

NO. 39596-7-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

PATRICIA L. VOGTMAN, a widow; LISA L. GHRAMM, Personal
Representative of the Estate of Vernon Vogtman, Pierce County Probate
No. 03-4-00419-0; and LISA L. GHRAMM, as her separate estate,

Respondent

V.

LASALLE BANK NATIONAL ASSOCIATION,

Appellant

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

RESPONDENT'S BRIEF

MARY GAIL CARVER
WSBA# 28460
Attorney for Respondent Lisa
Ghramm

Nelson & Carver, P.S.
420 North Meridian Street
Suite B
Puyallup, WA 98371
Phone: (253) 845-8895
Fax: (253) 848-4891

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I. INTRODUCTION

Defendant/Respondent Lisa Ghramm's ("Ghramm") father Vernon Vogtman ("Vernon") died on March 1, 2003. Vernon left his daughter his community property interest in his will, which comprised a one half interest in the property and appointed his sister as the personal representative. Vernon and his wife, Patricia Vogtman ("Vogtman"), were in the middle of obtaining a divorce when he died. Vogtman had herself appointed as the personal representative.

Vernon and Patricia Vogtman owned a house together, which Vogtman continued to live in after his death. In 2004, Vogtman refinanced the mortgage at a lower interest rate. At that time, she did not take any cash back on the loan. However, in 2005, she again refinanced the mortgage in her personal name, not as the personal representative of her late husband's estate. She received approximately \$65,000 cash at closing. There is no evidence that she used any of the cash received from this refinance for any estate debts. All evidence points to the fact that Vogtman kept the money for herself.

The Superior Court probate judge removed Vogtman as personal representative for wrongful conduct and appointed Ghramm as personal representative.

Plaintiff/Appellant LaSalle Bank National Association (“LaSalle”) provided the refinance funds for the second transaction. At the time of this second refinance, (several years after Vernon’s death) the probate was opened in Pierce County Superior Court and the will was published. Ghramm’s one half interest in the property was clearly public knowledge. The LaSalle loan could only encumber Vogtman’s one half interest in the property. Either LaSalle or the title company insuring the refinance missed this crucial fact, because later when it came to LaSalle’s attention, they tried to claim that Vogtman was acting in her capacity as personal representative of the estate in order to encumber both Vogtman’s and Ghramm’s interests in the property. However, the documents speak for themselves -- she was acting in her personal capacity.

The crucial issue in this case is whether after Ghramm inherited her father’s one half interest in the property, could Vogtman encumber both her one half community property interest as well as Ghramm’s other inherited half, when she signed both refinances in her personal capacity, not as the personal representative, and she did not use any of the cash from the refinance for any estate debts, but rather for herself? It is clear that Vogtman did not act in the interest of the estate but rather for her own self interests. A title report should have shown she only had a one half

interest in the property and therefore could not encumber the whole. Someone made a mistake, but Ghramm should not suffer for it.

II. STATEMENT OF THE CASE

Defendant Ghramm's father, Vernon Vogtman, was married to Patricia L. Vogtman. Her father adopted three of Patricia Vogtman's grandchildren; however, their marriage disintegrated and her father started divorce proceedings in May of 2002. Vernon Vogtman died March 1, 2003, before the divorce was finalized. The divorce was dismissed in May of 2003. (CP 124-127)

After Vernon died, Vogtman and her three grandchildren moved back into Vernon's house. With the help of her divorce attorney, Robert Ricketts, Vogtman went to court and had herself assigned as the Personal Representative of Vernon's Estate on April 1, 2003, without Ghramm's knowledge or consent. Vernon's Will stated that his sister, Fay R. Davis, was to be the Personal Representative and his daughter Lisa the appointed successor Personal Representative. Neither Fay nor Lisa Ghramm got along well with Vogtman. Vogtman's attorney informed Ghramm that as the wife of the deceased, her rights superseded Ghramm's as the sole heir and therefore it was best that Pat continue as the personal representative. Because Vogtman and her father's adopted children were living in the

house, Ghramm did not see a reason to intervene. The real property asset of the Estate was to be distributed half to Vogtman as community property and the other half to Ghramm pursuant to the Will. In 2003, the real estate market was doing well and Ghramm did not mind waiting until the right time to sell the house and claim her half of the equity. (CP 124-127; CP 91-97)

