

FILED

SEP 15 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO 283348

WASHINGTON STATE COURT OF APPEALS
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STATE OF WASHINGTON

Respondent,

v.

LANA T. FRAZIER-TURNER and
JAMES R. LEE, JR.

Appellants

v.

JAMES R. LEE, SR.

Respondent

BRIEF OF RESPONDENT

WADE E. GANO
WSBA NO: 5472
Counsel for Respondent, James R. Lee, Sr.

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COUNTER STATEMENT OF CASE

On October 6, 2008 the State of Washington filed a Condemnation Petition asserting the necessity to condemn and acquire certain real property in Yakima County (CP 139-143). The condemnation petition described two separate parcels of realty, for ease of identification these properties are identified as 1412 East Yakima Avenue and 1414 East Yakima Avenue. The properties adjoin each other, (CP 206). Parcel 1412 was jointly owned by Mitzi Lee and James R. Lee, Sr. as wife and husband, (CP 170-171), 1414 was the separate property of Mitzi Lee. On June 15, 2008, Mitzi Lee purportedly transferred her interest on both properties by Quit Claim Deed, to two of her children, Lana T. Frazier-Turner and James R. Lee, Jr. (CP 53-57).

The Petition identified James R. Lee, Sr.; Lana T. Frazier-Turner and John Doe Turner, Wife and husband and James R. Lee, Jr., and Jane Doe, husband and wife; as parties of record title to the real property to be condemned and acquired, (CP 397-403). An Amended Condemnation Petition was filed on October 31, 2008 in which an additional party of interest

Earl S. Lee and Jane Doe Lee, husband and wife, were added as parties (CP 392-396).

On November 10, 2008, Wade E. Gano attorney at law appeared to represent James R. Lee, Sr., (CP 385-386). However due to issues arising between counsel and client, on December 17, 2008 attorney Wade E. Gano withdrew as attorney for James R. Lee, Sr. (CP 382-384).

Following a contested hearing on the public use and necessity, the Court on January 8, 2009 entered an Order Adjudicating Public Use and Necessity (CP 376-381).

Having resolved differences between attorney and client, on February 11, 2009, Wade E. Gano again appeared as counsel for James R. Lee, Sr. (CP 374-375).

On April 7, 2009, James R. Lee, Sr. filed a Motion for Summary Judgment regarding a marital community and his separate property claim of an equitable lien upon the portion of real property previously owned as separate property by his wife,

Mitzi, (CP 372-373). A Declaration of James R. Lee, Sr. was filed in support of this motion, (CP 369-371).

Subsequent to the filing of James R. Lee, Sr.'s Motion for Summary Judgment and prior to the Motion being heard on May 15, 2009, James R. Lee, Sr., the State of Washington, Yakima County, Earl S. Lee, Lana Frazier-Turner and James R. Lee, Jr., stipulated to a Judgment and Decree of Appropriation which allowed the State a portion of the realty in exchange for payment of \$170,000. Those funds were paid into the registry of the court with disbursement of those funds to abide further order of the Court (CP. 61-63). On May 29, 2009, the court granted James R. Lee, Sr.'s Motion for Summary Judgment in part (CP 204-205). That Order granted an equitable lien to the community of Mr. Lee, Sr. and Mitzi Lee and to Mr. Lee Sr. as a separate equitable lien on the realty known as 1414. The issues remaining were the amount of the equitable lien and the amount due James R. Lee, Sr. from the condemnation award (CP 169).

As part of discovery prior to trial, James R. Lee, Sr. attempted to take the deposition of Mitzi Lee on June 1, 2009.

Mrs. Lee did not show for her deposition and in response, James R. Lee, Sr. moved for an Order requiring discovery or in the alternative an Order Prohibiting Mitzi Lee from appearing at trial and testifying (CP 202-203). The court on June 19, 2009 denied James R. Lee, Sr.'s motion (CP 58).

