

NO. 404311-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

MUTUAL OF ENUMCLAW INSURANCE COMPANY, an insurance company; W. SCOTT CLEMENT, an adult individual along with "JANE DOE" CLEMENT and any marital community; JOHN E. DROTZ, an adult individual along with "JANE DOE" DROTZ and any marital community; and JENNIFER FOWLER, an adult individual,

Appellants.

v.

BERSCHAUER PHILLIPS CONSTRUCTION CO., a Washington State Corporation,

Respondent.

BRIEF OF APPELLANTS W. SCOTT CLEMENT AND JOHN E. DROTZ

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I. INTRODUCTION

If a plaintiff lacks standing to bring a suit courts lack jurisdiction to consider it. *High Tide Seafoods v. State*, 106 W2d 695, 702, 725 2Pd 411 (1986), *dismissed*, 479 US 1073 (1987). In this action, a judgment creditor filed suit against a judgment debtor's insurer, attorneys and one of its employees, asserting the debtor's claims. The judgment creditor, however, had never obtained a right to assert the debtor's claims. As such, the matter should have been dismissed. However, the trial court refused to dismiss the suit, instead staying the case. The defendants/petitioners (now appellants) sought discretionary review, which was granted on May 25, 2010.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it declined to dismiss this matter for lack of standing.
2. The Trial Court Erred in Entering its February 19, 2010, Order Delaying Defendants' Motions for Summary Judgment and Staying this Matter Pending Resolution of Appeal in Another Matter.
3. The Trial Court Erred in Denying Reconsideration of its February 19, 2010, Order.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Clement and Drotz agree with and join in the Issues Presented as presented by Appellants MOE and Faller.

1. Where a plaintiff asserts claims without standing, is the trial court required to dismiss for lack of jurisdiction? (Assignment of Error Nos. 1, 2 and 3)
2. May a trial court, before determining that jurisdiction exists, grant relief to a plaintiff by indefinitely refusing to dismiss claims brought without standing and by staying the case to prevent or delay the defendants from raising jurisdictional defenses? (Assignment of Error Nos. 1, 2 and 3)
3. Where a plaintiff lacks standing to bring claims, can dismissal be delayed based on whether or not there is prejudice to the defendant? (Assignment of Error Nos. 1, 2 and 3)

IV. STATEMENT OF THE CASE

Petitioner W. Scott Clement and John E. Drotz agree with and join in the Statement of the Case set forth by both Faller and MOE in their Petitioner's briefing.

A. BP filed suit against CSSS, a terminated limited liability company, in King County Superior Court and obtained a default judgment.

Berschauer Phillips Construction Co. (BP) is a general contractor. It worked on a project at Redmond Junior High School for Lake Washington School District. CP 18-22. Concrete Science Services of Seattle (CSSS) was one of the subcontractors, working on the project in June and July, 2002. CP 18-22. CSSS was a Minnesota limited liability company and it was terminated by the State of Minnesota on September 12, 2003. CP 24.

In March 2004, BP filed suit in King County against several contractors who worked on the project, including CSSS. CP 18-22. The suit was given cause no. 04-2-05087-1SEA. *Id.* On August 31, 2005, BP obtained a default judgment against CSSS for \$233,403.00, as CSSS never appeared or responded to the suit. CP 152-153. After taking the default judgment, BP notified Mutual of Enumclaw (MOE), CSSS's insurer, of the claim, and MOE hired counsel Defendants/Petitioners W. Scott Clement and John E. Drotz (Clement and Drotz) to represent CSSS and have the judgment set aside. CP 9-11. BP successfully opposed the motion. CP 9. Clement and Drotz pursued an appeal on behalf of CSSS and the default judgment was affirmed by Division I. CP 161-171.

B. BP filed suit against Petitioners MOE, Clement and Drotz, and Faller before owning or possessing any claims of CSSS and therefore lacked standing to file suit.

On October 31, 2008, BP filed the present lawsuit in Thurston County Superior Court against Defendant/Petitioner MOE, CSSS's insurer. CP 5-7. BP's complaint against MOE alleged that MOE committed bad faith against CSSS by failing "to act reasonably and promptly in dealing with the default judgment" after it was notified of the default judgment. CP 6. BP's complaint purported to assert CSSS's alleged bad faith claim against MOE. CP 6-7. BP's suit acknowledged these claims belonged to CSSS, but alleged that it had obtained the claims

(“choses in action”) as CSSS’s judgment creditor, which is in fact false. CP 6. At the time BP filed this lawsuit, it did not own or have the right to assert any claim of CSSS against MOE, which BP later admitted. CP 372-380, CP 342.

