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No. 73808-9
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.,

and

DAVID KEENE, Respondent/Cross-Appellant

On Appeal from Snohomish County Superior Court
Case No. 15-2-01905-6
HON. JOSEPH WILSON

**REPLY BRIEF OF RESPONDENT/
CROSS APPELLANT, DAVID KEENE**

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I. INTRODUCTION

In this Reply, David Keene will address Performance's Reply arguments as set forth in subsections A, C and D of its Reply Brief. Critically, however, Mr. Keene directs this Court's attention to page 10 of Performance's Reply where it *concedes* that "a court may determine whether a party has a statutory right to redeem." As Mr. Keene explained beginning at page 19 of his Opposition/Cross Appeal, Performance's collateral attack of the *Order Directing Issuance of Sheriff's Deed* can only succeed if it demonstrates that the judgment/order was *void*, (i.e., the Court lacked jurisdiction over the subject matter, or lacked inherent authority to enter the particular order involved. (*Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968)). Performance has made no argument that the Court lacked jurisdiction over the subject matter. With its admission on page 10 that the Court could properly "determine whether a party has a statutory right to redeem," its appeal must fail. As Mr. Keene has previously demonstrated in his Opposition/Cross Appeal that the Court possessed both subject matter jurisdiction and the authority to enter the Order, reversal of summary judgment as to Mr. Keene is warranted.

II. REPLY ARGUMENT

A. *Redemption Rights Properly Assigned*

Performance Construction cites to two cases in support of its argument that the assignment from Slighter to Keene was somehow ineffective. These cases, *Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 767 P.2d 1382 (1989), and *Capital Inv. Corp. v. King County*, 112 Wn. App. 216, 47 P.3rd 161 (2002), are easily distinguished from this case.

In *Fid. Mut. Sav. Bank v. Mark*, the assignment was defective because it had not been made in “deed” form (i.e., it was neither acknowledged (notarized) or recorded) in compliance with Washington's real property transfer statutes. As a result, the Supreme Court concluded that the assignee was not a “successor in interest” to the right of redemption under RCW 6.23.010(2) because the unacknowledged and unrecorded assignment of interest was defective. *Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d at 52-53.

In *Capital Inv. Corp. v. King County*, a judgment debtor attempted to assign its right of redemption by way of a “certificate of redemption” which also purported to convey the proceeds of any re-redemption. At the same time, however, the assignor *retained* its judgment against the judgement debtor. This made the assignment ineffective. *Capital Inv. Corp. v. King County*, 112 Wn. App. at 229.

Here, in contrast, the assignment executed by Mr. & Mrs. Slighter and their LLC (the “Slighters”) was properly signed and notarized, and recorded prior to presentment of Mr. Keene’s motion. (CP 174 -176). The Slighters did not reserve or hold back any interest in the property: their interests had been foreclosed in the October 9, 2013 foreclosure and by way of the January 3, 2014 Sheriff’s foreclosure sale, leaving them with only the right of redemption.¹ (CP at 151 - 156). The assignment then “included” “any rights in and to the above-described property available to [the Slighters] under RCW 6.23 *et seq.* or as acquired thereafter.” (CP 175) (Emphasis added). The Slighters withheld nothing.²

B. Collette Glen Received Fee Title and Was Not a “Successor in Interest” Within the Meaning of RCW 6.23.010

Performance cites no authority for its contention that Ms. Glenn was somehow a “successor in interest” within the meaning of RCW 6.23.010. Mr. Keene, as President of D&J Shires LLC, purchased the property on behalf of the LLC at the sheriff’s sale. Mr. Keene then

¹ The October 9, 2013 foreclosure decree, at page 4, beginning at line 9, provides as follows:

ORDERED, ADJUDGED AND DECREED that all right, title, claim, lien, estate or interest of Defendants Slighter, Slighter Property, Nationstar Mortgage, LLC and Greenpoint Mortgage Funding, Inc., and of all persons claiming by, through, or under them is inferior and subordinate to the aforementioned Lien and is hereby foreclosed except only for the right of redemption allowed by law. (CP 156).

² The Slighters also assigned their rights to David Keene, “and/or assigns . . .” (CP 174). Mr. Keene was, in turn, freely able to transfer this right to his company” (D & J Shires, LLC), without consequence.

purchased the property rights from the Slighters (which was conveyed to Mr. Keene “and/or assigns”) and thereafter obtained the Order to issue a sheriff’s deed. A deed was issued pursuant to the motion. The deed listed D&J Shires, LLC as the grantee, based upon Mr. Keene’s request of the sheriff that is be issued as such. (CP 59 - 60).

Contrary to Performance’s representations, Mr. Keene has not conceded that the Warranty Deed to Ms. Glenn was “void” or “nothing at all.” Any defect in the Warranty Deed, if any, could give rise to a claim for breach of warranty on the part of Ms. Glenn, but does not make the transfer “nothing” or somehow make Ms. Glenn a “successor in interest” within the meaning of the statute.

C. The Court Commissioner Did Not “Shorten” the Redemption Period but Instead Determined That There Were No Qualified Redemptioners.

Performance goes to great length to characterize Mr. Keene’s motion as one which “shorten[ed] the statutory redemption period” and which “eliminate[ed] redemption rights. Reply Brief at pp. 9 – 10. Whether intentional or not, this fundamentally misreads and mischaracterizes the motion. Mr. Keene’s motion, beginning at page 4, argued that the Slighters “were no longer redemptioners” due to the advent of their assignment and (at page 5) that Mr. Keene was now the Slighters’ “successor in interest” under RCW 6.23.010(2).

