgage or deed of trust foreclosures under chapter 61.12 or 61.24 RCW.

RCW 6.23.120 (boldface added).

There are two appellate cases construing this statute. The 2004 case of *Graham v. Findahl*¹ held that an offer requiring conveyance by statutory warranty deed is not a qualifying offer. The 2015 case of *P.H.T.S., LLC v. Vantage Capital, LLC*² is closer to the main issue that concerned the trial court in this case, i.e. the meaning of “listing.” The *P.H.T.S.* court explained the operation of the statute as follows:

During the one-year redemption period under chapter 6.23 RCW, a licensed real estate broker may list property sold at a sheriff’s sale. If the property is not redeemed by the judgment debtor at the end of the one-year period, the purchaser at the sheriff’s sale shall accept the highest qualifying offer as defined under RCW 6.23.120(1).

P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, ¶ 13.

The statute defines a “qualifying offer” as an offer (1) made during the redemption period (2) through a licensed real estate broker listing the property and (3) at least equal to the sum of “[o]ne hundred twenty percent greater than the redemption amount” under RCW 6.23.020 plus the normal commission of the real estate agent making the offer. RCW 6.23.120(1). At closing, the property owner receives 120 percent of the redemption amount, the real estate broker receives a commission, and any excess is paid to the judgment debtor. RCW 6.23.120(2).

P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, ¶ 14. The

¹ *Graham v. Findahl*, 122 Wn. App. 461, 93 P.3d 977 (2004).

² *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App. 281, 345 P.3d 20 (2015).

appellant in *P.H.T.S. v. Vantage Capital* asserted that “[t]he trial court erred by finding that the offer made by P.H.T.S. to Vantage was a qualifying offer under RCW 6.23.120,” and raised the following issues:

1. Does the listing required in RCW 6.23.120 need to be substantively related to the offer process established in the statute in order for an offer made pursuant thereto to be a qualifying offer under the statute?
2. Did the listing posted in this case satisfy the requirements of RCW 6.23.120?
3. If the listing posted in this case satisfied the requirements of RCW 6.23.120, does the conduct of the listing broker nevertheless preclude recovery in favor of the Offeror who is owned and managed by the broker?³

The court employed the plain meaning approach to determine the meaning of “list” and “listing” as used in the statute. *P.H.T.S. v. Vantage Capital*, 186 Wn. App. 281, ¶ 19. Looking to the dictionary, the Court of Appeals held that “list” or “listing” means the authorization to the real estate broker to sell the property. *Id.*

The plain meaning of listing is either:

- the authorization to sell,
- the broker’s record of available properties, or
- the property itself.

³ Appellant's Brief, *P.H.T.S., LLC v. Vantage Capital, LLC*, No. 71591-7-I, pp. 1-2.

P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, ¶¶ 19-20.

None of those definitions requires a written advertisement.

None of them prohibit an advertisement either. An ad on zillow.com is one record of the property the broker is authorized to sell, so it is proper to call it a listing. But a broker does not have to publish a record of the properties the broker has for sale in order for them to be a listing. A listing is the authorization to sell, not the advertisement of the property listed.

The court did not decide the issue before this court, namely: Must an offeror under RCW 6.23.120 must post a written ad in order to “list” the property? Instead, the court assumed without deciding that an ad must be posted, but decided that the ad posted in that case did not disqualify the offer.

A broker listing the property is the same as a listing broker. In the ordinary sale, the listing broker is the broker authorized by the owner to sell the property. Under RCW 6.23.120, the listing broker is the broker authorized by the statute to sell the property. Every broker in the county is a listing broker under RCW 6.23.120 because the statute authorizes each of them to find a buyer for the property. Sullivan was a licensed real estate broker in Snohomish County listing the subject property for sale.

C. Colette Glenn is the successor to the interest of the sheriff's sale purchaser, D&J Shires, LLC, and, as such, the "property owner" under RCW 6.23.120.

RCW 6.23.120 does not expressly state to whom the upset offer must be made. But, implicitly, the offer must be made to the party entitled to the issuance of a sheriff's deed, for the sheriff's deed makes that party "the property owner."

If the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then **the property owner** shall accept the highest current qualifying offer upon tender of full cash payment within two banking days after notice of the pending acceptance is received by the offeror. (boldface added)

The person entitled to a sheriff's deed under RCW 6.21.120 is either the sheriff's sale purchaser or the last redemptioner, or their respective successors in interest. RCW 6.23.060; RCW 6.23.020(2) ("As used in this chapter, the terms "judgment debtor," "redemptioner," and "purchaser" refer also to their respective successors in interest.). Colette Glenn is the successor in interest to the sheriff's sale purchaser.