On July 16, 2009, BP filed an Amended Complaint in the present matter to add Defendants/Petitioners Clement, Drotz and CSSS’s employee, Ms. Faller, as defendants. CP 8-13. BP alleged Clement & Drotz committed legal malpractice in “failing to remove the default judgment in a timely manner.” CP 11. BP’s suit acknowledged these claims belonged to CSSS, but alleged that it had obtained the claims against Clement and Drotz (“choses in action”) as CSSS’s judgment creditor and had standing, which is in fact false. CP 11. Similarly, the Amended Complaint purported to assert claims of CSSS against Faller for “failing to reasonably assist” in removing the default judgment, which BP characterizes as a failure “to perfect” CSSS’s insurance coverage.¹ CP 12. At the time BP filed this lawsuit, it did not own or have the right to assert any claim of CSSS against Clement, Drotz or Faller, which BP later admitted. CP 133-147, 119-121, CP 372-380, CP 342.

¹ BP has made contradictory claims in its two lawsuits. In its King County lawsuit, BP successfully argued the default judgment was proper and should not have been set aside. CP 161-171. In its Thurston County lawsuit, BP claims that Clement, Drotz and Faller have liability to CSSS for failing to get the default judgment set aside. CP 11, 12.

In November and December 2009, recognizing that it did not own the purported claims and choses of action of CSSS, BP attempted to levy upon the “claims and choses of action” of CSSS in the King County lawsuit. CP 54-55, 57-59, 61-65, 128-130. However, those efforts were quashed by the King County Superior Court, no sheriff’s sale took place and BP did not purchase the purported claims of CSSS. CP 105-106, 298-299.

C. BP agreed that it lacked standing, but the trial court stayed the case, rather than dismiss it, without the proper jurisdiction to do so.

In January 2010, MOE, Clement and Drotz brought motions which sought dismissal of the claims asserted against them by BP for lack of standing, among other reasons. CP 78-97, 14-72, 122-132, 252-266, 257, 268-274, 381-388, 102-106, 295-312. The motions argued that because BP had not acquired the claims before filing suit, it did not have standing to sue on them. *Id.* Simply being a judgment creditor of CSSS did not allow BP to assert CSSS’s legal claims. *Id.*

In response to the motions of MOE, Clement and Drotz for summary judgment to dismiss for lack of standing, BP did not dispute that it lacked standing. CP 133-147, 372-380. BP acknowledged that it commenced suit without first obtaining the purported claims and choses of action of CSSS. *Id.* However, BP asked the court not to rule on the

motions to dismiss and to stay the entire proceeding while BP pursued appeal of the orders in BP's King County lawsuit and sought to acquire the right to assert claims belonging to CSSS. CP 119-121, 134-135, 245-249, 342, 372-374. All Defendants/Petitioners opposed this request. CP 237-243, 381-388, 389-393.

On February 19, 2010, the trial court granted the relief requested by BP despite the absence of standing/jurisdiction. CP 394-397. It declined to dismiss the matter, stayed this matter in its entirety "pending resolution on appeal" of BP's King County lawsuit against CSSS and delayed action on motions to dismiss until after that time. *Id.*

MOE, Clement and Drotz, and Faller all filed motions for reconsideration. CP 398-403, 409-413, 418-422. On March 1, 2010, the court also denied MOE, Clement and Drotz, and Faller's motions for reconsideration. CP 431-433. In its letter ruling, the trial court acknowledged that BP does not have standing. CP 432. The court reasoned that since statutes of limitation might limit BP's ability to assert some of the claims (unidentified) if it was forced to refile the lawsuit after it obtained standing to sue, "equity" demanded that the suit be preserved so BP would not be harmed by its initial lack of standing. *Id.*

More than a year and a half after commencing this matter, BP still has no standing to assert claims of CSSS against any party.

The court's orders allow the lawsuit to continue against MOE, Clement and Drotz, and Faller. It prevents Clement and Drotz and the others from seeking or obtaining dismissal for lack of standing and jurisdiction. It granted relief to BP despite the absence of subject matter jurisdiction. It prevents Clement and Drotz and the others from raising other jurisdictional defects that may exist for an indefinite period of time. It purports to help BP avoid the application of the statute of limitations. It indefinitely prolongs litigation over events which took place eight years ago.

MOE, Clement, Drotz and Faller all sought discretionary review. CP 434-461. Because the Thurston County Superior Court committed probable error and its order substantially limited the Defendants/Appellants' freedom to act, Division II granted review under RAP 2.3(b)(2) on May 25, 2010.

V. SUMMARY OF ARGUMENT

Clement and Drotz agree with and join in the legal arguments as presented by Appellants MOE and Faller. Because BP lacked standing to bring the claims asserted at the time the lawsuit was filed in Thurston County Superior Court, the lawsuit was void *ab initio*, the trial court lacked jurisdiction to grant any relief in the matter, and the trial court was required to dismiss the case. Washington law does not allow a plaintiff to

sue first and obtain standing later. “The absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action. *Amende v. Town of Morton*, 40 Wn.2d 104, 241 P.2d 445 (1952).

