

73808-9

73808-9

No. 73808-9

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

PERFORMANCE CONSTRUCTION, LLC,

Appellant,

v.

COLETTE GLENN, COBALT  
MORTGAGE, INC., MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., and DAVID KEENE,

Respondents.

RESPONDENTS COBALT MORTGAGE AND  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC'S ANSWERING BRIEF

Fred B. Burnside  
David A. Abadir  
Davis Wright Tremaine LLP  
Attorneys for Cobalt Mortgage, Inc.  
and Mortgage Electronic  
Registration Systems, Inc.

1201 Third Ave., Ste. 2200  
Seattle, Washington 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

**ORIGINAL**

73808-9  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
MAY 2 11 21 11  
E

## TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE.....	1
A. Factual Background. ....	1
B. Procedural Background.....	4
III. ARGUMENT .....	5
A. Standard of Review.....	5
B. The Purpose of RCW 6.23.120 is to Generate Funds for Judgment Debtors Who Lose Their Homes at a Sheriff's Sale for Less than Fair Market Value. ....	6
C. Even if the Redemption Period Were Improperly Terminated, Performance Failed to Timely Vacate the Order. ....	7
D. Even if RCW 6.23.120 Were Applicable, Performance Failed to Make a Qualifying Offer Under the Statute.....	8
E. Even if this Court Voided the Sheriff's Deed and Reinstated the Original Redemption Period Ending on January 3, 2015, Ms. Glenn Would Still Retain Ownership of the Property. ....	10
IV. CONCLUSION.....	12

## TABLE OF AUTHORITIES

	<u>PAGE</u>
<b>Cases</b>	
<i>Battle Ground Plaza, LLC v. Maldonado</i> , 183 Wn. App. 1003 (2014) .....	7
<i>Doe v. Dep't of Transp.</i> , 85 Wn. App. 143 (1997) .....	5
<i>Gossett v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 954 (1997) .....	5
<i>Graham v. Concord Constr., Inc.</i> , 100 Wn. App. 851 (2000) .....	5, 9
<i>Graham v. Findall</i> , 122 Wn. App. 461 (2004) .....	8
<i>Hayden v. Mut. of Enumclaw Ins. Co.</i> , 141 Wn.2d 55 (2000) .....	5
<i>Kirk v. Tomulty</i> , 66 Wn. App. 231 .....	11
<i>Miebach v. Colasurdo</i> , 102 Wn.2d 170 (1984) .....	11
<i>P.H.T.S., LLC v. Vantage Capital, LLC</i> , 186 Wn. App 281 (2015) .....	8, 9
<i>Tomlinson v. Clarke</i> , 118 Wn.2d 498 (1992) .....	11
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216 (1989) .....	5

**Statutes**

RCW 6.21.120 .....6  
RCW 6.23 *et seq.* .....2, 3, 7  
RCW 6.23.010 .....3  
RCW 6.23.120 ..... *passim*  
RCW 6.23.120(1).....6, 8, 9  
RCW 6.23.120(ii).....2

**Other Authorities**

CR 56(c).....5

## I. INTRODUCTION

Appellant Performance Construction, LLC (“Performance”) is an entity with no current or prior interests in the real property that Respondent Colette Glenn purchased in May 2014 for \$175,000. Yet, Performance remarkably filed this lawsuit against Ms. Glenn and her lenders believing RCW 6.23.120 entitles it to purchase the property for *half* of the price Ms. Glenn paid for it.

The trial court refused to order Ms. Glenn to sell her property to Performance, finding that she was an innocent, bone-fide purchaser of the property, and that Performance failed to make a “qualifying offer” under RCW 6.23.120. Performance now asks this Court to reverse the trial court’s Order granting summary judgment to all Respondents and quieting title to the property in Ms. Glenn’s name.

Performance’s claims hinge on its unsupported theory that it made a “qualifying offer” for the property during the redemption period. Whether Performance’s offer was qualifying is irrelevant because Ms. Glenn is a bona-fide purchaser of the property, having superior title to the property to Performance. As a result, this Court should affirm the trial court’s granting of summary judgment.