D&J Shires, LLC was the purchaser at the sheriff's sale. During the one-year statutory redemption period, D&J Shires delivered a statutory warranty deed to Glenn. If D&J Shires had held fee simple title, that deed would have been a conveyance in fee simple. RCW 64.04.030 (warranty deed in the statutory form is a conveyance in fee simple to the grantee.).

But D&J Shires could not convey what it did not have. “[A] void deed cannot pass title” *Albice v. Premier Mortg. Services of Wash, I.*, 174 Wn.2d 560, 577, n.1, 276 P.3d 1217 (2012). Void title “cannot be passed to any buyer (regardless of good faith status) because of the of *nemo dat quad non habet* (‘he who hath not cannot give’) rule. *State v. Mermis*, 105 Wn.App. 738, 748, n.27, 20 P.3d 1044 (2001). D&J Shires did not have fee simple title at the time of the deed, so it did not convey fee simple title to Colette Glenn.

What estate did D&J Shires have at the time of its deed to Ms. Glenn? The Supreme Court has repeatedly described the estate of a sheriff’s sale purchaser as an inchoate estate which may or may not ripen into absolute title. *W. T. Watts, I. v. Sherrer*, 89 Wn.2d 245, 248-49, 571 P.2d 203 (1977); *Singly v. Warren*, 18 Wash. 434, 445, 51 P. 1066 (1898). It is a valuable property right which entitles the bearer to, among other things, a condemnation award if the property is taken by eminent domain. *Nelson v. Lanza*, 18 Wn.2d 167, 169-70, 138 P.2d 667 (1943) (“But whatever the interest a purchaser acquires in the property purchased at an execution sale may be called, it is, at least, an interest for which value was given and of which he cannot be deprived without compensation.”). But the estate of a sheriff’s sale purchaser is subject to the right of redemption as well as the rights of upset price offerors. RCW 6.23.010 -.120.

D&J Shires *could* convey what it *did* have, and it did so by quitclaim deed. A quitclaim deed conveys “all the then existing legal and equitable rights of the grantor in the premises therein described” RCW 64.04.050.

A quitclaim deed is just as effectual to convey the title to real estate as any other deed, and a grantee of a quitclaim deed has the same rights as the grantee of a warranty deed, with the exception that he is given no warranty.

Barouh v. Israel, 46 Wn.2d 327, 333, 281 P.2d 238 (1955). So D&J Shires’ quitclaim deed to Colette Glenn conveyed all of D&J’s then existing legal and equitable rights, which were those of a sheriff’s sale purchaser. And those rights were subject to the redemption rights of the judgment debtor and lien creditors under RCW 6.23.010, and the purchase right of third parties under RCW 6.23.120. By that deed, Ms. Glenn acquired the inchoate right of D&J Shires, LLC to a sheriff’s deed. When the one-year redemption period ended without a redemption by either the judgment debtor or a redemptioner, Ms. Glenn’s right to a sheriff’s deed under RCW 6.21.120 became absolute. She is “the property owner” under RCW 6.23.120. She is the proper party to whom an offer under that statute should be made. And she is obliged, under that statute, to accept the highest current, qualifying offer.

D. When she acquired her interest, Colette Glenn had constructive notice of, and took subject to, the rights of upset price offerors under RCW 6.23.120.

A purchaser is deemed to have constructive notice of any prior interest recorded in the auditor's office.

[The bona fide purchaser] doctrine provides that a good faith purchaser for value, who is without actual or **constructive notice** of another's interest in the property purchased, has the superior interest in the property. **Constructive notice exists if the prior interest is recorded.** [bold face added]

Tomlinson v. Clarke, 118 Wn.2d 498, 500, 825 P.2d 706 (1992). Citing

Tomlinson v. Clarke, this court has stated:

To have the protection of the bona fide purchaser doctrine, a third party purchaser must be without constructive notice of another's claimed interest in real property.

Spahi v. Hughes-Northwest, Inc., 107 Wn.App. 763, 771, 27 P.3d 1233

(2001).

It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.

Steward v. Good, 51 Wn.App. 509, 513, 754 P.2d 150 (1988) (quoting

Peterson v. Weist, 48 Wash. 339, 341, 93 P. 519 (1908)).

