

70503-2

70503-2

No.: 70503-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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**DOUG KRUGER,**

**Respondent,**

**vs.**

**MICHAEL MOI,**

**Appellant.**

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**RESPONDENT'S REPLY BRIEF**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUN -3 PM 3:46

**ORIGINAL**

**TABLE OF CONTENTS**

TABLE OF CASES .....iv

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERRORS.....3

III. STATEMENT OF CASE.....3

    A. Overview.....3

    B. Writ of Execution, Sheriff Sale, and Confirmation.....4

    C. Mr. Kruger pays the taxes during the redemption period...5

    D. Moi fails to give the required five days’ notice of intent to redeem.....5

    E. Kruger provides a statement of redemption.....6

    F. Motion practice after expiration of one year right of redemption.....6

    G. Moi concedes at oral argument that he did not have the funds to redeem.....7

    H. Moi did not file an action for accounting, as required by statute.....8

    I. Moi attempted to place conditions upon redemption.....9

    J. Moi fails to present any evidence of the actual ability to redeem or any commitment from any lender.....11

IV. ARGUMENT .....12

    A. Even as of today’s date, Moi has failed to redeem, let alone redeem within the statutory time limit .....12

    B. This Appeal does not toll the Redemption Period.....14

C.	Moi failed to give proper notice required by statute.....	15
D.	There is no statutory provision allowing for a longer redemption period nor has Moi availed himself of the only judicially recognized exception allowing the extension the redemption period. ....	17
E.	Moi’s attempt to place conditions upon redemption violated the statute.....	18
F.	Moi failed to exercise due diligence.....	19
G.	The itemized statement for redemption fulfills the verified statement requirement.....	23
H.	There is no evidence of rejection of tender.....	25
I.	Extending the redemption period to obtain financing undermines public policy.....	27
J.	The accounting procedures should only apply to rents and profits, the redemptioner must still pay the sum required within the time limits prescribed by the statute.....	28
K.	Lis Pendens.....	31
V.	CONCLUSION.....	31

APPENDIX A

## TABLE OF AUTHORITIES

### Cases

<i>Christian v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007).....	17
<i>Frieze v. Powell</i> , 79 Wash. 483, 140 P. 690 (1914).....	23, 25
<i>Haynes v. City of Seattle</i> , 87 Wash. 375, 151 P. 789 (1915).....	23
<i>Gates v. Port of Kalama</i> , 152 Wn. App. 82 (2009).....	23
<i>GESA Federal Credit Union v. Mutual Life Insurance Co. of N.Y.</i> , 105 Wn.2d 248, 713 P.2d 728 (1986).....	12, 21, 30
<i>Graham v. Findahl</i> , 122 Wn. App. 461 (2004).....	18, 19
<i>Graves v. Elliott</i> , 69 Wn.2d 652, 419 P.2d 1008 (1966).....	12
<i>John Doe v. Puget Sound Blood Bank Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	25
<i>Kuper v. Stojack</i> , 57 Wn. 2d 482, 358 P.2d 132 (1960); <i>Wash. Pract.</i> <i>Volume 28</i> , Section 7.68 (1998).....	2, 12, 13, 15
<i>Le Tastebin, Inc. et al v. Seattle First National Bank</i> , 95 Wn. App. 224, 974 P.2d 896 (1999).....	26, 27
<i>Millay v. Cam</i> , 84 Wn. App. 369 (1996), 928 P.2d 463 (1996).....	12, 26
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998)....	12, 13, 14, 17, 18, 19, 20, 26, 27, 28, 29, 32
<i>Putnam v. Wenatchee Valley Med. Ctr., PS</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	24
<i>Zesbaugh, Inc. v. General Steel Fabricating</i> , 95 Wn.2d 600, 627 P.2d 1321 (1981).....	24