Ghramm was not aware that Vogtman refinanced the underlying mortgage on the property twice after her father's death. In 2004, Vogtman refinanced the mortgage at a lower interest rate, in her name only. The amount of the loan was \$112,300.00. At that time, she did not take any cash back on her loan. However, in 2005, she again refinanced the mortgage for \$176,500, taking approximately \$65,000 cash back. In addition, she did not inform Ghramm that she was doing this, and to the best of Ghramm's knowledge, none of the cash that she received went to pay for any Estate debts, because there were no known debts four years after his death. (CP 124-127)

In June of 2007, Vogtman called Ghramm and asked her to sign a Quit Claim Deed so that she could refinance the house a third time. Ghramm sought legal advice to find out what was going on and discovered the 2005 refinance where Vogtman had taken substantial cash back on her loan. Ghramm refused to sign the Quit Claim Deed. Then in August of

2007, Ghramm's attorney petitioned the Court to remove Vogtman as the personal representative. The Court determined that Vogtman had committed wrongful neglect of the Estate and breached her fiduciary duty to the Estate and its beneficiaries by taking no action to settle the estate in four years. Vogtman had also never distributed her husband's personal property to Ghramm including a valuable stamp collection, vehicles, tools and money from the sale of another property in Morton. (CP 124-127; CP 63-77)

After the Court removed Vogtman as the personal representative and appointed Ghramm in her place, Attorney Robert Ricketts sent Ghramm the entire probate file. Upon reviewing the file, there was only one creditor claim made on February 2, 2004 from Vernon's divorce attorney, Clayton King, in the amount of \$1,210.09. There were no other creditor claims in the file when Ghramm reviewed it for the first time in October of 2007. Ghramm has never seen any of the money that Vogtman obtained from the 2005 refinance, and to the best of her knowledge there were no Estate debts to be paid at that time of the refinance in 2005. Certainly not to the tune of \$65,000. (CP 124-127)

On March 25, 2008, Ghramm as the personal representative, distributed by quit claim deed a one half interest in the property to herself as the sole her heir. (CP 79) For clarification, prior to that date, the estate

of Vernon Vogtman held the one half interest of the property. Therefore during the time Vogtman was the acting personal representative, the estate held one half interest which was to be distributed to the sole heir, Ghramm.

In May 2008, LaSalle recorded a notice of trustee's sale because Vogtman was in default of her loan. In August 12, 2008, the Plaintiff's filed this complaint for judicial foreclosure, after discovering that Ghramm had a one half interest in the property. (CP 4)

III. ARGUMENT

A Vogtman was not refinancing the property for the administration of the estate, but rather for her own personal financial interests.

Approximately one year after her husband's death, Vogtman refinanced the mortgage on the residence for a lower interest rate. Then a year later she again refinanced the mortgage, taking cash back for her personal use. She signed the 2004 loan "Patricia L. Vogtman, widow" and the 2005 deed of trust "as her separate estate". (CP 68-77) Nowhere in these documents does it state that she was acting as the personal representative of the estate. Plaintiffs have provided no evidence that she was acting or purporting to act as the personal representative.

The probate judge determined that Vogtman was wrongfully neglecting the estate for four years and appointed Respondent Ghramm as the personal representative. (CP 107-110) At summary judgment, Ghramm presented a sworn statement that there were no known debts left to satisfy at the time of the 2005 refinance when Vogtman took cash back. (CP 124-127) It is undisputed that Vogtman did not sign in her capacity as personal representative, nor would she have been authorized under her fiduciary duty to the estate and its heirs to do so. There were no estate debts to pay and therefore no reason for the personal representative to be taking cash from the refinance. Plaintiff/Appellant failed to meet its burden of proof that Vogtman was refinancing this property as the personal representative and for the benefit of the estate. The lower Court properly found that Vogtman was acting on her own and as such could only encumber her one-half interest in the property. Therefore, the LaSalle loan encumbers only a one half interest in the property.

- 1. Plaintiffs' deed of trust only encumbers Vogtman's one-half community property interest and does not encumber Ghramm's one-half interest as an heir.**

The Deed of trust held by LaSalle does not encumber Ghramm's interest in the property. It is also undisputed that Vogtman is in default on

her personal obligation on the promissory note and deed of trust. The lower Court properly found that LaSalle may continue with a foreclosure but only Vogtman's one-half interest will be foreclosed. Any new owner of the property, whether LaSalle or a bidder at the trustee sale, will take ownership as a tenant in common with Ghramm's one-half interest, which is free and clear of the mortgage being foreclosed.

