

Court of Appeals No. 67954-6-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

JOHN K. DAHL

Plaintiff/Respondent,

v.

LEO GILLESPIE

Defendant/Appellant,

2012 APR 30 PM 2:46
COURT OF APPEALS DIV I
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT

Catherine C. Clark, WSBA 21231
The Law Office of Catherine C. Clark PLLC
701 Fifth Avenue, Suite 4785
Seattle, WA 98104
Phone: (206) 838-2528
Fax: (206) 374-3003
Email: cat@loccc.com
Attorney for Appellant

Sheila Ridgway, WSBA 14759
Ridgway Law Group, P.S.
701 Fifth Avenue, Suite 4755
Seattle, WA 98105
Phone: (206) 838-2501
Fax: (206) 838-2517
Email: Sheila@ridgwaylawgroup.com
Attorney for Appellant

ORIGINAL

Table of Contents

I.	INTRODUCTION	1
II.	ARGUMENT	1
	A. THE TRIAL COURT ERRED BY RESTORING POSSESSION TO THE ESTATE—MR. GILLESPIE HAS COLOR OF TITLE.....	1
	B. AS JUDGMENT WAS ENTERED, RES JUDICATA IS ARGUBLY APPLICABLE	6
	C. RAP 9.2 (c) ONLY APPLIES TO PARTIAL REPORTS OF PROCEEDINGS.....	7
III.	CONCLUSION	8

Table of Authorities

Cases

<i>Angelo Property Co. v. Maged Hafiz,</i> ___ Wn. App. ___, Slip Op. ¶42 (2012 WL 1331871, April 17, 2012)	5
<i>Basset v. City of Spokane,</i> 98 Wash.654, 656, 168 P. 478, 479 (1917).....	4
<i>Bellevue Square Managers, Inc. v. GRS Clothing, Inc.,</i> 124 Wn. App. 238, 246, 98 P.3d 498 (2004)	4
<i>Carrington v. McNeil,</i> 58 A.D.2d 719, 720, 396 N.Y.S.2d 286 (1977)	5
<i>City of Walla Walla v. \$401,333.44,</i> 164 Wn. App. 236, 262 P.2d 1239 (2011)	6
<i>Gorman v. City of Woodinville,</i> 160 Wn. App. 759, 762, 249 P.2d 1040 (2011)	2
<i>Munden v. Hazelrigg,</i> 105 Wn.2d 39,42-45, 711 P.2d 295 (1985).....	5,6,7
<i>Puget Sound Investment Group, Inc. v. Bridges,</i> 92 Wn. App. 523,527 963 P.2d 944 (1998)	3
<i>Scramlin v. Warner,</i> 69 Wn.2d 6, 9-10, 416 P.2d 699 (1966).....	4
<i>Schmitz v. Klee,</i> 103 Wash. 9, 16, 173 P.1026 (1918).....	4

Statutes

RCW 59.12.....1
RCW 59.18.....1
RCW 59.18.370.....1
RCW 59.18.380..... 1,2

Rules

CR 12(b)(6) 2
CR 54..... 6
RAP 2.2(a)(3)..... 7
RAP 9.2(a) 8
RAP 9.2(c)..... 7, 8

Treatises

3 Am. Jur.2d ADVERSE POSSESSION § 130 *Generally; instrument as
purporting to convey title*..... 4
3 Am. Jur.2d ADVERSE POSSESSION § 132 *Contract or mortgage* 4

I. INTRODUCTION

The real question posed by this appeal is whether or not Mr. Gillespie has a legitimate claim to title to the Property and if so, whether that claim must be decided before an unlawful detainer can be initiated against him on any basis.

Mr. Dahl contends that there is no such requirement in Washington law. Mr. Gillespie disagrees as more specifically stated below.

II. ARGUMENT

A. THE TRIAL COURT ERRED BY RESTORING POSSESSION TO THE ESTATE—MR. GILLESPIE HAS COLOR OF TITLE

RCW 59.18 does not have such a specific definition of what is an unlawful detainer as RCW 59.12, but rather addresses the right of possession. RCW 59.18.370 provides in relevant part:

The plaintiff, at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, upon filing the complaint, may apply to the superior court in which the action is pending for an order directing the defendant to appear and show cause, if any he or she has, **why a writ of restitution should not issue restoring to the plaintiff possession of the property** in the complaint described, and the judge shall by order fix a time and place for a hearing of the motion, which shall not be less than seven nor more than thirty days from the date of service of the order upon defendant.

(Emphasis added.) RCW 59.18.380 provides in relevant part:

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and **assert any legal or equitable defense or set-off arising out of the tenancy.** ...

If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer.

(Emphasis added.)