**Other State Cases**

*Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897, 904 (1957).....21

**Statute**

RCW 1.16.050.....15, 16

RCW 4.28.328.....3, 31

RCW 6.21.110.....4

RCW 6.23, *et seq.*.....1, 2, 25

RCW 6.23.020(1), (2).....1, 13, 20

RCW 6.23.040,(3).....21, 29

RCW 6.23.050.....21

RCW 6.23.080,(1), (3)..... 15, 21,  
26, 27, 29

RCW 6.23.090, (2).....2, 13, 14, 30, 31,  
32

RCW 7.33 .....24

RCW 7.33.040.....24

RCW 7.33.150 .....24

RCW 7.33.240.....24

RCW 7.33.250.....24

RCW 7.70.150.....24, 25

**Court Rules**

CR 6, (a) .....5, 15, 16,  
17

CR 8, (a).....25

CR 11, (a) . . . . . 23, 24, 25

**Other Authorities**

*The Statutory Right of Redemption in California*, 52 Calif. L. Rev. 846,  
851 n.38  
(1964).....21

15 Lewis H. Orland & Karl B. Tegland, *Washington Practice* §497, at 223  
(5<sup>th</sup> ed. 1996).....21

## I. INTRODUCTION

In 2007, Mr. Kruger obtained, what is now, an uncontested judgment for an uncontested amount. Moi has refused to satisfy the judgment. Mr. Kruger executed upon property of Moi, via a Sherriff's Sale, which was duly confirmed. In an untimely manner, Moi seeks redemption, and seeks to do so without paying the sum required to redeem.

The Washington redemption statutes at RCW 6.23 *et seq* provide the exclusive basis and remedy for redemption. The redemption statute allows a debtor to redeem (i.e. pay the sum required) within a statutorily prescribed time frame. As of today's date, Moi has failed to pay any amount to redeem. The time to make this payment has long since passed. His right to redeem has expired.

The one year period of redemption set forth in RCW 6.23.020(1) may only be extended in three circumstances. One, the period may be extended under certain circumstances involving a homestead. This matter does not involve a homestead, therefore this circumstance does not apply.

Two, the one year period of redemption may tolled for a brief time by the filing of an action for an accounting. In order for this extension to apply, the action for an accounting must be filed within a maximum of 70 days after the expiration of the one year time period (435 day total from

the date of sheriff's sale), "but not later." *See* RCW 6.23.090(2). Moi failed to file an action for an accounting within the statutory time period. In fact, even as of today's date Moi has failed to file an action for accounting.

Three, the Washington Supreme Court has recognized a very limited exception to the statutory time limit set forth in RCW 6.23 *et seq.* A redemptioner (debtor) may file a declaratory relief action and seek equitable relief under very limited circumstances. The Supreme Court has clearly indicated that in order to seek the protections of this limited exception, the declaratory relief action *must* be filed within the period of redemption. The debtor must set forth specific elements justifying equitable relief. In this case, Moi has failed to file a declaratory relief action within the statutory redemption period or otherwise. Moreover, Moi has failed to set forth any of the necessary elements justifying equitable relief. He did not seek equitable relief before the trial court and has not sought equitable relief before this court.

Significantly, the Washington Supreme Court has also held that the filing of an appeal *does not* extend the period of redemption. *Kuper v. Stojack*, 57 Wash. 2d 482, 483, 358 P. 2d 132 (1960). The period of redemption has passed. Moi failed to pay the redemption, he has also

failed to avail himself of any circumstance justifying extension of the redemption period.

## **II. ASSIGNMENTS OF ERROR**

Mr. Kruger assigns no error to the decisions of the lower court. Kruger respectfully requests this court affirm the lower court's decisions and remand the matter with specific instructions to the trial court to quash Moi's lis pendens and award fees pursuant to RCW 4.28.328.

## **III. STATEMENT OF CASE**

### **A. Overview**

The present dispute is before this court following eight years of litigation. CP 3-10. A order of default was entered by the court on November 27, 2006. CP 14-18. A judgment was entered on February 16, 2007. CP 25-29. As of today's date, Moi has failed to satisfy the judgment. *See* CP 275-276.

Consistent with the judgment entered in this matter, Kruger proceeded to execute on the judgment. Kruger executed on a building lot he co-owned with Mr. Moi by obtaining a writ of execution directing the Sherriff to sell Mr. Moi's co-interest in the building lot. CP 426-445. The sale occurred on May 25, 2012. *See* CP 468-471.