Thereafter, on June 23, 2009, the Court commenced trial to resolve the issues of what amount of the funds on deposit with the clerk should be disbursed to any of the parties. Following trial, the Court on June 29, issued its oral ruling and subsequently issued its written Findings of Fact and Conclusions of Law awarding Mr. Lee \$6,700 for his equitable lien and the marital community a lien of \$153,300 on Parcel 1414 with \$3,300 being allocated to the community for the partial taking of 1412 (CP 22-26). Prior to the entry of the Findings and Conclusions, James R. Lee, Sr. moved the court to Order the disbursement of the entire amount awarded to the marital community to him (CP 166-167). The Court in its Order following its entry of Findings of Fact and Conclusions of Law and Order granted Mr. James R. Lee, Sr. the entire amount of his separate equitable lien and one-half of the community lien and ordered disbursement of those funds to him (CP 22-26). The remaining amount, that portion allocated to

Mitzi Lee as her separate property and one-half the community equitable lien was eventually transferred to King County in relation to a guardianship action proceeding in King County Superior Court (CP 147-148).

**INTRODUCTION
ASSIGNMENTS OF ERROR
1, 2, 4, 6, 7, 9, AND 10**

The trial court has jurisdiction over the issues of the right and title of all of the named parties to the condemnation action, including the claims of Lana Frazier-Turner and James R. Lee, Jr.

The action was commenced as a condemnation action pursuant to RCW 8.04.010. RCW 08.04.140 authorizes the Court to determine and resolve the conflicting claims of the parties, including the claims relating to the validity of the Quit Claim Deeds from Mitzi Lee to Lana Frazier-Turner and James R. Lee, Jr., the extent and value of the equitable liens of James R. Lee, Sr. and the community lien of James R. Lee, Sr. and Mitzi Lee, and the claim of Earl Lee. Insofar as that the appellants assignments of error claim that the court did not have

jurisdiction to enter an order determining the rights of the various claimant, it is clear that the Court did have such jurisdiction, State v. Superior Court for Cowlitz County, 71 Wash. 354, 128 P.648 (1912).

**ASSIGNMENT OF ERRORS
3, 5, AND 15**

The procedure utilized by the Court did not to deprive Lana Frazier –Turner, nor James R. Lee, Jr. of any due process rights granted to them under either The Constitution of the United States, nor the Constitution of the State of Washington (Assignment of Error 3, 5 and 15).

Initially it is observed that the constitutional claims of the appellants are not supported by any reference to the record on appeal. It is appellants' responsibility to submit sufficient record to support these claims, State v. Mannhalt, 33 Wn.App. 696, 658 P.2d 15 (1983). RAP 9.2(b).

However, the record does support the conclusion that both Lana Frazier-Turner and James R. Lee, Jr. were given adequate notice and opportunity to defend their claim to the proceeds of the condemnation award based upon the Quit Claim Deeds or any other basis factual or legal that would support their claim to the funds on deposit with the Court. The Court provided them with adequate notice (CP 63) and both Lana Frazier-Turner and James R. Lee, Jr. attended the trial and were given full opportunity to defend and promote their claims. There has been no due process error, Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries, L.L.C., 159 Wn.2d 555, 151 P.3d 176 (2007).

ASSIGNMENT OF ERRORS 3, 6, 7 AND 10

James R. Lee, Sr. established at Summary Judgment and at trial both his separate equitable lien claim and a community equitable lien claim. The Declaration of James R. Lee, Sr., that was presented in conjunction with his Motion for Summary Judgment was unrebutted and clearly established an equitable lien, (CP 369-371). In re Marriage of Elam, 97 Wn.2d 811, 650 P.2d, 213 (1982).

Even though the court granted Mr. Lee, Sr.'s Motion in part, nevertheless, at trial sufficient evidence was presented to support the Court's Findings of Fact and Conclusions of Law regarding Mr. Lee, Sr.'s claim for equitable lien. Appellant has failed to cite to the record and demonstrate why the Court's findings are not supported by the evidence. Appellants failure to do so renders the Findings as verities on appeal, RAP 10.3 (a)(5) and (g), In re Estate of Lint, 135, Wash.2d 518, 957 P.2d 755 (1998). Pro se appellants are held to the same procedural rules as attorneys, Westberg v. All Purpose Structures, Inc., 86 Wash.App. 405, 936 P.2d 1175 (1997).