The trial court erred by refusing to dismiss the case and by granting relief to BP despite the lack of jurisdiction, and by preventing MOE, Clement, Drotz and Faller from raising additional jurisdictional defects. The trial court also erred in delaying dismissal based on a “no undue prejudice” standard. The court’s February 19, 2010 order delaying dismissal and staying the case in its entirety pending resolution of BP’s appeal in its King County lawsuit against CSSS should be reversed and this matter should be dismissed.

VI. ARGUMENT

A. Standard of Review.

Whether a party has standing to sue is a conclusion of law which the appellate court reviews de novo. *Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008).

When reviewing a trial court’s decision to grant summary judgment the appellate court engages in the same inquiry as the trial court. *Reynolds v. Hicks*, 134 Wash.2d 491, 495, 951 P.2d 761 (1998); *Faylor’s Pharmacy*

v. *DSHS*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. BP had not acquired an interest in CSSS's claims against MOE, Clement and Drotz or Faller before it filed suit, and has not acquired that interest to this day.

Clement and Drotz agree with and join in the legal arguments as presented by Appellants MOE and Faller. BP's only claim of standing is based on its status as a judgment creditor. Therefore, whatever basis BP has for suing on CSSS's claims against MOE, Clement and Drotz, and Faller must flow from that status. But that status did not give BP the right to sue on CSSS's purported claims.

Central to this case, levying against a debtor's property does not make the creditor the owner of the property or confer any rights with regard to the property. A levy of execution only creates a lien against the property seized. *Robb v. Kaufman*, 81 Wn. App. 182, 189, 913 P.3d 828 (1996). "[A] lien is a charge upon property for the payment or discharge of a debt or duty. . . ." *Swanson v. Graham*, 27 Wn.2d 590, 597, 179 P.2d 288 (1947), *see also State v. Teuscher*, 111 Wn.2d 486, 491, 761 P.2d 49 (1988) ("[a] lien is not a proprietary interest or estate in the land"); *Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964) ("a lien is an

encumbrance upon the property as security for the payment of a debt"). A lien "confers no general right of property or title upon the holder; on the contrary, it necessarily supposes the title to be in some other person." *Capital Inv. Corp. v. King County*, 112 Wn. App. 216, 229-30, 47 P.2d 161 (2002), quoting *Swanson v. Graham, supra*. To acquire a proprietary interest or a right in the property, one must purchase the property through the Sheriff's sale which the levy makes possible. *Also see* RCW 6.17.110-190.

Before filing this lawsuit, BP had not acquired ownership of any of the claims on which it was suing before it filed suit. Indeed, it has not acquired ownership to date.

C. The trial court erred by failing to dismiss the case for lack of standing and jurisdiction.

When BP commenced this lawsuit against MOE in 2008 and against Clement, Drotz and Faller in July 2009, it lacked standing to assert any of the claims asserted in its complaint. BP did not fully execute against and did not obtain any property of CSSS or any right to assert CSSS's purported claims against MOE, Clement, Drotz and Faller. Consequently, the trial court lacked subject matter jurisdiction and had no authority to delay dismissal for lack of subject matter jurisdiction, to grant relief to BP, or to prevent MOE, Clement and Drotz or Faller from bringing motions to dismiss or raising other jurisdictional defects.

“The doctrine of standing prohibits a litigant from asserting another’s legal right.” *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346, 349 (2008) (citations omitted). Standing is a matter of jurisdiction, without which the court cannot hear a case. *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008) (“standing is a matter of our jurisdiction. Without jurisdiction, we cannot hear a case”); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (unanimously holding: “If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.”) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir. 1985)). When a party lacks standing, the court is without subject matter jurisdiction to entertain the claim. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.3d 542, 556-57, 958 P.2d 962 (1998); *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974 (“The rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.”) Where a court lacks jurisdiction, “dismissal without prejudice is the limit of what a court may do.” *Housing Authority of the City of Everett v. Kirby*, 154 Wn. App. 842, 850, ___ P.3d ___ (2010) (where court lacked subject matter jurisdiction due to defect in process served, court properly dismissed action and could do no more).

Moreover, “[t]he absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 108, 241 P.2d 445 (1952) (“**An assignee for collection can sue only where he has title to the chose.**”).

Because BP lacked standing to bring the claims asserted in its Thurston County lawsuit, the trial court lacked jurisdiction and the lawsuit was void at its inception. A lawsuit brought by one who lacks standing is considered a “nullity from its inception.” *In re Estate of Boyd*, 5 Wn. App. 32, 35-36, 485 P.2d 469 (1971).

