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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

MICHAEL R. HANSON, et. ux.
Appellants,
v.
DIAMOND LAND COMPANY, LLC, et. al.
Respondents,

REPLY BRIEF OF APPELLANT

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Appellant, HANSON LIVING TRUST, by and through its undersigned counsel, submits the following Reply Brief of Appellant.

I. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents, through their "Statement of the Case" assert generally that HANSON sold land, including Lot 6, to DIAMOND LAND COMPANY, LLC (Respondents' Brief, at 2). An effort is made to identify Lot 6, as "community access" for the Lots released from the terms of the Real Estate Contract dated April 13, 2006, (CP 340-351). However, and at the time of sale, Lot 6 did not exist. Lot 6 was created on June 6, 2006 (CP 363).

Respondents boldly claim that a release from the security interest of the real estate contract was not required for Lot 6 of Diamond Beach. Their sole authority is the contract itself (CP 340-343). However, at no time was the security interest in Lot 6 released or extinguished, nor does the real estate contract evidence any such release. Again, Lot 6 did not exist at the time the contract was entered unto. Any suggestion that HANSON participated in the creation of twelve lots is equally without merit, as the plat of Elu Beach was accomplished in 1925. (See Respondents' Brief, at 3).

Further, any suggestion that HANSON was in any manner involved with the subdivision of any plat, except as a "lienholder," is

without authority and is not supported by the evidence. Paragraph 10 of the Real Estate Contract clearly obligates HANSON to participate in the signing of a final plat by stating: “Seller will also sign the final plat, if necessary, solely to evidence sellers’ consent, but seller shall not incur any obligations thereunder.” (CP 393). Stated otherwise, the record does not support any of the Respondents’ assertions that HANSON was somehow more than a lienholder on the plats sponsored by DIAMOND.

Also, the suggestion that the title litigation guarantee, issued by PATRICIA VREELAND (Respondents’ Brief, at 5), is somehow flawed, is without merit. Assuming that that property was not released from the terms of a real estate contract, such would create a wild deed unrelated to the issue raised by this case. This is the very reason that this lawsuit has been commenced – to quiet title to any claim of Respondents in Lot 6. If Respondents claim someone else owns Lot 6, then it is as much of a cloud on their title as HANSON’S. As between the parties, HANSON possesses the superior and perfected title. Moreover, the payment of property taxes by anyone (Respondents’ Brief, at 5) is not dispositive evidence of ownership in which the validity of a legal ownership is challenged in the courts.

RAP 10.3(4) mandates that the entire “Statement of Case” contain “a fair statement of the facts and procedures relevant to the issues

presented for review, without argument.” All of the arguments and misstatements of fact from the Respondents asserted in their “Statement of the Case” should be disregarded unless supported by the record.

II. REPLY TO RESPONDENTS’ BRIEF

A. A Common Law Dedication does not Arise in the Absence of a Dedication Involving the Public Generally.

According to RCW 58.17.165, a contract vendor must participate in and agree with the division of lands made by a plat. Every plat must include “a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.” HANSON was not an owner, but merely consented to the Plat. However, in so doing, HANSON did not release its security interest in Lot 6 without payment of the monetary obligation secured thereby, nor did HANSON offer any sort of “dedication” for public use.

The land now known as “Lot 6” has at all times, throughout this proceeding, been encumbered by a real estate contract. A real estate contract “is an agreement for the purchase and sale of real property” whereby title “is retained by the seller as security for payment of the purchase price.” Tomlinson v. Clarke, 118 Wn.2d 498, 504, 825 P.2d 706, 709 (1992). Because it is “a lien-type security interest, the obligation is distinct from the security itself – the real property.” Kofmehl v. Steelman,

80 Wn. App. 279, 283, 908 P.2d 391, 393 (1996). Also, the law sees virtually no distinction between real estate contracts and other types of mortgages in terms of retaining a security interest in real property. See Tomlinson, 118 Wn.2d at 509, 825 P.2d at 712. “Washington treats the seller’s interest under a real estate installment sales contract as a lien/mortgage-type security interest in real property.” Kofmehl, 80 Wn. App. at 282, 908 P.2d at 393, quoting In re McDaniel, 89 B.R. 861, 869 (Bankr.E.D.Wash.1988).

It cannot be disputed that the real property now known as Lot 6 was not properly released from the security interest in favor of HANSON as mortgagee, nor was it ever paid for by the mortgagor or any other party. Thus, the mortgage-type security interest has not been discharged on Lot 6, and anyone who obtains title thereto, other than HANSON, will take “subject to” that security interest. Liebl v. Schaeffer, 134 Wash. 168, 171, 235 P. 26, 27 (1925) (stating that when a mortgage is on record, the property remains subject to the lien even though conveyed to another party).