The sheriff's deed to Ms. Glenn's grantor, D&J Shires, LLC, was recorded. CP 241. The deed itself describes the sheriff's sale and refers to the case number of the foreclosure action. CP 242. A lis pendens was recorded at the commencement of the foreclosure action. CP 335. The sheriff's levy was recorded after the entry of a judgment of foreclosure. CP 343. All of these documents were recorded before the deed from D&J Shires to Glenn. CP 218. Ms. Glenn had constructive notice of the sheriff's sale. *Id.*

Ms. Glenn is presumed to know the redemption law. *State v. Vahl*, 56 Wn. App. 603, 609, 784 P.2d 1280 (1990) (A party is presumed to know the law.); *W. T. Watts, I. v. Sherrer*, 89 Wn.2d 245, 255, 571 P.2d 203 (1977) (the statutes notify everyone of the possible existence of redemptioners).

A party that acquires an interest in real property after a lis pendens is recorded has "constructive notice" of the proceeding and "shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action." RCW 4.28.320.⁴ With the filing of

⁴ RCW 4.28.320 provides in full: At any time after an action affecting title to real property has been commenced ... the plaintiff [or] the defendant ... may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties,

lis pendens, a party in Ms. Glenn's position may not assert a bona fide purchaser defense:

Thus, essentially since statehood, it has been the rule in Washington that once proper notice is given in an action affecting title to real property (i.e., once a lis pendens is filed), persons who subsequently acquire an interest in the property do so subject to the property's ultimate disposition in the pending suit as that suit was filed, and may not assert defenses, based on their status as transferees, that were not available to the property's transferor.

Snohomish Reg'l Drug Task Force v. 414 Newberg Rd., 151 Wn.App. 743, ¶ 17, 214 P.3d 928 (2009) *rev. denied*, 168 Wn.2d 1019 (2010).

Ms. Glenn, and her title insurer, may well have imprudently relied upon the ill-advised ex parte order. But one party's imprudence does not extinguish another party's substantive rights.

E. Performance Construction made its upset offer through “a broker listing the property” because a listing is the authorization to sell, not the written advertisement of the property listed.

Thomas Sullivan was authorized by RCW 6.23.120 to sell the subject property and, therefore, was "a broker listing the property for sale."

the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.

A synonymous phrase with a "broker listing the property" is a "listing broker." Thomas Sullivan was a listing broker because he was authorized by RCW 6.23.120 to sell the property "without a listing agreement." RCW 6.23.120 (1). Under the statute of frauds, a listing agreement has to be in writing and signed by the owner. RCW 19.36.010 (5). An exception is a listing under RCW 6.23.120 (1) which gives by statute, the authorization to sell the property to every licensed real estate broker in the same county as the subject property. Thomas Sullivan is a licensed real estate broker in Snohomish County. Therefore, Performance Construction's offer was made through a "broker listing the property." RCW 6.23.120 (1).

In *P.H.T.S. v. Vantage Capital*, the court looked to the dictionary to define list or listing:

Webster's Third New International Dictionary 1320 (2002) defines "list" as meaning "to place (property) in the hands of a real-estate agent for sale or rent." "Listing" is defined as "an authorization to a real-estate broker to sell or rent property[;] a broker's record of available properties[;] a piece of property listed with a real-estate broker." *Webster's Third New International Dictionary* 1320.

Likewise, *Black's Law Dictionary* 1073 (10th ed. 2014) defines "list" as meaning "[t]o place (property) for sale under an agreement with a real-estate agent or broker." *Black's Law Dictionary* defines "listing" as follows:

An agreement between a property owner and an agent, whereby the agent agrees to try to secure a buyer or tenant for a specific property at a certain price and terms in return for a fee or commission.--Also termed listing agreement; authorization to sell.

P.H.T.S. v. Vantage Capital, 186 Wn.App. 281, ¶¶ 19-20 (2015).

The definitions found in real estate specialty dictionaries are consistent with the above. The Barron's 2013 *Dictionary of Real Estate Terms* contains the following at pp. 296-97:

LIST - to obtain a listing.

LISTING -

1. A written engagement contract between a principal and an agent authorizing the agent to perform services for the principle involving the letters property.
2. A record of property for sale by a broker who has been authorized by the owner to sell.
3. The property so listed

Example: Able employs Baker to find a buyer for his home by giving Baker, a *listing* contract. When prospective buyers visit Baker, they will examine the *listings* in Baker's office. If interested, a prospective buyer may wish to visit the *listing*.