This nullity cannot later be corrected. In *Amende v. Town of Morton*, *supra*, 40 Wn.2d 104, the plaintiff later obtained title and attempted to amend his complaint. The Washington Supreme Court affirmed dismissal of the lawsuit, stating “An assignee for collection can sue only where he has title to the chose.” *Id.* at 107. In the addition, the Supreme Court said:

In his brief appellant concedes that he must rely upon the original assignment of the bonds . . . rather than the ratification thereof which occurred after the institution of suit; and that if the original assignment is not effective, he is not a member of the class and cannot maintain a lawsuit representing the class. This indicates recognition of the general rule that the **absence of a valid or subsisting title**

or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action.

Id. at 106 (emphasis added).

In sum, the trial court erred in failing to dismiss this matter for lack of standing. The court's February 19, 2010, order "delaying" motions to dismiss and staying the case should be reversed and the case dismissed.

D. BP's only arguments based on CR 17 and CR 15 did not give the trial court authority to stay the case.

Clement and Drotz agree with and join in the legal arguments as presented by Appellants MOE. BP's only defense has been to argue that dismissal for lack of standing is not a hard-and-fast rule. BP cites to CR 17(a) and CR 15(c), and cases applying those rules, in support of this contention. It argues that under these rules the trial court has authority to stay an action to allow joinder of the real party in interest, then relate the joinder back to the date of the original filing. The trial court accepted this argument, deciding it should withhold decision until Division I ruled on whether BP would be given a chance to purchase the claims. But neither the rules nor the spirit of the rules support what BP wants or the trial court did. Washington law does not allow a plaintiff to sue first and obtain standing later. "The absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental

complaint alleging subsequent acquisition of such title or right of action.”

Amende v. Town of Morton, 40 Wn.2d 104, 241 P.2d 445 (1952).

The rules clearly do not apply. Civil Rule 17(a) states:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (Emphasis added)

As the plain language of CR 17 indicates, the rule contemplates two distinct parties: the party who brought the suit and the real party in interest. The rule allows time for the real party in interest to ratify, join or substitute into the action. BP is not seeking time for the real party in interest to ratify, join or substitute into this action.

Likewise, Civil Rule 15(c) also does not apply. That rule states:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him,

the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

BP is not seeking to amend pleadings or relate anything back to an original pleading in this action.

Nor does the spirit of these rules support the result BP's wants. BP wants this court to apply these rules to any case where the wrong plaintiff has been named. CR 17 is not intended to apply so broadly. *Beal v. Seattle*, 134 Wn.2d 769, 778, 954 P.2d 237 (1998). *Beal* recognized CR 17(a) does not apply, and an action should be dismissed "when the determination of the right party to bring the action was not difficult and when no excusable mistake has been made." *Id.* The court specifically refused to read the rules as broadly as BP wants.

Here, there was no mistake. BP knew when it sued it did not own the claims it was suing on. To this day, it knows it does not own the claims and has no right to assert them on CSSS's behalf.

E. The trial court erred in applying an improper "prejudice" standard.

Clement and Drotz agree with and join in the legal arguments as presented by Appellant Faller. At the hearing on MOE's, Clement's and Drotz's motions to dismiss and BP's counter-motion for a stay, the trial

court asked the parties to comment on whether a stay would cause prejudice to the defendants/petitioners. RP (February 19, 2010) at 3-4. In deciding to delay ruling on the motions to dismiss and to stay the case, the court based its decision on its belief that there would be no undue prejudice to the defendants/petitioners. RP (February 19, 2010) at 25-26; CP 432.

The court's use of a "no undue prejudice" standard for refusing to grant relief of dismissal of claims brought without standing and for staying the case is unsupported by law. Whether or not there is prejudice is irrelevant. There is a lack of standing. The court lacked jurisdiction to hear this matter or to grant the "stay" relief requested by plaintiffs. Lack of undue prejudice is not a basis for conferring jurisdiction where there is none.

The stay and bar in raising defenses is not brief by any measure: The order indefinitely stays claims against the appellants "pending resolution on appeal" of the King County matter. Appellate review can take years. There is likely to be requests for review by the Supreme Court after the Court of Appeals makes a decision. In the meantime, memories will fade and witnesses may become unavailable. The stay causes severe prejudice to appellants.

Asserting judicial powers over defendants where the court lacks personal and subject matter jurisdiction violates constitutional due process.

VII. CONCLUSION

BP has clearly conceded that it lacks standing to sue, as it has never acquired any rights to sue. Therefore, BP lacks standing and the court thus lacks jurisdiction over the suit. When a court lacks jurisdiction, its only option is to dismiss the action. The trial court erred in failing to dismiss this matter for lack of standing/jurisdiction. The trial court also erred by setting aside jurisdictional challenges and granting relief without first establishing the existence of jurisdiction. The court's February 19, 2010 Order "delaying" motions to dismiss and staying the case should be reversed and the case dismissed.

RESPECTFULLY SUBMITTED this 29 day of June, 2010.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on June 29, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

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