## II. STATEMENT OF THE CASE

### A. Factual Background.

**The Judicial Foreclosure and Sale to Mr. Keene.** On June 12, 2013, Brookwood Place Condominium (“Brookwood”) filed a *Complaint for Lien Foreclosure* in Snohomish County Superior Court under Case No.

13-2-05481-5 (the “Judicial Foreclosure Action”) seeking to judicially foreclose on the real property owned by Thomas Slichter, Bonnie Slichter, and Slichter Property II, LLC (together, the “Slighters”), for failing to pay Brookwood’s monthly condominium assessments. CP 142-148. Also named in the foreclosure complaint were both lienholders of record, Greenpoint Mortgage Funding, Inc. (“Greenpoint”) and Nationstar Mortgage, LLC (“Nationstar”). *Id.* On October 9, 2013, Brookwood obtained a *Judgment and Foreclosure Decree* against all defendants, including the Slighters, Greenpoint, and Nationstar. CP 537-541.

On January 3, 2014, the Sheriff of Snohomish County conducted a public sale of the Slighters’ real property located at 18930 Bothell-Everett Hwy, Unit T-104, Bothell, WA 98012 (the “Property”). CP 156-167. Mr. David Keene, on behalf of his company D&J Shires LLC, was the highest bidder at the foreclosure sale and bought the Property for \$36,000 subject to a 12-month redemption period expiring on January 3, 2015. CP 543-544. Thereafter, the Court entered an order confirming the sale. *Id.*

**Redemption Rights Assignment and Termination.** On January 30, 2014, the Slighters assigned all their rights in the Property to Mr. Keene and his assigns, including: (i) the Slighters’ rights to any proceeds generated by RCW 6.23.120, (ii) *the Slighters’ rights of redemption*, and (iii) “*all other rights in and to the ... Property* available to [the Slighters] under RCW 6.23 *et seq.* or as acquired thereafter.” CP 546-548 (emphasis

added). Because no qualified redemptioners existed after the Slighters assigned to Mr. Keene all their rights, Mr. Keene filed a motion requesting that the Court terminate the redemption period and direct the Sheriff to issue a Sheriff's Deed free and clear of any rights of redemption as conferred by RCW 6.23 *et seq.* CP 156-167. Finding that "there [were] no qualified redemptioners for the [Property] as defined in RCW 6.23.010," on March 4, 2014, the court entered an order directing the Sheriff to issue a Sheriff's Deed, free and clear of any rights of redemption. CP 188-191. On April 14, 2014, the Sheriff recorded a Sheriff's Deed granting title of the Property to D&J Shires, LLC. CP 555-556.

**Property Sale to Ms. Glenn.** On May 3, 2014, D&J Shires LLC sold the Property to Defendant Colette Glenn for \$175,000 by way of statutory warranty deed. CP 218, 365-401. To purchase the Property, Ms. Glenn took out a loan from Cobalt Mortgage, Inc. ("Cobalt"). To secure repayment of her loan, Ms. Glenn executed a deed of trust (the "Deed of Trust") encumbering the Property. CP 431-452. The Deed of Trust explains that Cobalt was the lender and that Mortgage Electronic Registration Systems, Inc. ("MERS") was designated as "beneficiary" of the Deed of Trust solely as nominee (*i.e.*, limited agent) for the Cobalt and Cobalt's successors or assigns. CP 432.

On January 3, 2015, Performance sent Ms. Glenn a written offer to purchase the Property for \$92,500, approximately half of what Ms. Glenn

paid for the Property. CP 560. The Offer to Purchase was signed by Thomas J. Sullivan, the owner of Performance as well as a licensed real-estate broker. CP 294-296. The Property was *not* listed for sale at the time of Performance's offer. CP 130-134.

**B. Procedural Background.**

On January 15, 2015, Performance sued Ms. Glenn, Cobalt, and MERS alleging: (1) the court in the Judicial Foreclosure Action erred when it entered an order directing that the Sheriff issue a Sheriff's Deed free and clear of any redemption rights; (2) the Sheriff's Deed and the Deed of Trust encumbering the Property are void; and (3) its offer to purchase the Property from Colette Glenn is a qualifying offer pursuant to RCW 6.23.120. CP 601-612. Performance amended his Complaint on March 27, 2015 to add David Keene as a defendant. CP 584-588.