And at p. 383 of the same dictionary:

POCKET LISTING - a listing, whose entry into the multiple listing service (MLS) is delayed until the last minute so that the listing broker will have more time to find a buyer before someone in the system brings in a buyer. Tactic gives the listing broker more opportunity to earn the full commission rather than share with the cooperating broker.

"A listing agreement is also a type of employment contract, but it is between a seller and a broker." Alan Tonnon, *Washington Real Estate Law*, (Rockwell Publishing Co. 2007) at 237. Tonnon defines listing as follows:

LISTING - A written contract between a principal and an agent stipulating that the agent will be paid a commission for finding or attempting to find a ready, willing, and able buyer to purchase of the sellers property on terms acceptable to the seller. At p. 519.

LISTING, OPEN - A nonexclusive listing, given by an owner to as many different brokers as he or she chooses. If the property is sold, a broker is only entitled to a commission if he or she is the procuring cause of the sale. At p. 519.

A listing agreement is an employment contract that authorizes the broker to sell the property.

Lastly, syndicated real estate columnist Kenneth R.

Harney, writing in *The Seattle Times* on May 10, 2013, explained the unadvertised listings known as pocket listings:

How hot is hot when it comes to housing markets across the country right now? Crazy hot: Some houses sell within days, sometimes within hours, of listing. Then there are the growing numbers that sell even before they formally hit the market — sold through a controversial technique known as “pocket listings.” Essentially it’s a private, “off-market” listing, often of short duration. Instead of putting the house on the local multiple listing service — which exposes it to a vast number of shoppers and agents via real-estate websites — agents restrict access to information about the house to their own buyer clients or colleagues in the same brokerage, hoping for a quick, full-price sale.⁵

A pocket listing is still a listing even though it is unadvertised.

⁵ Harney, Kenneth R., *Surging Market Fuels Growth of "Pocket Listings,"* *The Seattle Times*, May 10, 2013, <http://www.seattletimes.com/business/real-estate/surging-market-fuels-growth-of-lsquo-pocket-listingsrsquo>.

All of these definitions of listing are consistent with the definitions employed by the Washington Administrative Code when applying the term to the sale of mobile homes and vessels:

"Listing' shall mean a contract between a seller of a used mobile/manufactured home and a listing dealer for the dealer to locate a willing purchaser for that home. WAC 308-66-110 (12).

"Listing' means an arrangement whereby the seller will compensate the vessel dealer to obtain a willing purchaser for the seller's vessel." WAC 308-90-030 (6).

A listing is not the posting of a written advertisement. It is the authorization to find a buyer for the property.

The legislature did not require a broker to take on a public ad campaign. It expected a single broker to produce a single buyer to make a single offer, and hoped that other brokers would do the same, and that the judgment debtor would be the beneficiary of the competition between them. By statute, a sheriff's sale is advertised. RCW 6.21.030. The legislature did not mandate another advertisement. And why would there be a need for a second advertisement? The sheriff is already required to advertise the sheriff's sale. RCW 6.21.030.

The trial court's interpretation of the statute would undermine the incentive the legislature created. One broker advertising the property would invite other brokers in the county to generate offers and earn the nonexclusive commission instead. Why would a broker go to the effort of

providing information to other brokers so the other brokers could earn the commission? There is no provision in the statute for sharing the commission with another broker. Instead, the legislature gave many brokers an incentive, the hope of earning the commission, to get them to find buyers and generate offers. It did not command an advertisement. It harnessed the competitiveness of real estate brokers. It created an incentive for them to find buyers and generate offers. An interpretation requiring a written advertisement would take away that incentive.

An unadvertised listing, i.e. a pocket listing,⁶ is still a listing. And an advertised listing was a listing the moment the broker was authorized to sell the property, not when the broker advertised the property. The authorization is what makes it a listing, not the advertisement of the property for sale.

The plain meaning of listing is either:

- the authorization to sell,
- the broker's record of available properties, or
- the property itself.

⁶ *Barron's Dictionary of Real Estate Terms* (2013), p. 383 ("pocket listing"); Harney, Kenneth R., *Surging Market Fuels Growth of "Pocket Listings,"* The Seattle Times, May 10, 2013, <http://www.seattletimes.com/business/real-estate/surging-market-fuels-growth-of-pocket-listings>.