This court is asked to decide whether, in the face of the express terms of the Lease, the Estate was entitled to possession and/or whether Mr. Gillespie presented a viable legal or equitable defense to the entry of judgment against him. While the statutes do not set out what the appropriate standard is to apply in determining a legal or equitable defense under it, Mr. Gillespie submits it should be akin to that applicable under CR 12(b)(6) which is:

Dismissal under CR 12(b)(6) is appropriate only if the complaint alleges no facts that would justify recovery. The plaintiff's allegations and any reasonable inferences are accepted as true.

(Footnotes with citations omitted.) *Gorman v. City of Woodinville*, 160 Wn. App. 759, 762, 249 P.2d 1040 (2011).

At page 9 of the Respondent's Brief, the Estate acknowledges that Mr. Gillespie has presented a "viable legal and equitable theory" and then states:

It is only a theory at this point and his status is that of a tenant until his claim is adjudicated in another forum.

Mr. Gillespie is the proper owner of the Property as a matter of law. The Estate did not offer any authority that Mr. Gillespie's claims were not proper or valid. Further, Mr. Dahl has now

admitted that Mr. Gillespie presented a viable theory which is all that the statute requires.

The Estate contends that it can initiate an unlawful detainer action against Mr. Gillespie and he is properly a tenant (who must pay rent) until his claim is determined. That is not correct.

Again, in *Puget Sound Investment Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (1998), this court stated that claims to title must be resolved prior to the initiation of an unlawful detainer action.

Puget Sound may not proceed under subsection (6) of the unlawful detainer statute unless it can show that Bridges entered on the land "without permission of the owner and without having color of title thereto". Bridges holds a statutory warranty deed. The deed gives Bridges color of title. Therefore, Puget Sound must establish superior title before it may proceed under RCW 59.12.030(6). The appropriate procedure is action in ejectment and quiet title under RCW 7.28.

92 Wn. App. at 527. This court also stated: "We hold that dispossession may not be achieved through an action for unlawful detainer when title has not been cleared." *Id.* at 525.

Here, the Lease gives Mr. Gillespie color of title to the Property. Again, it states at Paragraph 10:

Additional Lease Terms: Landlord agrees to bequeath to the Tenant(s) the above mentioned property free and clear of any encumbrances [sic] in her Last Will and Testament together with all monies paid in rent, property taxes and repairs during the lease period.

CP 48. While the Lease does not give Mr. Gillespie title to the Property, it gives him color of title to it. The Washington Supreme Court has defined color of title as follows:

In *Basset v. City of Spokane*, 98 Wash. 654, 656, 168 P. 478, 479 (1917), color of title has been defined as follows:

Color of title is that which is a semblance or appearance of title, but is not title in fact nor in law. A claim to property under the terms of some conveyance, however incompetent to carry or pass the title, is strictly color of title.

This definition was amplified in *Schmitz v. Klee*, 103 Wash. 9, 16, 173 P. 1026 (1918):

An instrument, in order to operate as color of title, must purport to convey title to the grantee, or to whose with whom he is in privity, And [sic] must describe and purport to convey the land in controversy; it cannot be aided by parol evidence.

Scramlin v. Warner, 69 Wn.2d 6, 9-10, 416 P.2d 699 (1966). See also 3 Am. Jur.2d ADVERSE POSSESSION § 130 *Generally; instrument as purporting to convey title*. A document claimed to give "color of title must purport to pass title, and the claimant must believe it to be a valid title." *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.*, 124 Wn. App. 238, 246, 98 P.3d 498 (2004).

Contracts can also form the basis of color of title. 3 Am. Jur.2d ADVERSE POSSESSION § 132 *Contract or mortgage* and cases cited therein. In New York, the following is true:

While one who enters upon land under a mere agreement to purchase does not hold adversely as against the vendor until his agreement has been full performed (*In re Dep't of Public Parks*, 73 N.Y. 560), a claim of right based upon a written instrument may be upheld when the terms of the contract

have been fully performed except for the execution of the deed (*Reid v. City of New York*, 274 N.Y. 178, 8 N.E.2e 326; *Coming v. Lehigh Val. R. R. Co.*, 14 A.D.2d 156, 217 N.Y.S.2d 874).

Carrington v. McNeil, 58 A.D.2d 719, 720, 396 N.Y.S.2d 286 (1977).

Given Mr. Gillespie's claims to title to the Property, it is irrelevant that the Estate chose to initiate an action based on a non-payment of rent. Both unlawful detainer statutes are clear: where there is a viable defense, the matter should be set over for trial.