2. RCW 62A.3 does not apply to a deed of trust because it is not a negotiable instrument.

Appellant LaSalle argues that under RCW 62A.3-402 the signature of Patricia L. Vogtman, as her separate estate, on the 2005 deed of trust binds the estate despite the fact that she signed the document in her personal capacity and not as the personal representative of the estate. (CP 74-77) Under this section of the UCC **“If a person acting, or purporting to act, as a representative, signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature...”** RCW 62A.3-405 *emphasis added*. The representative can in some instances bind the represented person even if no mention of the represented person appears in the document.

As applied to this case, Appellant's argument lacks merit because section 62A.3 only applies to negotiable instruments and a deed of trust is

not a negotiable instrument. See RCW 62A.3-102. A negotiable instrument is a written instrument that is signed by the maker and includes an unconditional promise to pay a specified sum of money that is payable on demand or at a certain definite time, and is payable to order or to bearer. RCW 62A.3-104. A deed of trust is a deed which conveys real property to a trustee as security until the grantor repays a loan. See Black's Law Dictionary, 445 (8th ed. 1996)

3. Vogtman signed the deed of trust in her personal capacity and there is no evidence that she was acting as the personal representative in this transaction.

Even if the UCC applies to the signing of this deed of trust, there is no evidence that Vogtman intended to sign the deed of trust as the personal representative of the estate. The burden was on LaSalle to show that she was "acting or purporting to act" as the personal representative of the estate in order to bind the obligation to the estate and not just her personally. There is no such evidence. LaSalle merely wants this to be true so that her personal signature can arguably bind the estate.

A representative cannot bind a principal if she is acting outside the scope of her authority. The existence of authority is a question of fact. Hoglund v. Meeks, 139 Wn. App 854, 866, 170 P.3d 37 (2007). Here, there is no evidence that Vogtman was acting as the PR. To the contrary,

she refinanced a loan twice as her personal debt. (CP 68-77) On the 2005 loan in question, she did not sign as the personal representative but rather “as her separate estate” and it has already been determined by the probate court that she was not acting as the personal representative but had taken the money for her own use. (CP 107-110).

In this case, Patricia Vogtman assigned herself as the personal representative of her deceased husband’s estate, despite his Will which appointed his sister as the personal representative and his daughter, Defendant Ghramm, as the alternate. Vogtman then refinanced the property twice, both loans as her personal obligation, presumably because she continued to live at the residence. The first refinance of the mortgage occurred in 2004 and the second refinance (the subject of this suit) occurred in 2005, two years after his death. Vogtman signed both deeds of trust in her personal capacity and not as the personal representative of the estate. (CP 68-77) There is no evidence that she was acting in good faith to borrow against the property in order satisfy estate debts. Vogtman did not tell Ghramm, the only heir, of the refinance or the money Vogtman received in the 2005 refinance. (CP 124-127)

When Defendant Ghramm had Vogtman removed as the personal representative of the estate, the Court entered written findings that **Vogtman had not taken any action regarding the administration of**

the estate for four years and the amounts of the deeds of trust exceeded the assessed value of the property. The Court also determined that Vogtman had committed wrongful neglect of the estate and breached her fiduciary duty to the estate and its beneficiaries. (CP 107-110)

There is no evidence that Vogtman was refinancing the property in her capacity as personal representative to pay estate debts. When Ghramm took over as the new personal representative, she received the probate file in 2007 from Vogtman's attorney and it contained only one notice of a creditor in the amount \$1,210.09. This debt was received by Vogtman on February 10, 2004. The refinance with cash back occurred in April 2005. Why did Vogtman need approximately \$65,000 to settle a two year old estate debt of \$1,210.09? Vogtman has produced no showing of any estate debts that she paid from this money, and Plaintiffs have provided no evidence that Vogtman was acting as the personal representative. (CP 124-127)

The probate judge found that Vogtman had not taken any action regarding the administration of the estate for 4 years. Ghramm found that there were no substantial estate debts to be paid. Vogtman was certainly not acting as an authorized person to bind the estate, but rather acting on her own to bind her half interest in the property. She signed the deed of trust in her personal capacity, not as personal representative of the estate.