The Sheriff's sale was confirmed without objection or response from Moi on July 6, 2012. CP 475-76. Thereafter, Mr. Kruger provided all

the requisite notices required under the redemption statutes. Mr. Moi failed to redeem within the one year period provided for by Washington law. As a result, the trial court ordered the Sheriff to transfer the deed.

**B. Writ of Execution, Sheriff Sale, and Confirmation**

On March 28, 2012, this court issued a writ of execution for the judgment entered in this matter.<sup>1</sup> CP 431-432. The Sheriff was directed to sell the property pursuant to the writ. Mr. Kruger requested an opening bid amount in the amount of \$70,479.29, which was an amount sufficient to satisfy the outstanding judgment. CP 431-432. The Sheriff provided the appropriate notices concerning the sale to Mr. Moi. CP 435-445. Moi has not challenged the sufficiency of any of these notices.

On June 4, 2012, the Sheriff issued a notice of return of Sheriff's sale on real property. CP 453-454. Copies of the notice of return were mailed to both parties. *Id.*

Pursuant to RCW 6.21.110, Mr. Kruger then filed his motion to confirm the Sheriff's sale. Moi did not oppose the sale nor did he oppose the confirmation of that sale. CP 425-76.

Pursuant to statute, there was a one year redemption period.

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<sup>1</sup> The writ of execution included interest payable through February 28, 2010. The fees and expenses from 2010, the judgment owed was \$70,479.29. Moi has not challenged this calculation.

**C. Mr. Kruger pays the taxes during the redemption period.**

Attached hereto as **Appendix A** is the public record evidencing the payment of property taxes during the period of redemption. All totaled, Mr. Kruger caused to be paid \$13,341.74 in property taxes on the property during the one year period of redemption.

**D. Moi fails to give the required five days' notice of intent to redeem.**

The one year redemption period expired on May 28, 2013.

On May 21, 2013, Mr. Moi provided his notice of intent to redeem. CP 494. It was not timely. May 25 and 26 were weekends and May 27, 2013 was the Memorial Day holiday. Pursuant to CR 6(a), Moi only provided four days' notice of his intent to redeem.

*May 19-June 1, 2013*

DAY	SUN	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
19		20	21 Moi gives Written Notice of Intent to Redeem	22	23	24	25 WEEK END
26 WEEK END		27 Memori al Day HOLI DAY RCW 1.16.050	28	29	30	31	1

**E. Kruger provides statement for redemption.**

On May 22, 2013, Mr. Kruger provided the itemized statement for redemption. This document was signed by counsel and filed in open court. CP 495-96. Additionally, the document was recorded. CP 497. On the day the document was recorded, Moi demanded an accounting for the rents and profits. By letter dated May 28, 2013, Mr. Kruger explained that he had not received any rents or profits. CP 486, ¶ 1.

On May 29, 2013, Mr. Kruger filed his Motion for Order for Sheriff to Transfer Deed. In that pleading, signed by counsel, Mr. Kruger again reiterated that he had received no rents or profits. Kruger again set forth the accounting of the fees and expenses. CP 455-498 See CP 495-96 specifically. Moi admits the property executed upon was simply a vacant building lot. CP 511 lines 18-21. There was no evidence or argument that Kruger received *any* rents or profits from this vacant property during the period of redemption.

**F. Motion practice after expiration of one year right of redemption.**

On May 29, 2013, after the expiration of the one year right of redemption, Kruger filed his motion for an order to transfer the property consistent with the execution and redemption statutes. CP 455-498. In response, Moi agreed that the “sum required” to redeem was at least

\$78,936.80. Moi's agreement was based upon his understanding of the bid amount at sherriff's sale plus accrued interest during the period of redemption. Id. Moi did not take into consideration Kruger's payment of taxes.

Kruger argued in his moving papers that Moi had failed to comply with the threshold requirement to provide five (5) days written notice as required under the redemption statute. CP 458 lines 8-9. Moi did not respond to this argument. See CP 503-508. Moi offered no evidence of excusable neglect for his failure to comply with the notice requirement. Id. Moi simply failed to respond to the threshold issue of whether or not he timely complied with the statute.

