

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

PATRICE CLINTON et al, Plaintiffs

v.

MARGUERITE NICKLESS et al, Defendants

No: 41536-4

BRIEF OF APPELLANT

PATRICE CLINTON
Appellant
9316 Glencove Rd.
Gig Harbor, WA 98329

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

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A. ASSIGNMENT OF ERROR

Assignments of Error

No. 1. The Trial Court dismissed with prejudice without cause

No. 2. The Trial Court failed to require proof of standing by the moving party for the Summary Judgment Motion.

No. 3. The Trial Court entered Order while Bankruptcies were pending without requiring notice the Chapter 7 Trustee.

Issues Pertaining to the Assignments of Error

No. 1. Can a trial court dismiss causes of action that are not adjudicated on the merits with prejudice?

No. 2. Must a party show standing to present and argue a Motion for Summary Judgment?

No. 3. Can a trial court enter orders when there has been no notice whatsoever to the real parties in interest?

I. TABLE OF AUTHORITIES

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Banchero v. City Counsel of City of Seattle. 2 Wn. App. 519; 468 P. 2nd 724
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Linton v. State 185 Wash. 97, 52 P. 2nd 1239 (1936); Parker v. Theubet 1 Wn.
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Magant v. Fierce, 35 Wn. App., 666 P.2nd 386 (1983).9

US BANKRUPTCY

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B. STATEMENT OF THE CASE

Appellant Patrice Clinton purchased a house and acreage from Respondent Marguerite Nickless. Clinton subsequently transferred ownership of the subject property to Ryanscrest Trust, for which she is the Trustor, Trustee, and a Beneficiary. Clinton later discovered that the property had been illegally subdivided by an earlier predecessor in interest in violation of RCW 58.17 and the Pierce County Code. An illegal subdivision is a serious cloud on title, which continues indefinitely whether the property owner has knowledge of the violation or not. Even if an innocent purchaser, like Clinton, would sell, or even offer to sell, an illegally subdivided property, she would be guilty of a misdemeanor (RCW 58.17.300). Clinton chose to exercise her statutory right to rescind the sale under RCW 58.17. Clinton and Ravenscrest filed suit against Nickless to rescind the sale and collect damages authorized by statute. (cp 1-3). Nickless appeared, but has not yet filed an Answer or otherwise participated. The deed record indicated the possible existence of a lien against the property, but the actual holder of that lien was not clear. A Google search shows that there are hundreds, if not thousands, of different businesses using the names Ameriquest and Deutsche Bank.

A lien holder might be affected by the lawsuit to rescind, so Ameriquest Mortgage Securities Inc, Ameriquest Mortgage Company, and Deutsche Bank

National Trust Company were all named as Defendants in order to allow each of them the opportunity to prove that they had an interest, and then to participate to the sole and limited extent of "assisting in the rescission process" (cp 1-3) .

Ameriquest Mortgage Securities Inc and Ameriquest Mortgage Company appeared and were dismissed with prejudice after they declared that they had no interest in the property at issue (cp 10-11).

"Deutsche Bank National Trust" filed Notice of Appearance (cp 7-9), but used a different name ("Deutsche Bank National Trust Company") when it filed an Answer in which they deny having any interest in the property. (cp 208-209). No other Answers have been filed.

Five days before Deutsche filed their Answer, Clinton filed bankruptcy, which imposed an automatic stay. (cp 12). In the Bankruptcy schedules, Clinton identified that she was responsible for the lien on the property, and identified her interest in the property as "Trustee and Beneficiary". Ryanscrest Trust was not part of that bankruptcy.

An entity identifying itself as "Deutsche Bank National Trust Company, as Trustee in trust for the benefit of the Certificate holders for Ameriquest Mortgage Securities Trust 2005-R11, Asset-Backed Pass Through Certificates, Series 2005-R11, through its servicing American Home Mortgage Servicing,

Inc, its successors in interest, agents, and assignors" requested and received a lifting of the bankruptcy stay for the limited purpose of "enforcing its security interest". (cp 63-64). The stay was NOT lifted for the Superior Court lawsuit now on appeal, which was an additional asset listed separately in the Bankruptcy Schedules. Clinton's objections and requests for an evidentiary hearing to have this alleged creditor prove that he was the actual holder of the Note and Deed of Trust fell on deaf ears. This "Deutsche Bank" even had different attorneys and law firms for representation. Immediately after the stay was lifted a Motion for Summary Judgment was filed by the attorney for "Deutsche Bank National Trust", but it is not "Deutsche Bank National Trust" which moved for Summary Judgment.