Division Two recently stated:

Because a landlord may have varying grounds for pursuing an unlawful detainer action, a court applying the *Munden* test should (1) first look at the underlying basis for the landlord's unlawful detainer action by examining the landlord's notice to quit and its unlawful detainer complaint, and (2) then ask whether a tenant's counterclaim is based on facts that may "excuse" the tenant's breach alleged by the landlord. If the answer to the second inquiry is "yes," then the trial court may properly hear the counterclaim in an unlawful detainer proceeding. But if the answer to the second inquiry is "no," then the trial court may not address the counterclaim without first converting the unlawful detainer action into an ordinary civil action for damages.

Angelo Property Co. v. Maged Hafiz, ___ Wn. App. ___, Slip Op.

¶42 (2012 WL 1331871, April 17, 2012) citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 711 P.2d 295 (1985). In *Munden*, the Washington

Supreme Court stated:

In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed. It has long been settled that counterclaims may not be asserted in an unlawful detainer action.

An exception to the general rule is made when the counterclaim, affirmative equitable defense, or set-off is “based on facts which excuse a tenant’s breach.”

105 Wn.2d at 45.

Mr. Gillespie agrees that the unlawful detainer action is not the place for his title claim to be adjudicated but also contends that no writ of restitution or judgment should have been entered against him.

B. AS JUDGMENT WAS ENTERED, RES JUDICATA IS ARGUBLY APPLICABLE

The Estate contends that the judgment entered below “obviously” does not have *res judicata* effect without any citation to authority and thus should remain in place until Mr. Gillespie’s title claim is resolved in the TEDRA Proceeding. Respondent’s Brief, p. 10. Given that statement, the Estate is now judicially estopped to claim *res judicata* effect of these proceedings. *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 262 P.2d 1239 (2011).

However, as the judgment is a final judgment under CR 54, the proper course is to reverse the trial court as it is a final determination that Mr. Gillespie is a tenant which is not a proper determination at this point given his pending claims. The trial court erred and should be reversed.

Further, as noted in *Munden*, the Order and Judgment here, while reserving Mr. Gillespie’s claims, does not say that his claims were dismissed without prejudice. CP 201-204; 266-268. As such,

under *Munden*, and despite the preservation language contained in the court's order, there is the possibility that Mr. Gillespie's claims are now finally determined. *Munden*, 105 Wn.2d at 42-44. In *Munden*, the Supreme Court addressed a dismissal of a counterclaim without prejudice and whether such an order was appealable. The court concluded in that case that it was not citing RAP 2.2(a)(3). Mr. Gillespie further notes that Mr. Dahl does not contend that the Commissioner's Order and the Order on Revision are not final judgments and thus not appealable under RAP 2.2(a)(3). Mr. Gillespie needs a clear direction from this court on this point.

C. RAP 9.2(c) ONLY APPLIES TO PARTIAL REPORTS OF PROCEEDING

As his first argument (Respondent's Brief, p. 3), Mr. Dahl complains that Mr. Gillespie did not comply with RAP 9.2(c). That rule provides:

(c) Notice of Partial Report of Proceedings and Issues. If a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the issues the party intends to present on review. Any other party who wishes to add to the verbatim report of proceedings should within 10 days after service of the statement of arrangements file and serve on all other parties and the court reporter a designation of additional parts of the verbatim report of proceedings and file proof of service with the appellate court. If the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party's own expense or apply to the trial court for an order requiring the party seeking review to pay for the additional parts of the verbatim report of proceedings.

The rule, on its face, applies to the situation where a party orders only a portion of a Verbatim Report of Proceedings. It does not apply to a situation, as here, where the appellant did not order a Verbatim Report of Proceedings. See Appellant's Notice of Not Filing a Verbatim Report of Proceedings. Under RAP 9.2(a) a party is not obligated to file a Verbatim Report of Proceedings. The rule states in part:

If the party seeking review does not intend to provide a verbatim report of proceedings, a statement to that effect should be filed in lieu of a statement of arrangements within 30 days after the notice of appeal was filed or discretionary review was granted and served on all parties of record.

Mr. Gillespie chose not to file a Verbatim Report of Proceedings and was under no obligation to do so. RAP 9.2(c) does not apply to this case. RAP 9.2(a).

III. CONCLUSION

For the above stated reasons, the trial court should be reversed, the judgment vacated and the matter dismissed without prejudice.

Dated this 27th day of April, 2012.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

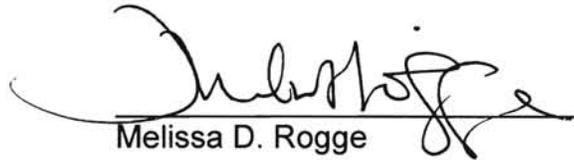
By: 

Catherine C. Clark, WSBA 21231
Attorney for Leo Gillespie

Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 30th day of April, 2012:

Via Messenger Hand Delivery
Raymond J. Walters, WSBA 6943
9728 Greenwood Ave. N., Ste A
Seattle, WA 98103



Melissa D. Rogge