

Supreme Court No. 92967-0
Court of Appeals No. 72504-1-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SELENE RMOL II REO ACQUISITIONS II, LLC

Plaintiff/Respondent/Petitioner,

v.

VANESSA WARD,

Defendant/Appellant/Respondent.

AMICUS CURIAE BRIEF OF
NORTHWEST CONSUMER LAW CENTER

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William B. Stoebuck & John W. Weaver,

17 WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW

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I. INTEREST OF *AMICI*

The Northwest Consumer Law Center (NWCLC), are statewide non-profit law firms that provide representation and counseling to low and moderate income homeowners in Washington. Collectively, we have counseled and represented thousands of Washington homeowners over the last five and a half years since the current foreclosure crisis began.

NWCLC receives funding from the National Mortgage Settlement, an historic state-federal settlement that was reached in February 2012 among Washington's Attorney General, the attorneys general of 48 other states, the U.S. Justice Department, and the country's five largest loan servicers. The settlement provided approximately \$44.5 million for the Washington Attorney General to distribute to non-profit corporations and government agencies in Washington for foreclosure-related work on behalf of Washington homeowners and others impacted by the foreclosure crisis in our state.

We and our homeowner clients have a substantial interest in this Court's interpretation and application of the Washington Deeds of Trust Act (DTA), RCW 61.24, and unlawful detainer actions under RCW 59.12. In this case, the Court will be addressing the

intersection between these two statutory schemes and defenses to an eviction action. This brief addresses title issues not raised by the parties in this case.

II. STATEMENT OF THE CASE

For purposes of this amicus brief, the following chain of title (chain of deeds) to the subject property is important:

Sometime in 1999, Appellant Vanessa Ward purchased the subject property. CP 29. This deed was recorded. Ms. Ward then appears to have conveyed the Property to Mr. Chester Dorsey.¹ CP 29. This deed was recorded.

On December 2, 2004, Mr. Dorsey signed a quitclaim deed to Ms. Ward (2004 Deed). CP 45. This document was notarized but not recorded.

On September 9, 2005, Mr. Dorsey conveyed the property to his uncle, Mr. Fred Brooks (2005 Deed). CP 29. On April 3, 2007, Mr. Brooks, acting through Mr. Dorsey as his power of attorney, conveyed the property to Mr. Dreier (2007 Deed). CP 29. Mr. Dreier then sought and received a loan from First Franklin secured by a

¹ Ms. Ward contests that she did not sign this document but contends that her signature was forged. RP page 13, lines 5-20.

deed of trust recorded on April 3, 2007 (2007 Deed of Trust). CP 4-5; 29.

On February 3, 2009, the 2007 Deed of Trust was foreclosed and a trustee's deed was issued to LaSalle Bank conveying Mr. Dreier's interest in the property (2009 Trustee's Deed). CP 4-5; RCW 61.24.050(1). On October 12, 2012, a special warranty deed was issued by LaSalle Bank to Respondent Selene RMOL II Acquisitions II, LLC, relating to the property (2012 Deed). CP 6-7.

III. ARGUMENT

A. **RCW 61.24 DOES NOT AUTHORIZE AN UNLAWFUL DETAINER ACTION AGAINST THOSE WHO DO NOT CLAIM TITLE THROUGH THE GRANTOR ON THE FORECLOSED DEED OF TRUST**

Selene contends that the 2009 Trustee's Deed conveyed all right and title to the property to LaSalle Bank, which then conveyed all right and title to Selene. Petition for Review, p. 2. Selene states: "The trustee's deed conveyed all rights, title and interest in the Property to LaSalle Bank." *Id.* This is incorrect.

RCW 61.24.050(1) provides that a trustee's deed conveys the right, title, and interest held or later acquired by the grantor:

Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and

personal property sold at the trustee's sale **which the grantor had or had the power to convey** at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired.