Nor was there a common law dedication as to Lot 6. A common law dedication requires clear and unmistakable evidence that the landowner intended to dedicate the land to public use – the use must be for the public generally, not for one person, or for use of restricted groups of

individuals. Knudsen v. Patton, 26 Wn. App. 134, 141, 611 P.2d 1354, 1360 (1980). There the court stated the general rule as follows:

The essence of dedication is that it shall be for the use of the public at large, that is, *the general unorganized public*, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals. There may be a dedication for special uses, *but it must be for the benefit of the public*. Properly speaking, *there can be no dedication to private uses* or for a purpose bearing an interest or profit in the land. (emphasis added).

Id., quoting 23 Am.Jur.2d, Dedication, s 5 (1965).

Inasmuch as this is the clear rule, the trial court committed reversible error in finding a dedication where no public use is allowed. No member of the public may cross over Lot 6 without permission; there is no easement for the public to use; indeed, the “general unorganized public” has no right to Lot 6 in any way whatsoever. Instead, the “Plattor’s Declaration,” inappropriately called a “dedication” by the trial court, states that Lot 6 is for “community access *only for* the Hansen Division,” lot 2, the “replat” of lots 1-4, lots 5-11, and Mike and Karen Hanson.

Because “community access” was absolutely restricted to only the named lots and individuals, *it is impossible* for there to be a “public use.” Because there is no public use, meaning “the general unorganized public,” as Knudsen states, there can be no dedication. Thus, on this point alone, this court should reverse the trial court’s ruling.

B. A Common Law Dedication Cannot Exist in Favor of a Separate Division of Land.

Again, and because of the lack of public benefit by dedication, there can be no common law dedication under the facts of this case. Knudsen, 26 Wn. App. at 141, 611 P.2d at 1360. Respondents assert, without benefit of the record, or evidence thereof, that lots were sold with beach access. Assuming that Lots were sold by DIAMOND with lot access, they were not sold by HANSON, nor did HANSON release its security interest therein.

A dedication in favor of the public is absent. Any conveyance of a real property interest in Lot 6 does not exist from the face of the plat. Some form of a conveyance to others would necessarily be required. If conveyed, the conveyance would require full legal ownership by DIAMOND in Lot 6. No transfer of a real property interest in Lot 6 is accomplished by the plat of Diamond Beach.

C. The Consent to a Subdivision of Property does not Create Rights and Benefits to Others in the Absence of a Deed and in the Absence of Release of Security.

Assuming that HANSON had been paid in full for Lot 6, there is still no conveyance of Lot 6 to others. RCW 58.17.165 still requires a dedication. Here there is neither a common law dedication nor a dedication fulfilling the requirements of RCW 58.17.165.

Respondents argue that M.K.K.I., Inc. v. Krueger, 135 Wn. App. 647, 145 P.3d 411 (2006) requires the amendment of the “Diamond Beach” plat. That case endears the ability of local government to regulate the subdivision of land and to provide for access by private road easements for ingress and egress to serve properties within the particular plat. Id. at 661, 145 P.3d at 419. In M.K.K.I., Inc., the dedication of the easement satisfied the statutory requirements of a short plat. Here, the facts are distinguishable in that not only is there an absence of a dedication involving Lot 6 but also the failure to satisfy the security interest in favor of HANSON.

M.K.K.I., Inc. also requires that when a short-plat includes a “public dedication,” that the alteration or vacation thereof be processed in accordance with RCW 58.17.212 or 58.17.215. Id. at 659, 145 P.3d at 418. Here, there is no public dedication and no change to the terms or condition of the plat, rendering M.K.K.I., Inc. inapplicable.

D. The Security Interest Encumbering Lot 6 has not been Extinguished, nor has the Debt secured by Lot 6 been satisfied; therefore, even if the Respondents have an interest in Lot 6, that interest is subject to the Security Interest held by HANSON.

A conveyance of land reserving a security interest is a matter of record. “A contract seller’s retention of title is a security device fundamentally similar to a real estate mortgage or deed of trust.” Terry v.

Brown, 24 Wn. App. 652, 655, 604 P.2d 504 (1979). Any assertion that Diamond Land could unilaterally convey Lot 6 free and clear of the HANSON security interest without payment does heresy to the recording statutes. (Respondents' Brief, at 15). Any interest conveyed by DIAMOND of Lot 6 is conveyed and taken "subject to" HANSON'S security interest, which remains on that land until the debt has been paid. By analogy, the satisfaction of a mortgage requires evidence to be made of record. RCW 61.16.020. No satisfaction has been made; therefore, the mortgage is not discharged nor extinguished.