ASSIGNMENT OF ERROR 11

Wade Elliott Gano appeared to represent James R. Lee, Sr. (CP 385-386, 374-375) at no time was there any representation by Wade Elliott Gano of Mitzi Lee. It appears that the appellants are asserting that by advancing a marital community claim of equitable lien against separate property of Mitzi Lee, and since Mitzi Lee is a part of the marital community, the claim could not be advanced without her

consent, and by doing so on behalf of Mr. Lee, Sr., attorney Gano had a conflict of interest.

RCW 4.08.030 authorizes either spouse to sue on behalf the community. It was not necessary in order to advance the equitable lien claim of the community to first obtain Mitzi's consent or to include her as a party, RCW 4.08.030. The claim was advanced solely by Mr. Lee, Sr.

ASSIGNMENT OF ERROR 12

Mr. James R. Lee, Sr. at no time agreed to settle any of his claim to the proceeds deposited with the Court. Appellant has totally failed to cite or produce any such agreement. There is no citation or reference in Appellants' brief that establishes that the issue presented in Assignment of Error 12 was ever ruled upon by the trial court. Without production of such a record, the Assignment of Errors is without merit, State v. Mannhalt, supra, RAP 9.2 (b), 10.3 (a)(6).

ASSIGNMENT OF ERROR 13

Appellants have failed to produce any reference to the record that establishes that the court was in some way bound by

contract to the Washington Department of Transportation. This Assignment of Error is without merit, State v. Mannholt, supra.

ASSIGNMENT OF ERROR 14

Appellants again have not cited or referenced any portion of the record that establishes that the issue of whether Mitzi Lee should or should not be a party was ever presented to the trial court. This Assignment of Error is without merit, State v. Mannholt, supra.

ASSIGNMENT OF ERROR 16

It is presumed from this Assignment of Error that the Court refused to allow Lana Frazier-Turner and James R. Lee, Jr. to act as attorneys for Mrs. Mitzi Lee. Although the record submitted by the Appellants is devoid of any reference where the trial court specifically ruled on this issue, nevertheless, assuming there was such a ruling, it was entirely correct. Neither Lana Frazier-Turner nor James R. Lee, Jr. are attorneys admitted to practice before the Court of law in the State of Washington or elsewhere. A Power of Attorney in Fact does not convey to them the authority to represent on a pro se basis

their principal (Mitzi), State vs. Hunt, 75 Wash.App. 795, 880 P.2d 96 (1994) RCW 2.48.180.

RESPONDENT'S REQUEST FOR FEES

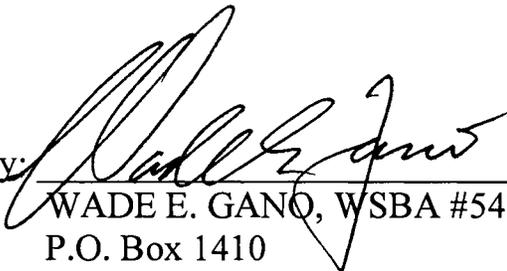
The Appellant's appeal is totally devoid of merit, there has been no attempt to comply with the Rules of Appellate Procedure. RAP 18.9 allows for sanctions to be imposed when an Appellant files a frivolous appeal. Appellants' failure to produce a record for review which would allow the reviewing court sufficient record to determine the claimed errors contended by the Appellants constitutes a frivolous appeal. The record on appeal is to be reviewed in its entirety, Streater v. White, 26 Wash.App. 430, 613 P.2d 187 (1980). A review of that record establishes that Appellants have failed to address the basis of the lower court's decision. Matheson v. Gregoire, 139 Wash.App. 624, 161 P.3d 486 (2007); In re Settlement/Guardianship of AGM, 154 Wash.App. 58, 223 P.3d

1276 (2010) and is so devoid of merit that there is no reasonable possibility of reversal.¹

Respondent, James R. Lee, Sr., should be granted terms, attorney fees and costs.

Respectfully submitted this 13 day of September, 2010.

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¹ In response to the Commissioner's ruling of May 17, 2010, Appellants filed a portion of the verbatim report of proceedings. No references have been made to those proceedings by the appellants that in any way support their assignment of error.