On May 7, 2015, the parties brought cross-motions for summary judgment. CP 192-208, 320-331, 489-532. Finding no controverting evidence had been presented, the trial court awarded Respondents summary judgment on June 30, 2015 and denied Performance's cross-motion for summary judgment. CP 47-52. In its order, the trial court determined:

- (i) "The Court [in the Judicial Foreclosure Action] ha[d] no authority to set aside the 12 months redemption period;"
- (ii) Performance "failed to make a qualifying offer under RCW 6.23.120 for the property;"
- (iii) "The Property was not listed for sale as required by RCW 6.23.120," and
- (iv) "Colette Glenn is an innocent, bona fide purchaser of the Property and is entitled to have the Property quieted in her name."

CP 49.

On July 10, 2015, Performance sought reconsideration. CP 32-46. On July 28, 2015, the trial court denied reconsideration. CP 11-12. On July 30, 2015, Performance filed a Notice of Appeal. CP 1-10.

### III. ARGUMENT

#### A. Standard of Review.

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000) (citing *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147 (1997)). In determining whether a genuine issue of material fact exists, this Court construes the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963 (1997). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff. *Id.*

**B. The Purpose of RCW 6.23.120 is to Generate Funds for Judgment Debtors Who Lose Their Homes at a Sheriff's Sale for Less than Fair Market Value.**

Performance seeks to use a borrower's statutory protection as a sword to thwart a sale to a bona-fide purchaser. This turns the statutory scheme on its head. Under RCW 6.23.120:

*[D]uring the period of redemption for any property ... 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.... **An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property**[.]*

RCW 6.23.120(1) (emphasis added).

As Performance describes in its brief, RCW 6.23.120 provides a unique mechanism whereby any third party may offer (though a real estate broker listing the property) an upset price to the purchaser at a sheriff's sale during the redemption period, in the event that the judgment debtors did not redeem the property. *See* RCW 6.23.120(1) (if a real estate broker lists the property subject to redemption on an open listing, a third party can make a 'qualifying offer' through a real estate broker). Any payments from the offeror greater than 120% of the redemption amount are distributed to the judgment debtors, who ostensibly did not receive fair market value for the property at the foreclosure sale. Thus, as Performance maintains, the purpose of RCW 6.23.120 is to generate funds

for judgment debtors who lost their homes at a sheriff's sale for less than fair market value. Appellant's Brief at 6-8.

Performance, however, seeks to use the borrower protections of RCW 6.23.120 as a purchaser's sword. The judgment debtors in this case, the Slighters, previously *sold* their redemption rights and their rights to any proceeds generated by RCW 6.23.120 to Mr. Keene, presumably because they had no intention to redeem the Property. CP 173-175. As a result, RCW 6.23.120 no longer provided any benefit to the Slighters, as any surplus funds at the sheriff's sale would be paid directly to Mr. Keene.

**C. Even if the Redemption Period Were Improperly Terminated, Performance Failed to Timely Vacate the Order.**

The Court in the Judicial Foreclosure Action terminated redemption period because: (i) there were no qualified redemptioners; and (ii) the judgment debtors (*i.e.*, the Slighters) could not receive any distributions from RCW 6.23.120 because they sold all of their rights conferred by RCW 6.23 *et seq.* to Mr. Keene and his assigns. CP 156-167, 188-191.

Regardless whether termination of the redemption period was proper, if Performance disagreed with the court's Order terminating redemption rights, its remedy was to seek to vacate *that order*, directing the issuance of the Sheriff's Deed. *See Battle Ground Plaza, LLC v. Maldonado*, 183 Wn. App. 1003 (2014) ("the bankruptcy court previously approved the sale of the undeveloped parcel to Maldonado and issued a final order on the sale. Thus, BG Plaza LLC's claim is precluded under

the doctrine of collateral estoppel and is an improper collateral attack.”). Instead, Performance waited nine months after the court terminated the redemption period to file suit. By then, D&J Shires had sold the Property to Ms. Glenn, a *bona fide* purchaser, who reasonably relied on the court’s order directing the issuance of Sheriff’s Deed to D&J Shires LLC.