The motion identifies the Movant as "Defendant Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates, series 2005-R11 ("Defendant DB)". (cp 13-19).

This now makes four different variations on the Deutsche Bank name, with the only one of the four having been brought into the lawsuit by Summons being "Deutsche Bank National Trust". None of the others have ever petitioned to join, and the only one to file an Answer denied any interest in the property. (cp 208-209).

About this time Ryanscrest Trust also files bankruptcy, and another automatic bankruptcy stay goes into effect. (cp, 164-173). In the Bankruptcy Schedules, Ryanscrest identifies itself as the owner of the property, with Ameriquest having held a lien, whose current status is unknown. After filing, a fifth entity made claim as a lien holder, apparently for the same Note, but this alleged claimant did not have the words "Deutsche Bank" in its name. None of the five have ever produced a Note.

Movant's argument for summary judgment is that the property belongs to the Bankruptcy Trustee, not the Plaintiffs, but the Summary Judgment Movant did NOT serve notice of the motion on the Bankruptcy Trustee for either the Clinton bankruptcy, nor for the Ryanscrest bankruptcy. (cp 13-19).

Clinton cited the continued existence of bankruptcy stay(s), and contested the Summary Judgment Movant's lack of status to file the motion. (cp 74-76,88-90,93-94).

The summary judgment Movant failed to serve Clinton with notice of the hearing (cp 95-96), and then mislead the Court to try to cover (cp 145-146). After the first summary judgment order (cp 97-98) was vacated (cp 160-163), a second order was entered granting summary judgment (cp 181-182), without Clinton's concerns being addressed.

Clinton presented proof that an illegal subdivision did occur. (cp 157). Clinton's and Ryanscrest's Complaint was dismissed with prejudice (cp 181-182). Clinton appealed to the Court of Appeals (cp 183-185).

C. ARGUMENT

Dismissal with Prejudice:

RCW 4.56.120 provides the rules governing dismissal. Here, the dismissal provides Clinton and the Trust with no right to proceed against anyone for the illegal subdivision. Dismissal of an action with prejudice is a final judgment on the merits of the controversy. Banchero v. City Counsel of City of Seattle. 2 Wn. App. 519; 468 P. 2nd 724 (1970). Dismissal for insufficiency of evidence should not be with prejudice. Linton v. State 185 Wash. 97, 52 P. 2nd 1239 (1936); Parker v. Theubet 1 Wn. App. 285, 291, 461 P.2nd 9 (1969).

Lack of Standing

Throughout the case, no party asserted an interest in the property. Deutsche Bank and Ameriquest denied having an interest in answering paragraph 2 of the Complaint. From that point on, there was never a promissory note provided which would reflect the real parties in interest. There was never an assignment provided that would have given Deutsche Bank any interest. If there was ever a note or assignment provided then standing could be perfected. Absent a showing of standing, a party cannot file a Motion. Magant v. Fierce, 35

Wn. App., 666 P.2nd 386 (1983).

Jurisdiction

The complaint identifies Clinton and the Ryancrest trust as parties. During the duration of a bankruptcy actions are stayed. That is to determine what interest the Trustee may have on the claims. The trustee may abandon or pursue the claim. Until that time, the lower court does not take action absent Bankruptcy Court approval. If a party obtains relief from stay, that does not eliminate the original parties to the action until the Chapter 7 Trustee determines what action he will take. It would premature to dismiss the claims absent action by Chapter 7 Trustee.

Of more concern would be the lack of notice to the Chapter 7 Trustee. There is no contest that the real party in interest as asserted by Defendant DB i.e. the Chapter7 Trustee was given notice of the Summary Judgment Motion. (No proof of service). If either Trustee abandons the claim then the parties may proceed with the action. Carol Christi Cobb, v. Aurora Loan Services, LLC, Deutsche Bank Trust Company America 408 B.R. 351 (2009).

D. CONCLUSION

An otherwise unknown party with unknown interests seeks to have a lawsuit dismissed that otherwise has statutory merit. The Court dismisses the Claim with prejudice when regardless of the bankruptcy status the issues have not been

resolved on the merits and the limitation via Court Order is unlawful. Even whether the claims had value the Chapter 7 Trustees must be afforded the right to reject or accept a claim and have notice of proceedings affecting anything in which they have an interest.

Dated: 7/11/11


P. Clinton

PROOF OF SERVICE

I MAILED ONE COPY OF THE ABOVE TODAY AS FOLLOWS:

FREDERICK OLIVIERO, 1201 3RD AVE SUITE 4800, SEATTLE WA 98101

DATED THIS 11th DAY OF JULY 2011



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