

SEP 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 297209

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DEERE CREDIT, INC.

Respondent,

v.

CERVANTES NURSERIES, LLC, CERVANTES PACKING &
STORAGE, LLC, MANCHEGO REAL, LLC, AND JOSE & CYNTHIA
CERVANTES,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY

THE HONORABLE DAVID A. ELOFSON

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	SUMMARY OF REPLY ARGUMENT	1
II.	ARGUMENT	1
	1. A. THE SINGLE ACTION STATUTE APPLIES ON ITS FACE TO THE LIQUIDATION PROCEEDINGS IN BANKRUPTCY.	1
	2. B. THE LIQUIDATION PROCEEDING IN THE REOPENED BANKRUPTCY ACTION WAS AN ACTION PROSECUTED BY DCI.	3
	3. C. THE STATUTE’S PURPOSE HAS NOT BEEN MET AND THE APPEAL IS NOT MOOT.	5
	4. D. THE TWO CONCURRENT ACTIONS WERE ON THE SAME DEBT.	7
III.	SUMMARY OF REPLY ARGUMENT	8

TABLE OF AUTHORITIES

Page

Washington Cases

Advance Thresher Co v. Schimke, 47 Wash. 162, 91 P. 645 (1907)..... 6, 7

CHD, Inc. v. Taggart, 153 Wn. App. 94, 220 P.3d 229 (2009)..... 4

Miller v. Campbell, 164 Wn. 2d 529, 192 P.3d 352 (2008)..... 4

Non-Washington Cases

Corales v. Flagstar Bank, FSB, C10-1922JLR, 2011 WL 1584284 (W.D. Wash. Apr. 26, 2011)..... 4

Gschwend v. Markus, C 07-00838 JSW, 2008 WL 4346503 (N.D. Cal. Sept. 23, 2008)..... 4

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982)..... 3

Stern v. Marshall, 564 U.S. ---, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) *reh'g denied*, 10-179, 2011 WL 3557250 (U.S. Aug. 15, 2011) 4

Statute

RCW 61.12.120.....*passim*

I. SUMMARY OF REPLY ARGUMENT

The question before the Court is whether the Washington single-action statute, RCW 61.12.120, prevents a creditor from simultaneously reopening a bankruptcy action to force liquidation, and bringing a new state court action to foreclose on real estate in satisfaction of the same debt. Respondent Deere Credit, Inc. (“DCI”) raises several technical arguments against the plain reading of the statute, but all are hollow. DCI argues that a contested proceeding to compel liquidation of real property in a bankruptcy court is not an “action,” but the dictionary and court usage say otherwise. DCI argues that the issue is moot, but the deprivation of Appellant’s rights can still be remedied. DCI argues that it did not elect the liquidation remedy, even though it elected to reopen the bankruptcy case and compel liquidation. Finally, DCI argues that the two actions dealt with different debts, but the bankruptcy court record indicates otherwise. None of these arguments should prevent the Court from enforcing the single-action statute.

II. ARGUMENT

A. **The Single Action Statute Applies On Its Face To The Liquidation Proceedings in Bankruptcy.**

The Single Action Statute provides that DCI could not “proceed to foreclose [its] mortgage while [it was] prosecuting any other action for the

same debt or matter...or...seeking to obtain execution of any judgment in such other action.” The parties agree that in November 2009, DCI sought remedies in two courts: 1) it reopened the Cervantes Orchards & Vineyards, LLC (“COV”) Bankruptcy case to arrange for a forced sale of COV’s real property; and 2) it filed this case to arrange for a foreclosure of the Cervantes Defendants’ real property. There is also no question but that the second remedy DCI sought was a foreclosure. DCI argues only that the statute does not or should not apply to its first election.

At the outset, DCI expresses confusion as to what Appellants mean by the phrase “liquidation by foreclosure,” asking how a future creditor in the same situation could tell if it was about to liquidate property by foreclosure in violation of the statute. That is a red herring. The phrase is not a term of art, it merely describes what happened. DCI moved to have a liquidating agent liquidate real property by compelled auction sales against the owner’s will, a procedure fairly and understandably described as a liquidation by means of foreclosure. The important part, however, is not the means, but the liquidation. What the statute forbids is foreclosing in one state court, while prosecuting an action on the debt or seeking to execute in another court. That is what DCI did here.