(Emphasis added.). This statute is strictly construed. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007); cf. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 72, 283 P.2d 1082 (2012) (City could only receive what dedicator had to convey).

This statute unequivocally states that a trustee's deed like the 2009 Trustee's Deed at issue in this case conveys only the right, title, and interest held by Mr. Dreier at the time he signed the 2007 Deed of Trust or any right, title, and interest he thereafter acquired. *Udall*, 159 Wn.2d at 909-10 (holding that courts must give effect to the plain meaning of RCW 61.24.050(1)).

When Mr. Dreier conveyed the 2007 Deed of Trust to LaSalle Bank, LaSalle stepped into Mr. Dreier's shoes. When Selene accepted the conveyance from LaSalle Bank, Selene also stepped into Mr. Dreier's shoes.

As is clear from the chain of title recited above and the record, Mr. Dreier's claim to title was in direct conflict with Ms. Ward's claim. Both Mr. Dreier and Ms. Ward appear to claim title from Mr. Dorsey, who apparently signed at least three deeds to the

Property—including the 2004 Deed to Ms. Ward, the 2005 Deed to his uncle, and the 2007 Deed to Mr. Dreier (which Mr. Dorsey signed as power of attorney for his uncle). In short, Selene has purchased its way into a quiet title action with Ms. Ward—the same status held by Mr. Dreier when he received the 2007 Deed. Selene's claim that the 2009 Trustee's Deed wipes out Ms. Ward's claim of title to the Property is incorrect because Ms. Ward claims title through Mr. Dorsey, not Mr. Dreier.

RCW 61.24.060 also supports Ms. Ward's claim that a quiet title and ejectment action should have been filed instead of an unlawful detainer action. Subsection (1) of that statute provides:

The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, ***as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust***, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

(Emphasis added.) Ms. Ward was not the borrower or grantor under the 2007 Deed of Trust, nor is her interest junior to the 2007 Deed of Trust, since the 2004 Deed on which her claim is based predates it by several years.

B. THOSE CLAIMING TO BE TRUE OWNERS ALWAYS HAVE A DEFENSE TO AN UNLAWFUL DETAINER ACTION BROUGHT BY A THIRD PARTY

To establish that its unlawful detainer action under RCW 59.12 was proper, Selene must prove that Ms. Ward claimed interest in the property was conveyed by Mr. Dreier. RCW 59.12.030(6) provides that “a tenant of real property for a term less than life is guilty of unlawful detainer” if he or she is

A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040. Such person may also be subject to the criminal provisions of chapter 9A.52 RCW.

The statute therefore requires Selene to prove two things: (1) that Ms. Ward occupies the Property without the owner's permission, and (2) Ms. Ward does not have color of title to the Property.

Selene cannot prove that Ms. Ward occupies the property “without permission of the owner” because Ms. Ward claims to be the owner based on the 2004 Deed. Her interest is not affected by the foreclosure under RCW 61.24 and she has a deed that is valid on its face. Selene has not taken the proper steps to eliminate Ms. Ward's claimed interest in the Property by pursuing a quiet title action under RCW 7.28 and/or a declaratory judgement action

under RCW 7.24. An unlawful detainer action is not the proper procedure to litigate claims to title. *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ndiaye*, 188 Wn. App. 376, 384, 353 P.3d 644 (2015).²

Selene also cannot prove that Ms. Ward does not have color of title to the Property. Washington courts have defined the phrase "color of title" to mean "that the adverse claimant holds or traces back to a title document, usually a deed, that appears on its face to convey good title, but that, for some reason that does not appear on its face, did not convey title." *Campbell v. Reed*, 134 Wn. App. 349, 358, 139 P.3d 419 (2006) (quoting William B. Stoebuck & John W. Weaver, 17 WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 8.20, at 542 (2004)). The instrument "must purport to convey title to the grantee ... and must describe ... the land in controversy." *Id.* (quoting *Scramlin v. Warner*, 69 Wn.2d 6, 10, 416 P.2d 699 (1966)) (alterations in original).