**G. Moi concedes at oral argument that he did not have funds to redeem.**

Oral argument was held on June 11, 2013. Kruger argued that Moi had failed to comply with the threshold notice requirement in order to avail himself of the statutory right of redemption. RP p. 5. l. 20-21. Kruger also argued that Moi had failed to pay the "sum required."

The court specifically asked whether or not Mr. Moi had the ability to redeem, i.e., actually pay the money. The court inquired:

Where is the sub—where is the principle question? I mean, does your client actually have the money to pay this?

Ms. Garella: My client – and actually I have interviewed several lenders. We are on a thin cusp of potentially being able to redeem.

RP, p. 14, l. 7-12.

Counsel continued:

But I don't think you need to under the case of *Kennedy v. Trumble* consider whether or not Mr. Moi will be able to redeem or not. I don't know. I can't sit here in good faith and tell you I know that if we get rid of this \$38,000 dollars he'll be able to redeem, because I have received no such promises. I have heard nothing like that. I just don't know.

RP, p. 14, l. 19-25.

**H. Moi did not file an action for accounting as required by statute.**

Moi knew of the requirement to file for an action for an accounting. During oral argument, counsel for Moi repeatedly acknowledged the statute's requirement to file an action for an accounting in order to extend any period of redemption. RP, p. 15, l. 14-15; RP, p. 16, l. 24-25.

Counsel advised the trial court that Moi fully intended to file an action for an accounting. *Id.* Thus the statutory requirement to file an action for an accounting was not unknown or an unexpected surprise. Despite knowing that an action for an accounting was mandatory in order to extend the period of redemption, Moi failed to file any such action.

**I. Moi attempted to place conditions upon the redemption.**

At oral argument, counsel for Mr. Kruger waived all “disputed” amounts. RP, p. 37 l. 6-p. 38, l. 11.

The Court: That’s enough. All right. Let me hear from Mr. Wathen, and then I’m going.

Mr. Wathen: Your Honor, it’s going to cost my client more than \$10,000 to continue down this path of nonsense. They cannot dispute the purchase price paid under Itemized No. 1. They cannot dispute the 12 percent interest. Can’t do it. Okay? They can dispute the real estate taxes and the \$6,000 there. If the Court grants our motion, I will waive on behalf of my client that \$10,000 that’s in dispute. Problem solved.

The Court: Yeah, I was thinking you were going to do that, and that would make sense to me. Okay.

Ms. Garella: That does not satisfy us.

The Court: Why—no, what—I mean, look, 12 percent interest, that’s what the interest is.

Ms. Garella: Mm-hmm.

The Court: Okay?

Ms. Garella: We’re not contesting the interest.

The Court: Okay. So if the \$10,000 is off the table, why are you still contesting?

Ms. Garella: It doesn’t matter, Your Honor. They had to provide a sworn and itemized statement. That’s what the —

The Court: Okay.

Ms. Garella: I’m not — listen—

Ms. Garella: It's strictly construed.

The Court: There is strictly construction and then there is ridiculous construction. And I'm not going to go to that length. I mean, if Mr. Kruger is willing to waive that \$10,000, then there is nothing left to argue about.

By waiving the taxes and associated fees, Mr. Kruger accepted as the "sum required" *exactly* in the undisputed amount as agreed upon by Mr. Moi. The court allowed five additional days to pay the agreed upon amount. Despite waiving all contested amounts, and agreeing to Moi's number, counsel still professed an inarticulable dispute. RP, p. 30, l. 24.

Despite Mr. Kruger's argument that the redemption period had already expired by the June 11, 2013 hearing date, the court allowed for an additional five days to make payment. See Court's Order dated June 22, 2013, CP 834-835.

Thereafter, rather than simply pay the agreed and undisputed amount, Moi attempted to place multiple conditions on Mr. Kruger so that Mr. Moi could redeem. For example, Moi demanded that Mr. Kruger obtain a release from Chase Bank. CP 571. Mr. Kruger has no dominion or control over Chase Bank whatsoever. Second, Moi demanded that Kruger be able to deliver the property "unencumbered." CP 572. Moi failed to advise the court that there were also other unrelated judgments against him

which had attached to the property which would have made it impossible for Mr. Kruger to deliver the property “unencumbered” without coming up with a substantial amount of money to pay off Mr. Moi’s other debts. For example, under King County Cause No. 09-2-45245-8; 09-9-41407-1. The amount owing on that judgment is approximately \$50,000.00. So in essence, Moi demanded that Mr. Kruger pay off Moi’s other debts as a condition of redemption and secure the release of a third party, Chase Bank.