**B. The Liquidation Proceeding In the Reopened
Bankruptcy Action Was An Action Prosecuted By DCI.**

Next, DCI argues that there was no other “action” because bankruptcy proceedings are supposedly not actions. Yet they match the standard law dictionary’s definition of “action” as cited by the Washington Supreme Court: “a ‘civil or criminal judicial proceeding,’ ‘an ordinary proceeding in a court of justice,’ and ‘any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.’ *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn. 2d 29, 40-41, 42 P.3d 1265 (2002) (quoting Black’s Law Dictionary 28-29 (7th ed.1999)); *and see* 28 U.S.C. § 1334 (federal courts retain original jurisdiction over all “civil proceedings arising under” the Bankruptcy Act). Bankruptcy cases are civil proceedings that can subsume legal and equitable claims of all kinds.

Indeed, from 1898 to 1978, there were no bankruptcy courts, bankruptcy was handled by federal district judges and court-appointed referees. *See* Bankruptcy Act of 1898 (30 Stat. 544). Even when the modern bankruptcy court system was created in 1978, it had to be put under the control of the judicial branch. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). The resulting bankruptcy courts have such broad

powers that the United States Supreme Court recently held they still take on too much judicial power at times. *Stern v. Marshall*, 564 U.S. ---, 131 S. Ct. 2594, 2611, 180 L. Ed. 2d 475 (2011) *reh'g denied*, 10-179, 2011 WL 3557250 (U.S. Aug. 15, 2011) (“It is clear that the Bankruptcy Court in this case exercised the ‘judicial Power of the United States’ in purporting to resolve and enter final judgment on a state common law claim.”) The problem was precisely that “[w]e deal here not with an agency but with a court.” *Id.* Thus, while the *Stern* decision slightly limits bankruptcy court jurisdiction, those courts perform, within their proper sphere, as courts. This is why both Washington appellate courts and the federal civil courts routinely refer to a core proceeding in bankruptcy as a “bankruptcy action.” *E.g.*, *Miller v. Campbell*, 164 Wn. 2d 529, 541, 192 P.3d 352 (2008) (“the bankruptcy court reopened Miller’s bankruptcy action”); *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 103, 220 P.3d 229 (2009) (“the inconsistent statements CHD made in the bankruptcy action”); *Corales v. Flagstar Bank, FSB*, C10-1922JLR, 2011 WL 1584284 (W.D. Wash. Apr. 26, 2011) (“Following voluntary dismissal of Plaintiffs’ bankruptcy action”); *Gschwend v. Markus*, C 07-00838 JSW, 2008 WL 4346503 (N.D. Cal. Sept. 23, 2008) (“On January 9, 2007, the bankruptcy court dismissed her bankruptcy action, but gave Gschwend twenty days to file a confirmable Chapter 13 Plan.”).

As explained in Appellants' opening brief, most bankruptcy actions are not actions brought by a creditor to recover on the debt, so they do not fall within the scope of the statute. Usually, the debtor brings the action, and brings it to limit recovery on the debt. But where, as here, the case is forcibly reopened by a creditor for the sole purpose of compelling liquidation of the debtor's remaining property, in a contested proceeding that goes to a full evidentiary hearing, it is an action brought and prosecuted by the creditor on the debt.

For the same reasons, DCI's argument that it did not "elect" the remedy not only lacks any basis in the text of the statute, it is factually wrong. Whether or not a creditor in the usual bankruptcy proceeding elects a remedy when it files a claim against the estate, DCI did elect to reopen and seek liquidation.

Contrary to DCI's suggestion, it will usually be easy to tell which party started the proceedings, and for what reason, so there is no reason to fear a flood of frivolous motions under the Single Action Statute. The Washington courts can make those determinations perfectly well.