P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, ¶¶ 19-21, citing *Webster's Third New International Dictionary* 1320 (2002), *Black's Law Dictionary* 1073 (10th ed. 2014), and *Whiting v. Johnson*, 64 Wn.2d 135, 140, 390 P.2d 985 (1964). None of those definitions requires an advertisement. None of them prohibit an advertisement either. An ad on zillow.com is one record of the property the broker is authorized to sell, so it is proper to call it a listing. But a broker does not have to publish a record of the properties the broker has for sale in order for them to be a listing. A listing is the authorization to sell, not the written advertisement of the property listed.

A broker listing the property is the same as a listing broker. In the ordinary sale, the listing broker is the broker authorized by the owner to sell the property. Under RCW 6.23.120, the listing broker is the broker authorized by the statute to sell the property. Every broker in the county is a listing broker under RCW 6.23.120 because the statute authorizes each of them to find a buyer for the property. Sullivan was a licensed real estate broker in Snohomish County listing the subject property for sale.

And there is nothing in the law that prohibits a real estate broker from being a buyer. *Sing v. John L. Scott, Inc.*, 134 Wn. 2d 24, 32, 948 P.2d 816 (1997); RCW 18.85.011 (16)(a) (A real estate licensee may provide real estate brokerage services on the licensee's own behalf).

F. RCW 6.23.120 applies to a residential condominium.

The plain language of RCW 6.23.120(1) applies to "any property that a person would be able to claim as a homestead." The subject condominium unit is residential real property. RCW 64.34.020. A person would be able to claim it as a homestead. RCW 6.13.010 (1). RCW 6.23.120 applies. The subject condominium unit is a "property that a person would be able to claim as a homestead." RCW 6.23.120(1).

RCW 6.23.120(1) does not require the judgment debtor to actually claim the property as a homestead. It just requires that the property be the type a person *could* claim as a homestead. Subsection 1 of the statute focuses on the *property* that could be claimed as a homestead, and not on whether the homestead exemption is *available* against the type of lien being foreclosed.

"It is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed." *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). The legislature's reference to homestead in RCW 6.23.120 is markedly different from its references in two other redemption statutes. RCW 6.23.030 (1) ("If the property is subject to a homestead as provided in chapter 6.13 RCW...") and RCW 6.23.110 (4) ("In case of any homestead as defined in chapter 6.13 RCW and occupied for that purpose at the time of

sale").⁷ And yet RCW 6.23.120 is much more broadly stated, referring to "any property that a person would be able to claim as a homestead." It specifies "a person," not the judgment debtor or the owner of the property. The legislature chose different words and is presumed to intend different meanings. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). "[A]ny property that a person would be entitled to claim as a homestead" includes the subject property.

G. Colette Glenn did not make a qualifying offer.

An offer containing disqualifying terms is not a qualified offer under RCW 6.23.120. *Graham v. Findahl*, 122 Wn. App. 461, 463, 469, 93 P.3d 977 (2004). In *Graham*, the disqualifying terms was the requirement that the conveyance be by statutory warranty deed. *Id.* Ms. Glenn's offer contains the exact same disqualifying term as *Graham*, namely that "[t]itle shall be conveyed by a Statutory Warranty Deed." CP 364 (¶ d). Her offer is not a qualifying offer. *Id.*

RCW 6.23.120 (1) required Colette Glenn to pay the "full cash payment within two banking days" after D&J Shires accepted her offer on Monday, April 7, 2014.

...[T]he property owner shall accept the highest current qualifying offer upon tender of full cash payment within two

⁷ RCW 6.23.110 (4) was amended to its present language as part of the same reform as RCW 6.23.120. Chapter 329, Laws of 1981, § 21.

banking days after notice of the pending acceptance is received by the offeror. If timely tender is not made, such offer shall no longer be deemed to be current and the opportunity shall pass to the next highest current qualifying offer, if any.

RCW 6.23.120(1). Ms. Glenn did not tender the full price until May 5 & 6, 2014. Even were her offer were "qualifying," it was not "current" because she did not timely tender full cash payment. Her deadline was April 9, 2014 and she did not meet it. The opportunity passed to the next highest offeror, Performance Construction. RCW 6.23.120 (1).

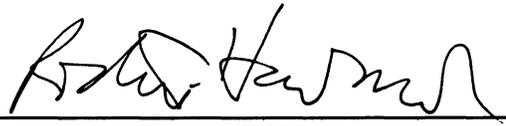
V. Conclusion

Colette Glenn made the mistake of buying real property from a sheriff's sale purchaser before the expiration of the one-year statutory redemption period. She had, at least, constructive knowledge that she was doing so. She bought subject to the substantive rights established by RCW 6.23.120. Performance Construction made a qualifying offer under that statute. Its offer was made within the statutory one-year redemption period by a licensed real estate broker in Snohomish County. Colette Glenn made an offer to buy the property, but the offer is neither qualifying nor current under RCW 6.23.120.