At page 5 of Mr. Keene's motion, citing *Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 629-630, 289 P.3d 645 (2012), he presented argument that neither Nationstar Mortgage or Greenpoint Mortgage Funding were not "redemptioners" within the meaning of RCW 6.23.010(1)(b). (CP 160 - 164). As Mr. Keene explained at page 7 of his motion,

Here, Nationstar and Greenpoint were served with the Summons and Complaint filed in this matter, failed to appear or answer following such service, were adjudged to be in default, and their interests foreclosed. Although said Defendants acquired their liens rights prior to that of the lien assessment recorded by the Plaintiff Condominium Association (the "HOA"), the advent of RCW 64.34.364 conferred "super priority" of the HOA's lien over that of their lien interests. This allowed the HOA to foreclose its lien interest over the interests of the said Defendants. Moreover, as Nationstar's and Greenpoint's lien rights were not acquired "subsequent in time" to that of the HOA, they does not meet the definition of a "qualified redemptioner" under RCW 6.23.010(1)(b). *Summerhill Vill. Homeowners Ass'n v. Roughley*, 15 166 Wn. App. at 631. Nationstar and Greenpoint are not qualified "redemptioners" within the meaning of RCW 6.23.010, as it read at the time the Plaintiff initiated this action, and as their interests were subsequently foreclosed. (CP 163).

Mr. Keene concluded by arguing that since there were no qualified redemptioners other than the Slighters, and since he was the Slighters' successor in interest, there were no "redemptioners" within the meaning of the statute and his motion should be granted. (CP 163 - 164). Nowhere in his motion did Mr. Keene argue that the redemption period should be "shortened" or that the rights of any redemptioner should be "eliminated."

Mr. Keene's motion stated simply that there was no one who could exercise the redemption right, and that issuance of a Sheriff's deed was appropriate as a result. Performance itself, at page 10 of its Reply, *concedes* that "a court may determine whether a party has a statutory right to redeem." Mr. Keene requested nothing other than the Court make this exact determination.

D. Ex Parte Order Not Void

Performance argues at page 12 of its Reply that the order Mr. Keene obtained was somehow void because it was "entered without the notice required by CR 55 to Slighter Property II, LLC and Thomas and Bonnie Slighter . . ." Performance's assertion ignores the express language of the Slighter's assignment on page 2, which states that "The Undersigned [i.e., the Slighters] waive notice of presentment of this Assignment to the Court in the above-referenced matter."

Aside from the Slighters, Defendants Nationstar and Greenpoint were served with the Summons and Complaint filed in this matter, failed to appear or answer following such service, were adjudged to be in default, and their interests foreclosed. (CP 151 - 156). As parties to who are in default, CR 55(a)(2) provides, in part, that once a party is in default "he may not respond to the pleading nor otherwise defend without leave of court." Parties who have not appeared are not entitled to notice of

presentment of a motion for default. CR 55(a)(3). Once a court has properly entered a default order, the defaulted party is not entitled to notice of subsequent proceedings, nor may it contest the outcome of further proceedings. *Estate of Stevens*, 94 Wn.App. 20, 971 P.2d 58 (1999); *C. Rhyne & Associates v. Swanson*, 41 Wn.App. 323, 326, 704 P.2d 164 (1985). Nothing within RCW 6.23 *et seq.* requires such notice. Performance cites no case law to the contrary. Performance cites no authority for the proposition that Performance, as a *non-party*, was somehow entitled to notice.

At page 11 of its Reply, Performance argues that because the foreclosure Complaint referenced a twelve-month redemption period, the order that Mr. Keene obtained was somehow “void.” This argument again is premised on the argument that the Court somehow “shortened” or “eliminated” redemption rights, which Performance reiterates at page 12. As set forth above, however, this argument misses the point since Mr. Keene’s motion did not ask the Court to “shorten” or “eliminate” redemption rights but asked the Court to determine *who* had the statutory right to redeem, a determination (which Performance has previously conceded) that was *properly* before the Court. Since, as Performance concedes, the determination of *who* may redeem was properly before the Court, as Mr. Keene has previously argued in his cross appeal at pages 19

- 22, the resulting order was not void. Performance's collateral attack against the order fails as a result.

E. Performance Concedes Court's Authority for Issuance of Deed

Performance argues at page 13 of its Reply that the sheriff had no authority to issue a deed until after the redemption period had expired.

This argument ignores the order Mr. Keene obtained directing issuance of the deed and the inherent authority of the Court to issue the order.

Performance concedes at page 10 of its Reply that "a court may determine whether a party has a statutory right to redeem." Moreover, RCW 7.24.010 provides, in part, that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

Performance's argument is again based on the false premise that the issuance of the deed was "premature." As described above, the court was not asked to eliminate or shorten the redemption period, but determine if any redemptioners existed as defined under RCW 6.23.010.

Performance concedes that the Trial Court possessed the right to make this determination.

Given the above concession, since no one has argued that the Trial Court lacked jurisdiction over the subject matter of the foreclosure suit or the parties themselves, the Trial Court's order directing the issuance of the

sheriff's deed to Mr. Keene was not void. Performance cannot sustain its collateral attack against the order. The grant of summary judgment against Performance was appropriate. The entry of summary judgment against Mr. Keene must be reversed.

III. CONCLUSION

Performance's concession that the issue of who may redeem was properly before the Court requires reversal of the summary judgment as to Mr. Keene, since the Trial Court possessed subject matter jurisdiction and jurisdiction over the parties. Performance's collateral attack in this suit fails as a result. The briefing before this Court demonstrates that the Trial Court should otherwise be affirmed. Performance's appeal should be DENIED, and Mr. Keene's cross appeal should be GRANTED accordingly, with that portion of the Trial Court's Order should being REVERSED.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 7th day of March, 2016, per an agreement with counsel for electronic delivery, I e-mailed mailed via regular U.S. mail faxed delivered by legal messenger a true and correct copy of this document to:

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