**D. Even if RCW 6.23.120 Were Applicable, Performance Failed to Make a Qualifying Offer Under the Statute.**

Even if the court in the Judicial Foreclosure Action had erroneously terminated the redemption period on March 14, 2014—and it did not—Performance failed to make a “qualifying offer” under RCW 6.23.120 because Mr. Sullivan never listed the Property. Indeed, RCW 6.23.120 expressly provides that an “offer is qualifying if the offer is made during the redemption period *through a licensed real estate broker listing the property.*” RCW 6.23.120(1) (emphasis added); *see also Graham v. Findall*, 122 Wn. App. 461, 463 (2004) (noting that RCW 6.23.120 is “a relatively unique upset process,” the gist of which is that “*if a real estate broker lists the property on an open listing*, a third party can make a ‘qualifying offer’ through a real estate broker.”) (emphasis added).

In *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App 281 (2015), Mr. Sullivan—the *same* real estate broker in the case—listed property on *Zillow.com* one day before the end of the redemption period and submitted an offer to purchase the property the following day. *See id.* at \*1. The parties in *P.H.T.S., LLC* did not dispute that: (i) the redemption period had not yet expired, (ii) that a licensed real estate

broker listed the property on an open listing, and (iii) the licensed real estate broker listing the property made an offer sufficient in amount prior to the expiration of the redemption period. *See id.* at 289 (“Vantage does not dispute that Sullivan was a licensed real estate broker in Snohomish County, that Sullivan listed the property for sale on *Zillow.com* during the statutory redemption period, that Sullivan made an offer on behalf of P.H.T.S. before expiration of the redemption period, or that the offer was at least 120 percent of the redemption amount plus the normal real estate broker commission”). The issue before the Court of Appeals was whether Mr. Sullivan’s “listing on *Zillow.com* ... compl[ied] with the requirements for a qualifying offer under RCW 6.23.120(1) [where] it was posted one day before the end of the redemption period.” *Id.* at \*4.

Notwithstanding that the listing was posted only *one day* before the expiration of the redemption period, the Court of Appeals determined Mr. Sullivan submitted the “highest qualifying offer during the redemption period,” and thus ordered Vantage to sell Mr. Sullivan the property according to the terms of his offer. *Id.* at \*6. Thus, in both the *P.H.T.S., LLC* and *Graham* cases, the Court of Appeals determined that a licensed real estate broker must actually list the property on an open listing even if the property is only posted for one day.

Performance’s opening brief concedes that Thomas Sullivan never *listed* the Property on a listing service such as *Zillow.com* or on a multiple listing service (MLS). Instead, Performance’s arguments hinge on its

semantic analysis of the word “listing.” Performance argues RCW 6.23.120 does not expressly require that a licensed real estate broker to post the Property on an open listing, but rather, that a broker need only make a qualifying offer. Appellant’s Brief at 9-10. Performance’s reading of the statute is contrary to the Legislature’s obvious intent. If Performance’s reading of the statute would render the phrase “listing the property” superfluous and without meaning.

In this case, Mr. Sullivan simply put his name on his business entity’s Offer to Purchase, identifying himself as the broker through whom the offer was being made. CP 560. But RCW 6.23.120 expressly contemplates a *public* real estate listing (*e.g.*, through the multiple listing service (MLS)). Obviously no bidding will occur if a broker makes the property available only to himself. Had Mr. Sullivan truly intended to generate bids for the Property—rather than preserve the opportunity for himself—he would have listed the Property in advance of what he (incorrectly) believed was the last day of the redemption period. The trial court properly determined that Thomas Sullivan failed to *list* the Property and refused to condone Performance’s attempt to make an end-run around the statute’s language and intent.