Colette Glenn is statutorily obligated to accept the offer of Performance Construction, and to deliver to it the bargain and sale deed attached to the offer. The Court should so declare and should:

- 1) reverse the trial court, except to the extent it voided the sheriff's deed and the ex parte order for its issuance,
- 2) grant Performance Construction's motion for summary judgment, and
- 3) remand this case with instructions to the trial court to deal with any procedural questions that arise during the closing.

Respectfully submitted this 2nd day of November, 2015

A handwritten signature in black ink, appearing to read "Rodney T. Harmon". The signature is written in a cursive style with a large initial "R" and "H".

Rodney T. Harmon, WSBA #11059
Attorney for Appellant Performance Construction, LLC

Appendix A

RCW 6.23.120 provides in full:

(1) Except as provided in subsection (4) of this section, **during the period of redemption for any property that a person would be entitled to claim as a homestead, any licensed real estate broker within the county in which the property is located may nonexclusively list the property for sale whether or not there is a listing contract.** If the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then the property owner shall accept the highest current qualifying offer upon tender of full cash payment within two banking days after notice of the pending acceptance is received by the offeror. If timely tender is not made, such offer shall no longer be deemed to be current and the opportunity shall pass to the next highest current qualifying offer, if any. Notice of pending acceptance shall be given for the first highest current qualifying offer within five days after delivery of the sheriff's deed under RCW 6.21.120 and for each subsequent highest current qualifying offer within five days after the offer becoming the highest current qualifying offer. **An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property** and is at least equal to the sum of: (a) One hundred twenty percent greater than the redemption amount determined under RCW 6.23.020 and (b) the normal commission of the real estate broker or agent handling the offer.

(2) The proceeds shall be divided at the time of closing with: (a) One hundred twenty percent of the redemption amount determined under RCW 6.23.020 paid to the property owner, (b) the real estate broker's or agent's normal commission paid, and (c) any excess paid to the judgment debtor.

(3) Notice, tender, payment, and closing shall be made through the real estate broker or agent handling the offer.

(4) This section shall not apply to mortgage or deed of trust foreclosures under ch. 61.12 or 61.24 RCW.

(boldface added).

FILED

2015 JUN 30 PM 2: 28

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

PERFORMANCE CONSTRUCTION, LLC,
Plaintiff,

v.

COLETTE GLENN; COBALT MORTGAGE,
INC.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC.; DAVID
KEENE,
Defendants.

NO. 15-2-01905-6

**ORDER GRANTING
DEFENDANTS' SUMMARY
JUDGMENT MOTIONS AND
DENYING PLAINTIFF'S
SUMMARY JUDGMENT
MOTION**

COLETTE GLENN,
Third-Party Plaintiff,

v.

D&J SHIRES, LLC, a Washington limited liability
company,
Third-Party Defendant.

THIS MATTER came on for hearing on Plaintiff's Motion for Summary Judgment, Defendant Colette Glenn's Motion for Summary Judgment, Motion of Cobalt Mortgage, Inc. and MERS for Summary Judgment, and Defendant David Keene's Motion for Summary Judgment. The Court has considered the following documents:

1. Plaintiff's Motion for Summary Judgment, dated May 7, 2015

ORDER GRANTING DEFENDANTS' SUMMARY
JUDGMENT MOTIONS AND DENYING PLAINTIFF'S
SUMMARY JUDGMENT MOTION - I



Ryan, Swenson & Cleveland, PLLC
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Seattle, WA 98101-3034
206.464.4224 | Fax 206.583.0359