What really happened in this case? Although no specific evidence was offered below, it appears from the deed of trust that Lawyers Title insured this deed of trust. (CP 74) The probate and Will are public documents, which established that Ghramm had a one-half interest in the property as the sole heir and Vogtman had a one-half interest as the surviving spouse. One can only conclude that either Lawyers negligently omitted this finding or LaSalle ignored it.

It would have been common practice to obtain a quit claim deed from the heir or a subordination agreement or have the heir co-sign the loan and also to require that Vogtman sign as the personal representative, not as her separate estate. The point is that someone made the mistake of not requiring the proper signature of the and/or some written guarantee from the heir. More importantly, the Plaintiffs have a remedy---Title Insurance. Either Lawyer's Title or LaSalle is the responsible party, not the heir whose property has now been tied up in litigation, and the sole remaining asset from her father's estate is in jeopardy. It would be grossly unfair for Ghramm to bear the burden of a mistake she had no part in making.

B. Equitable subrogation does not apply in this case because that doctrine is only applicable to determining the priority of liens properly encumbering real property and only where the intervening interest is no worse off than its prior position.

Plaintiffs argue that the Doctrine of Equitable Subrogation applies in this case. However all of the cases cited by Plaintiffs involve the priority between a senior and junior interest in real property and where “no material prejudice” is found against the junior interest, and both the junior and the senior interests encumber the whole property. To be eligible for equitable subrogation under the Restatement the lender must show it expected to receive a first priority and no junior lender will be materially prejudiced. *See* RESTATEMENT (THIRD) § 7.6 cmts. e, f, at 519, 522, *emphasis added*.

Here, neither Vogtman’s nor Ghramm’s interest is senior to the other. They both equally have a one-half interest in the property. In the 2004 refinance which lowered the interest rate, Vogtman assumed the underlying mortgage in her name only, presumably because she and her children continued to live there. Then in 2005 she refinanced her personal loan with the LaSalle’s deed of trust. (CP 68-77) As a one-half owner, she had legal authority to personally encumber her one-half interest but not Ghramm’s interest, which is exactly what she did. Only in the event there were debts of the estate which exceeded the amount of available cash

would she have had the authority as personal representative to mortgage against the entire property and only with Ghramm's consent. In that instance, the title company would have required a quit claim deed, subordination or co-sign from Ghramm as the only heir and a personal representative signature from Vogtman. Vogtman refinanced her own mortgage which encumbered only her half and LaSalle made a bad deal. They should honor it instead of trying to pass blame onto an innocent party.

First, LaSalle's mortgage simply cannot encumber Ghramm's interest in the property because she was not a party to the mortgage, nor did she receive any monetary or equitable benefit from the mortgage. Second, the doctrine of equitable subrogation only applies to intervening interests that are **no worse off** than before the priority is established. Bank of America, v. Prestance corp., 160 Wn.2d 560, 565, 160 P.3d 17 (2007). The classic example being where a second mortgage is still in second place after a third mortgagee refinances the first mortgage with the intent of being kept in first position. In that case, the second mortgagee is no worse position than before the refinance of the first.

Here, the LaSalle's mortgage was used to refinance a 2004 mortgage under the name of Patricia Vogtman, as her separate estate. She not only refinanced her own prior mortgage (held as her separate estate)

but took out an additional \$65,000. (CP 68-77; CP 124-127) This is not a case where two mortgagees are fighting over priority, but rather whether a single mortgage encumbers more than a one half interest in the property. At the time of the 2004 and 2005 mortgages, Vogtman only had a one half interest in the property and Ghramm held the other half. Vogtman could only encumber her own one half undivided interest in the property. Patrick v. Bontrhius, 13 Wash.2d 210, 215, 124 P.2d 550 (1942).

Plaintiff argues that the 2005 mortgage subrogated to the 2004 which subrogated to the 1998. This makes no sense. Vogtman refinanced the 1998 mortgage in 2004 as a widow, which is a single person. (CP 68-73) She then in 2005 refinanced again as her separate estate but also took approximately \$65,000 cash back on the loan. (CP 74-79) Now the plaintiff expects the entire personal mortgage of Vogtman to encumber Ghramm's half of the property too.