The 2004 Deed conveys title to Ms. Ward. It accurately describes the Property, it is signed by the party to be charged (Mr. Dorsey), and it is notarized. RCW 64.04.030; *Campbell*, 134 Wn. App. at 358. The *Campbell* court appeared to limit the phrase "color

² Selene relies heavily on *Ndiaye*, which is inapplicable because the party challenging title was the grantor of the deed of trust at issue.

of title” in RCW 59.12.030(6) to defective title documents, but doing so excludes true owners from a defense to an unlawful detainer action. Such a construction does not make sense. See *Sprincin King St. Partners v. Sound Conditioning Club*, 84 Wn. App. 56,64-65, 925 P.2d 217 (1996) (construing RCW 59.12 and holding that “[c]ourts refuse to literally or grammatically construe statutes when absurd or unjust determinations, inconsistent with the purposes and policies of the statute being construed, result”).

Whether or not the 2004 Deed was recorded does not solve the problem as Selene suggests. See Petition for Review, pp. 11-12 (“Ms. Ward is only a mere tenant with a disputed claim to ownership of the Property and her unrecorded interest does not afford her ‘color of title.’”).³ Recordation of a document does not validate the document. Rather, it only gives notice of its contents. RCW 65.08.030. “[T]he mere fact that an instrument is recorded does not establish or change its effectiveness between the parties.” *Chelan County v. Nykreim*, 105 Wn. App. 339, 359, 20 P.3d 416

³ The record before the Court does not contain a lease, a rental agreement or an acknowledgment of a tenancy by Ms. Ward, or any testimony on the subject from Mr. Dorsey or Mr. Dreier.

(2001), *overruled on other grounds* by 146 Wn.2d 904, 52 P.3d 1 (2002).

Selene relies heavily on *OneWest Bank v. Erickson*, 185 Wn.2d 43, 367 P.3d 1063 (2016). In *Erickson*, the daughter to a grantor contested (through a conservator) a judicial foreclosure of a deed of trust used to secure a reverse mortgage. *Id.* at 1066-67. The daughter claimed she had an unrecorded quit claim deed from her father, the grantor on the deed of trust. *Id.* at 1067. This court held that the Idaho court's decision was entitled to full faith and credit and allowed the foreclosure to proceed. *Id.* at 1079.

Erickson involved a judicial foreclosure in which claims to title may have been litigated and were properly brought. It did not address unlawful detainer actions under RCW 59.12, in which claims to title are not properly brought. *Erickson* therefore does not govern in this case.

As to Selene's claim that it did not have notice of Ms. Ward's claims⁴, the 2012 Deed conveying title to the Property to Selene is entitled "special warranty deed." CP 6-7. The conveying language of this deed states that LaSalle Bank "bargains, sells and conveys

⁴ See CP 19 where Ms. Ward states: "In 2012 which before purchasing property I certifiably gave [REO Selene II LLC] notice of fraudulent title."

to Selene." CP 6. Thus, this "special warranty deed" is nothing more than a bargain and sale deed authorized by RCW 64.04.040. As such, LaSalle Bank only warranted against its own actions and not against any title defects that may have arisen during the ownership of previous owners of the property. *Graham v. Findahl*, 122 Wn. App. 461, 468 n.6, 93 P.3d 977 (2004). This type of deed would put any prudent person on notice to inquire further as to the status of title and to determine why a full statutory warranty deed under RCW 64.04.030 was not given. See *Albice v. Premier Mtg. Serv.*, 174 Wn.2d 560, 574-75, 276 P.3d 1277 (2012).

IV. CONCLUSION

For the foregoing reasons, amici respectfully request that the Court hold that RCW 61.24 does not authorize an unlawful detainer action against persons who claim title through the grantor on the foreclosed deed of trust.

Respectfully submitted this 3rd day of January, 2017.

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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individuals in the identified manner on this 3rd day of January, 2017.

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