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Appendix B

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- 1 2. Declaration of Thomas J. Sullivan, dated Feb 25, 2015
- 2 3. Declaration of Rodney T. Harmon, dated May 1, 2015
- 3 4. Declaration of Rodney T. Harmon, dated May 6, 2015
- 4 5. Plaintiff's Response to Defendants' Motions for Summary Judgment
- 5 6. Plaintiff's Reply Memorandum
- 6 7. Colette Glenn's Motion for Summary Judgment against Plaintiff Performance
- 7 Construction
- 8 8. Declaration of Britenae Pierce in Support of Colette Glenn's Motion for
- 9 Summary Judgment, dated May 1, 2015
- 10 9. Declaration of Colette Glenn in Support of Her Motion for Summary Judgment
- 11 10. Colette Glenn's Opposition to Plaintiff's Motion for Summary Judgment
- 12 11. Colette Glenn's Reply in Support of Her Motion for Summary Judgment
- 13 12. Motion of Cobalt Mortgage, Inc. and MERS for Summary Judgment
- 14 13. Declaration of David A. Abadir in Support of Motion for Summary Judgment,
- 15 dated May 7, 2015
- 16 14. Opposition of Cobalt Mortgage and MERS to Plaintiff's Motion for Summary
- 17 Judgment
- 18 15. Reply in Support of Cobalt Mortgage and MERS' Motion for Summary
- 19 Judgment
- 20 16. Defendant David Keene's Motion for Summary Judgment
- 21 17. Declaration of Stephen M. Hansen in Support of Defendant David Keene's
- 22 Motion for Summary Judgment, dated May 12, 2015
- 23 18. Declaration of David Keene, dated June 1, 2015
- 24 19. Defendant David Keene's Opposition to Plaintiff's Motion for Summary
- 25 Judgment
- 26 20. Defendant David Keene's Reply to Plaintiff's Response for Summary Judgment

ORDER GRANTING DEFENDANTS' SUMMARY
 JUDGMENT MOTIONS AND DENYING PLAINTIFF'S
 SUMMARY JUDGMENT MOTION - 2



1 21. and the records and files herein
2 and having heard oral argument of counsel, now the Court hereby decides as follows:
3 a. The Court has no authority to set aside the 12 months redemption period;
4 b. The Quit Claim Deed to Performance Construction, LLC (Snohomish County
5 recording number 201503160471) contains an inaccurate legal description of the property
6 therein;
7 c. Performance Construction failed to make a qualifying offer under RCW
8 6.23.120 for the property commonly known as 18930 Bothell-Everett Highway, Unit T-104,
9 Bothell, Washington 98012, and legally described as:
10 Unit 104, Building T, Brookwood Place Condominium, according to the
11 declaration thereof recorded under Snohomish County Rec. No.
12 200606210170, and any amendments thereto, located on Survey Maps and
Plans recorded under Rec. No. 200606215001, and any amendments thereto,
records of Snohomish County, Washington.
13 (the "Property");
14 d. The Property was not listed for sale as required by RCW 6.23.120;
15 e. Colette Glenn is an innocent, bona fide purchaser of the Property and is
16 entitled to have title to the Property quieted in her name;
17 f. The claims decided in this Order address all of plaintiff's claims to the
18 Property and the remaining issues before the trial court primarily relate to recovery of
19 attorneys' fees and costs and third-party claims;
20 g. The claims decided in this Order are separate and different from the
21 unadjudicated claims remaining in this matter so a final judgment on these claims is
22 appropriate;
23 h. The questions which would be reviewed on appeal are not before the trial court
24 for determination in the unadjudicated portion of the case and the Court will not make any
25 new determinations concerning the issues plaintiff seeks to appeal;
26

1 i. The need for review will not be mooted by future developments in the trial
2 court;
3 j. The practical effects of allowing plaintiff to appeal this Order now compel
4 entry of CR 54(b) and RAP 2.2(d) certification; and
5 k. There is no just reason for delay of appeal of this Order.
6 Based on the foregoing findings, the Court hereby orders as follows:
7 ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Summary
8 Judgment be and hereby is DENIED and that plaintiff's claims are dismissed with prejudice;
9 and it is further
10 ORDERED, ADJUDGED AND DECREED that Defendant Colette Glenn's Motion
11 for Summary Judgment is GRANTED; and it is further
12 ORDERED, ADJUDGED AND DECREED that Defendant Cobalt Mortgage, Inc. and
13 Mortgage Electronic Registration System, Inc.'s Motion for Summary Judgment is
14 GRANTED; and it is further
15 ORDERED, ADJUDGED AND DECREED that Defendant David Keene's Motion
16 for Summary Judgment is GRANTED; and it is further
17 ORDERED, ADJUDGED AND DECREED the sheriff's deed to D&J Shires, LLC,
18 (Snohomish County Rec. No. 201404140186) is void, as is the order for its issuance entered
19 in Case No. 13-2-05481-5 on March 4, 2014; and it is further
20 ORDERED, ADJUDGED AND DECREED that the Quit Claim Deed to Performance
21 Construction, LLC (Snohomish County recording number 201503160471) is void; and it is
22 further
23 ORDERED, ADJUDGED AND DECREED that Colette Glenn is a bona fide
24 purchaser of the property commonly known as 18930 Bothell-Everett Highway, Unit T-104,
25 Bothell, Washington 98012, and legally described as:
26