**J. Moi fails to present any evidence of the actual ability to redeem or any commitment from any lender.**

During oral argument, Moi suggested to the court that he was “interviewing” lenders. RP p. 14, l. 7 & 12. Moi didn’t identify the name of the alleged lenders, let alone providing a letter of credit, documents evidencing an offer to extend credit, or other verifiable evidence indicating that any lender was even considering loaning money to Moi. Moi did not represent a good credit risk. The following are significant factors which would be considered by any lender:

- Mr. Moi is a convicted criminal. CP 594
- Mr. Moi filed bankruptcy and indicated that he had no income. CP 594
- The genesis of these lawsuits is Mr. Moi’s default on the Chase bank loan. CP 1-12.

- Mr. Moi also has a judgment entered against him in the matter of *Dynamic Strategies v. Moi*, King County Cause No. 09-2-45245-8.
- As set forth in Moi's bankruptcy filing, he is over \$750,000 in debt. CP 760.

The court entered the final order transferring the deed to Kruger on June 24, 2013. CP 843-44.

Following the court's orders, Moi filed a notice of lis pendens. CP 880-881.

#### IV. ARGUMENT

The redemption statutes convey a right that is subject to specific deadlines. The prospective redemptioner must pay within those timelines or take very specific action to extend the timelines. Moi has done neither. Filing of this appeal does not extend the period of time for redemption. *Kuper v. Stojack*, 57 Wn.2d 482-483, 358 P.2d 132 (1960).

**A. Even as of today's date, Moi has failed to redeem, let alone redeem within the statutory time limit.**

The legislature has dictated that redemption occurs at the moment of payment. *Millay v. Cam*, 84 Wn. App. 369, 374, 928 P.2d 463, remanded on other grounds, 135 Wn.2d 193, 955 P.2d 791 (1998). The right to redeem property sold under execution is strictly a creature of statute and depends entirely on the statute creating the right. *GESA Federal Credit Union v. Mutual Life Insurance Co.*, 105 Wn.2d 248, 252,

713 P.2d 728 (1986) citing *Graves v. Elliott*, 69 Wn.2d 652, 419 P.2d 1008 (1966); *Kuper v. Stojack*, 57 Wn.2d 482, 358 P.2d 132 (1960).

In other words, without the statute, there is no right of redemption. The role of the court is to ascertain and give effect to the legislature's intent. *Millay*, 84 Wn. App., at 373. This court has recognized that tendering payment is necessary to affect redemption. *Id.*

In this case, it is undisputed that Moi has not made payment as required under the statute in order to redeem. There is no evidence before this court indicating he had funds available to redeem or that he ever even attempted actual redemption, i.e. tendering the sum due. Instead, Moi offers various excuses as to why he did not redeem. In doing so, he ignores the timeframe in which the statute allows him to exercise his right to redeem. By failing to actually redeem within the applicable timelines available under the statute, he is not entitled to redeem. Moi's appeal is moot.

As the Supreme Court has clearly stated, property sold under execution cannot be redeemed absent actual payment or tender of the "sum required" within the time limit prescribed by the statute. *Millay v. Cam*, 135 Wn.2d 193, 199, 955 P.2d 791 (1998). Ordinarily, the time for redemption is "within one year after the date of the sale." RCW 6.23.020(1). RCW 6.23.090 provides for the *maximum time* the period of

redemption may be extended. RCW 6.23.090(2) allows that, if there is a complete failure to provide an accounting of rents and profits, the redemptioner (debtor) “may bring an action within sixty days after making such demand, *but not later*,...” (emphasis added)

The maximum timeframe the period of redemption may be extended is one year, plus ten days, if demand is made plus an additional sixty days, for a total of one year and seventy days. (435 days). As of the filing of this brief, more than 740 days have passed without redemption.