C. The Statute's Purpose Has Not Been Met And The Appeal Is Not Moot.

DCI urges the Court to define the word "action" consistently with the purpose of the Single Action Statute. The Court should do just that,

but DCI mistakes the purpose of the statute. The “evident spirit and intent” of the statute, held the Washington Supreme Court, is “to prevent plaintiffs from harassing defendants in foreclosure actions, with ancillary proceedings prosecuted before judgment, for the purpose of seeking additional and concurrent remedies,” and “to prohibit a mortgagee securing by writ of attachment or otherwise an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale.” *Advance Thresher Co v. Schimke*, 47 Wash. 162, 164, 91 P. 645 (1907). The legislative goal to protect people from litigation harassment at their financial nadir does not call for an artificially narrow reading of the word “action,” but rather for a broad one.

According to DCI, the statute’s purpose has been met and the appeal is moot, because the real property liquidated in the bankruptcy court action did not satisfy the whole debt, so DCI is no longer “anticipating” a deficiency, unlike the plaintiff in *Advance Thresher Co*. Not so. DCI reads *Advance Thresher Co*. exactly backwards: the Court, as quoted above, held that the creditor should refrain from anticipating a deficiency resulting from the foreclosure, not from the concurrent other action. *Advance Thresher Co.*, 47 Wash. at 164.

Similarly, the statutory purpose has not been met, and the appeal is

not moot, despite DCI's contentions, merely because both forced sales of Appellants' property were applied towards their debt. Appellants sought to avoid having to simultaneously litigate related property rights to final decrees in separate forums while in financial straits, which is just the problem identified in *Advanced Thresher Co.* that the statute was intended to prevent. In prohibiting that situation, the Legislature showed a solicitude towards Appellants' due process rights which this Court should enforce. The rather chaotic trial court record described in DCI's brief demonstrates the problem with forcing debtors to try to fend off multiple attacks on the same debt at the same time: the merits of those cases tend to suffer. Appellants lacked the time and resources to do much more than interpose the Single Action Statute – but that should have been enough for the time being. DCI may bring its foreclosure action now, when the parties' rights after relief in the bankruptcy court are clearer, and the debtors have more resources to litigate the merits of the action.

D. The Two Concurrent Actions Were On The Same Debt.

DCI at the last makes the new and highly technical argument that the debt in the bankruptcy court was not strictly speaking the same as in the state court, because a confirmed plan discharges debts and novates the debt agreements except to the extent reaffirmed in the plan or confirmatory order. The creditor's approved claim in the plan, of course,

arises solely out of the pre-bankruptcy debt agreement and the balance on the debt therefrom, but DCI argues that under the state statute, it should be considered a new, unrelated debt. Even if that type of technical, hair-splitting argument could properly inform interpretation of a remedial, protective statute, which it should not, it cannot apply here: the Bankruptcy Plan exempted the debts secured by DCI's deeds of trust from the discharge. *See In re Cervantes Orchards & Vineyards*, No. 05-06600-JAR11 ECF No. 422 at 16:17-21 (Bankr. E.D. Wash. October 20, 2006) ("the confirmation of the Plan shall not discharge the Debtor's obligations to DCI under the DCI Loan Documents.") Although DCI did not raise this specific argument in the Superior Court, so that the Plan was not part of the Clerk's Papers, it is public record of which judicial notice may properly be taken even on appeal. Once again, neither DCI's statutory interpretation nor its factual premises hold water.

VI. CONCLUSION

Because the plain reading of the Single-Action Statute barred this action during the pendency of the bankruptcy court liquidation contest, this Court should reverse and remand with instructions to enter an order vacating summary judgment and dismissing the Washington Action.

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DATED this 21st day of September, 2011.

RESPECTFULLY submitted,

JOHNSTON LAWYERS, P.S.

By: 
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CERTIFICATE OF SERVICE

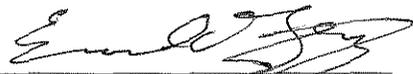
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

APPELLATE BRIEF

TO: ROGER W. BAILEY

Bailey & Busey, PLLC 411 N 2nd St Yakima, WA 98901-2336 roger.bailey.attorney@gmail.com <i>Attorneys for Respondent</i>	VIA FEDERAL EXPRESS [] VIA REGULAR MAIL [X] VIA CERTIFIED MAIL [] VIA EMAIL [X] VIA FACSIMILE []
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Dated at Seattle, Washington, this 21st day of July, 2011.


Emanuel Jacobowitz, WSBA #39991