In addition, even if some portion of the underlying community debt of 1998 encumbered the estate's half interest at the time of Vernon's death, Vogtman then refinanced the 1998 mortgage in 2004 assuming the community debt personally. She did not refinance it as the personal representative which would have encumbered the whole. It is presumed she paid consideration for assuming the entire debt by the lower interest rate and by living there for four years. In the event the 2004 refinance was

deemed to be inequitable to Vogtman, she would have a third party claim against estate for it, but not against LaSalle. LaSalle can only claim to have the same rights of the 2004 loan which it refinanced and which was held by Vogtman personally, not the estate.

In a somewhat similar case, Kim v. Lee, 145 Wn.2d 79, 31 P.3d 665 (2001), opinion corrected by 43 P.3d 1222 (Wash. Dec. 12, 2001), the court stated that the Doctrine of equitable subrogation did not apply to restore the first lien position to judgment debtor's mortgage refinance lender over that of intervening judgment creditor, where increase in mortgage terms was prejudicial should the judgment lien be subrogated to the new deed of trust by refinance lender, and lender's title insurer not only negligently failed to discover the recorded and perfected judgment lien when it conducted its title search, but also failed to acknowledge the lien when it had actual knowledge of it from the issued title policy insuring lender's first lien position. Id. at 90-91. The Court stated "...the loss should fall on the title company rather than the innocent judgment creditor." Id. at 91.

Ghramm, as the only heir of her father's estate, held a half interest in the property, which was free and clear of any liens after Vogtman personally assumed the debt on the first refinance in 2004. If LaSalle is permitted to encumber both halves of the property then Ghramm will have

a mortgage encumbering her half, which was free and clear. The doctrine of equitable subrogation only applies where Ghramm would be left in no worse position. Obviously LaSalle's idea of equitable is not equitable to Ghramm. LaSalle had constructive notice of Ghramm's interest as an heir by the published will, but failed to get her guarantee of the loan. However, Ghramm was given no notice of the LaSalle's mortgage or their alleged intent to encumber her half, which occurred only after they realized that the title insurance company had failed to insure the deed of trust against Ghramm's interest in the property. She should not suffer from their mistake.

The Deed of trust held by LaSalle does not encumber Ghramm's interest in the property. It is also undisputed that Vogtman is in default on her personal obligation on the promissory note and deed of trust. LaSalle may continue with a foreclosure but only Vogtman's one-half interest will be foreclosed. Any new owner of the property will take it as a tenant in common with Ghramm's one-half interest, which is free and clear of the mortgage being foreclosed.

IV. CONCLUSION

The trial court did not err in granting summary judgment to Ghramm. Respondent respectfully requests this Court to affirm the trial court's ruling.

DATED this 21st day of October, 2009.

Respectfully Submitted,

NELSON & CARVER, P.S.



MARY GAIL CARVER, WSBA#28460

Of Attorneys for Respondent

Respondent.appeal.brief.Ghramm.101309.mg

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON
BY
DEPUTY

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COURT OF APPEALS
DIVISION II

LaSALLE BANK NATIONAL ASSOCIATION,

Appellant,

Case No. 39596-7-II

v.

DECLARATION OF SERVICE

PATRICIA L. VOGTMAN, et al,

Respondents.

Patricia Rigney, under penalty of perjury under the laws of the State of Washington declares as follows:

I am an individual over the age of 18 years and competent to make this declaration.

On October 21, 2009, I served Respondent's Brief, and this Declaration of Service in the matter above-referenced via ABC Courier Delivery as follows:

- 1) Original to:

Washington State Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

DECLARATION OF SERVICE

declaration of service 102109

NELSON & NELSON, P.S.
420-B North Meridian, P.O. Box 217
Puyallup, Washington 98371
(253) 845-8895
fax (253) 848-4891

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2) Copy to:

Steven L. Larson
518 N Tacoma Avenue
Tacoma, WA 98417

Dated this 21st day of October, in Puyallup, Washington.

NELSON & CARVER, P.S.



Patricia Rigney

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DECLARATION OF SERVICE

declaration of service 102109

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NELSON & NELSON, P.S.
420-B North Meridian, P.O. Box 217
Puyallup, Washington 98371
(253) 845-8895
fax (253) 848-4891