ORDER GRANTING DEFENDANTS' SUMMARY
JUDGMENT MOTIONS AND DENYING PLAINTIFF'S
SUMMARY JUDGMENT MOTION - 4

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Appendix B

 Ryan, Swanson & Cleveland, PLLC
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1 Unit 104, Building T, Brookwood Place Condominium, according to the
2 declaration thereof recorded under Snohomish County Rec. No.
3 200606210170, and any amendments thereto, located on Survey Maps and
Plans recorded under Rec. No. 200606215001, and any amendments thereto,
records of Snohomish County, Washington.

4 (the "Property"); and it is further

5 ORDERED, ADJUDGED AND DECREED that title to the Property hereby is quieted
6 in Colette Glenn's name and that Ms. Glenn owns the Property free and clear of any claims by
7 Performance Construction, LLC; and it is further

8 ORDERED, ADJUDGED, AND DECREED that pursuant to CR 54(b) and
9 RAP 2.2(d), there is no just reason to delay immediate appeal of this Order; and it is further

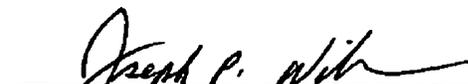
10 ORDERED, ADJUDGED, AND DECREED that pursuant to CR 54(b) and
11 RAP 2.2(d), the Court orders entry of final judgment pursuant to CR 54(b) and certifies this
12 Order for immediate appeal.

13 DATED this 30th day of June, 2015.

14

15

16


JUDGE OF THE SUPERIOR COURT

17

18 Presented by:

19

RYAN, SWANSON & CLEVELAND, PLLC

20

21

By 
Britenae Pierce, WSBA #34032
Attorneys for Defendant Colette Glenn

22

23 Approved as to Form; Notice of Presentation Waived

24

25


Rodney T. Harmon, WSBA #11059
Attorney for Plaintiff

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ORDER GRANTING DEFENDANTS' SUMMARY
JUDGMENT MOTIONS AND DENYING PLAINTIFF'S
SUMMARY JUDGMENT MOTION - 5

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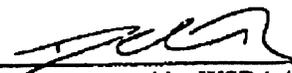


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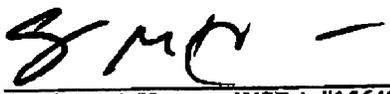
Appendix B

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DAVIS WRIGHT TREMAINE LLP

By: 
Fred B. Burnside, WSBA #32491
David A. Abadir, WSBA #46259
Attorneys for Defendant Cobalt Mortgage and
Mortgage Electronic Registration Systems, Inc.

THE LAW OFFICES OF STEPHEN M. HANSEN, P.S.

By: 
Stephen M. Hansen, WSBA #15642
Attorneys for Defendant David Keene

ORDER GRANTING DEFENDANTS' SUMMARY
JUDGMENT MOTIONS AND DENYING PLAINTIFF'S
SUMMARY JUDGMENT MOTION - 6

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Appendix B

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In the Court of Appeals of the State of Washington,
Division One

Performance Construction, L.L.C.,
Appellant/Cross-Respondent

No. 73808-9

v.

Proof of Service of Appellant's
Brief

Colette Glenn, Cobalt Mortgage, Inc., and Mortgage
Electronic Registration System, Inc.,
Respondents.

and

David Keene,
Respondent/Cross-Appellant

On November 2, 2015, I served a copy of Appellant's Brief on the following counsel by
email in accord with prior agreed practice as follows:

Britenae M. Pierce
Attorney for Colette Glenn
Pierce@ryanlaw.com

David Abadir
Attorney for Cobalt Mortgage, Inc. and MERS
DavidAbadir@dwt.com

Stephen Hansen
Attorney for David Keene
steve@stephenmhansenlaw.com

2015 NOV -4 AM 11:15
STATE OF WASHINGTON
COURT OF APPEALS

1 I declare under penalty of perjury under the laws of the state of Washington that the foregoing is
2 true and correct.

3 Dated this 2nd day of November, 2015 at Bothell, WA

4 
5 _____
6 Rodney T. Harmon, WSBA #11059
7 Attorney for Performance Construction, LLC