**E. Even if this Court Voided the Sheriff’s Deed and Reinstated the Original Redemption Period Ending on January 3, 2015, Ms. Glenn Would Still Retain Ownership of the Property.**

Even if this Court affirms the trial court’s order determining that the redemption period was erroneously terminated on March 14, 2014—

thus reinstating the original redemption period ending January 3, 2015— Ms. Glenn would still retain ownership of the Property because she made the highest qualifying offer to purchase the Property through a licensed real estate broker listing the Property. *See* RCW 6.23.120.

Indeed, regardless whether the prior court’s termination of the redemption period is proper, or whether Performance’s Offer to Purchase was a “qualifying offer,” Performance’s claim still fails because Ms. Glenn’s offer to purchase the Property for \$175,000 on May 3, 2014 exceeds Performance’s offer of \$92,500, and as a result, constitutes the highest qualifying offer under RCW 6.23.120.

Moreover, Ms. Glenn is a bona-fide purchaser, and equity cannot force her to accept payment of half of what she paid for the Property. A bona fide purchaser is one who pays valuable consideration for property without notice of another’s claim of right to, or equity in, the property. *Kirk v. Tomulty*, 66 Wn. App. 231, 239-40 (citing *Miebach v. Colasurdo*, 102 Wn.2d 170, 175 (1984)). The doctrine provides a strong protection for the innocent purchaser of land:

The land law has seen its years of progress marked by a continual struggle between one who had legal title to, or an equity or interest in or claim against real estate and one who in good faith parts with consideration in the honest belief that he is acquiring title from another. The law has long recognized that the massive public policy in favor of stimulation of commerce demands the fullest possible protection to a good faith purchaser for value. The bona fide purchaser for value without notice is the favored creature of the law.

*Tomlinson v. Clarke*, 118 Wn.2d 498, 508 (1992) (quoting 8 G. Thompson, *Real Property* § 4290, at 222-23 (1963 repl.)).

Ms. Glenn did not purchase the Property at a foreclosure sale. Instead, she purchased the Property through a licensed real estate broker on the open market after the Property had been publicly listed for sale. She paid the valuable consideration of \$175,000. CP 130-134, 218. The public records available from the court in the Judicial Foreclosure Action show that there *was no redemption period* for the Property.

In contrast, not a single record or document shows Performance had or could have had any interest in the Property at the time Ms. Glenn purchased it in May 2014. Performance did not even make a claim for any interest until its offer made in January 2015. As a result, under the bona-fide purchaser doctrine, Ms. Glenn's claims to the Property are superior to the claims of Performance. Forcing Ms. Glenn, a bona fide purchaser, to sell her home to Performance for half the amount she paid for it is contrary to law and equity.

#### IV. CONCLUSION

Respondents Cobalt and MERS respectfully ask this Court to affirm the trial court's granting of summary judgment in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of December, 2015.

Davis Wright Tremaine LLP  
Attorneys for Respondents Cobalt  
Mortgage, Inc. and Mortgage Electronic  
Registration Systems, Inc.

By s/ David A. Abadir  
Fred B. Burnside, WSBA #32491  
David A. Abadir, WSBA #46259

PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

Rodney T. Harmon, Esq. (X) By U. S. Mail  
P.O Box 1066 (X) By E-Service  
Bothell, WA 98041 ( ) By Facsimile  
rodharmon@msn.com ( ) By Messenger

*Attorney for Appellant*

Britenae Pierce (X) By U. S. Mail  
Ryan, Swanson & Cleveland, PLLC (X) By E-Service  
1201 Third Avenue, Suite 3400 ( ) By Facsimile  
Seattle, WA 98101 ( ) By Messenger  
pierce@ryanlaw.com

*Attorney for Respondent Colette Glenn*

Stephen M. Hansen, Esq. (X) By U. S. Mail  
Law Offices of Stephen M. Hansen, P.S. (X) By E-Service  
1821 Dock Street, Suite 103 ( ) By Facsimile  
Tacoma, WA 98402 ( ) By Messenger  
steve@stephenmhansenlaw.com

*Attorney for Respondent David Keene*

Dated at Seattle, Washington this 2nd day of December, 2015.

s/ David A. Abadir  
David A. Abadir

2015 DEC 2 11:21 AM