E. The Respondents are Not Bona Fide Purchasers Because they had Constructive Notice due to the Proper Recordation of the Real Estate Contract; and, they thus Fail to Satisfy the Requirements to be Bona Fide Purchasers.

Respondents claim that they are all Bona Fide Purchasers for Value (hereinafter "BFP"). The Doctrine of Bona Fide Purchaser "provides that a good faith purchaser for value, who is without actual or constructive notice of another's interest in real property purchased, has a superior interest in the property." Levien v. Fiala, 79 Wn. App. 294, 298, 902 P.2d 170, 172 (1995) citing Tomlinson, 118 Wn.2d at 500. A BFP must "have paid value as the law defines value." Grand Inv. Co. v. Savage, 49 Wn. App. 364, 368, 742 P.2d 1262, 1265 (1987).

Respondents claim that “Defendants Aguirre purchased from the Richeals without any claim and are therefore” BFPs. (Respondents’ Brief, at 16). However, Respondents stated earlier that the Richeals “gifted . . . 50% of their interest in Lot 6” to the Aguirres “through Quit Claim Deed.” (Respondents’ Brief, at 4). Because the Aguirres did not purchase this interest “for value,” they cannot be BFPs.

Furthermore, all of the Respondents most definitely had constructive notice of HANSON’S security interest in Lot 6 because the real estate contract, granting HANSON a security interest in land that became “Lot 6,” was recorded on April 17, 2006 in Pend Oreille County, Aud. File # 2006 0286434. (CP 340-51). The Washington Supreme Court has clearly held that “[c]onstructive notice exists if the prior interest is recorded.” Tomlinson, 118 Wn.2d at 500, 825 P.2d at 707, citing RCW 65.08.070; Kendrick v. Davis, 75 Wn.2d 456, 464, 452 P.2d 222 (1969).

Also, a purchaser of real estate is charged with notice of all deeds, documents, and proceedings in the claim of title. See 8 Thompson, Real Property § 4310 (1963). Because the security interest was recorded, it imparted notice to all the world – the Respondents therefore cannot be BFPs as to Lot 6. Consequently, any interest they may have in Lot 6 is “subject to” HANSON’S security interest.

F. RCW 58.17.165 does not Transform Consent to Subdivision into A Quit Claim Deed that Extinguishes a Prior Security Interest, especially when no Dedication Occurred.

RCW 58.17.165 states in pertinent part that:

Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

Respondents claim that this section of RCW 58.17.165 makes the final plat of “Diamond Beach” operate as a quitclaim deed granting the Respondents “an interest in ‘LOT 6’ as a Community Access.” (Respondents’ Brief, at 9). However, the plain language of the statute states that any “designation, donation or grant” may operate as a quitclaim deed. Here, there was no “dedication” because there is no public use.

Respondents’ Brief openly concedes this as follows:

[H]owever, there was not a designation of public access for “LOT 6” on the Diamond Beach plat. Further, there was no intention for “LOT 6” in the “Diamond Beach” to be a public access. The use of “LOT 6” was specifically limited by the dedicator in the designation on the plat.

(Respondents’ Brief, at 9).

Respondents’ own admission that there was no public use intended or designated clearly shows that a “dedication” is impossible (which means this court should reverse on this point alone). Thus, there is no

“dedication” for the purposes of RCW 58.17.165. Nor is there a “donation or grant as shown on the face of the plat” as RCW 58.17.165 requires because words in the statute must be read in their surrounding context. In re Estate of Blessing, 160 Wn. App. 847, 850, 248 P.3d 1107, 1109 (The plain meaning of a statute is derived “from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found”). The context of RCW 58.17.165 is concerning “dedication[s].” Thus without a dedication, there can be no “quitclaim deed” as to HANSON’S interest. Therefore, HANSON’S security interest remains. Consequently, this court should reverse the trial court.

III. CONCLUSION

The final plat of “Diamond Beach” shows only that HANSON agreed to the subdivision as required by contract; such agreement did not constitute a “dedication” for public use; because, use of Lot 6 was limited only to the specified lots and owners, not to “the general unorganized public.” In any case, HANSON only consented to the plat; it did not participate in any sale or conveyance. Furthermore, Lot 6 remains “subject to” HANSON’S security interest as recorded on April 17, 2006. Accordingly the grant of summary judgment in favor of Respondents should be reversed and HANSON is entitled to have title cleared into their names.

RESPECTFULLY SUBMITTED this 4th day of August, 2011

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