Thus, when there is a complete failure to provide the statement of amounts of rents and profits, the redemptioner (debtor) must file an action for an accounting no later than 435 days after the Sheriff’s sale.

In this matter, Moi was required to file an action for an accounting no later than July 5, 2013. The statute is very clear that such action cannot be filed after the extended period because the legislature specifically uses the term “but not later.” It is undisputed in this case that Mr. Moi failed to pay the redemption amount or even attempted to tender the agreed upon amount due. Based upon the plain language of the statute and clear and unequivocal Washington Supreme Court holding in *Millay v. Cam*, the period of redemption has passed. Moi failed to exercise his rights of redemption. As a result, Moi’s appeal is moot.

**B. This Appeal does not toll the Redemption Period.**

It is anticipated that Moi will argue that the filing of this appeal somehow extends the period of redemption. The Washington Supreme Court has held that the redemption period is not extended by an appeal. *Kuper v. Stojack*, 57 Wn. 2d 482, 483, 358 P. 2d 132 (1960); *See also*, *Wash. Pract. Vol. 28*, section 7.68 (1998)

In *Kuper*, the Washington Supreme Court rejected the argument “that the statute of limitations was suspended by the appeal to this court for the order confirming the sale.” *Id.*

**C. Moi failed to give proper notice required by statute.**

Pursuant to RCW 6.23.080(1), a redemptioner must give written notice of his intent to redeem five days before the expiration of redemption period. The state provides in part:

(1) The person seeking to redeem shall give the sheriff at least five days' written notice of intention to apply to the sheriff for that purpose.

The parties agree that May 25, 2013 was the expiration of the one year period of redemption. May 25, 2013 was a Saturday and May 27, 2013 was a legal holiday as defined by RCW 1.16.050.

As a result, computation of time is controlled by CR 6. CR 6 provides:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

For purposes of considering the timeliness of Moi's notice, the court must exclude May 25, 26, and 27 from the computation. The parties agree that the right of redemption expired on May 28, 2013.

*May 19-June 1, 2013*

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
19	20	21 Moi gives Written Notice	22	23	24	25 WEEK END
26 WEEK END	27 Memori al Day HOLI DAY RCW 1.16.050	28	29	30	31	1

Pursuant to the plain language of CR 6, Moi's notice of intent to redeem was required no later than Monday, May 20, 2013. Moi's notice of

intent to redeem filed on May 21, 2013 provided only four days' notice and, as such, it was untimely. *See Christianson v. Ellsworth*, 162 Wn. 2d 365, 372-377, 173 P. 3d 228 (2007) (CR 6(a) applies when it generally requires a party to take legal action.) Moi failed to comply with the redemption statute.

**D. There is no statutory provision allowing for a longer redemption period nor has Moi availed himself of the only judicially recognized exception allowing the extension the redemption period.**

In the Washington Supreme Court decision of *Millay v. Cam*, *supra*, the court addressed most of the arguments advanced by Moi in this appeal. As will be set forth in greater detail below, the Supreme Court rejected those arguments.

The *Millay* court did adopted a very narrow exception to the redemption timelines. In recognizing that narrow exception, the *Millay* court also placed specific conditions and guidelines on a party seeking to avail themselves of a claim for equitable tolling. *Id.*, at 206. In order for a party to avail themselves of the rule, the court stated:

This rule requires more than good faith on the perspective redemptioner's part.

*Id.*

The perspective redemptioner **must** file the declaratory action within the redemption period for tolling to apply. *Id.* Thus, a prerequisite

to seeking any equitable tolling is that the redemptioner *must* file a declaratory action within the redemption period for tolling to apply. Moi did not, and has not, filed a declaratory relief action. He is unable to avail himself of the only recognized exception recognized by the court in *Millay*. Moreover, Moi failed to seek any equitable relief before the trial court and has failed to seek any equitable relief before this court. As a result, he has not only failed to comply with the requirement to file a declaratory relief action but he has also failed to plead any equitable relief.<sup>2</sup> In short, he has failed to avail himself of any of the remedies available under *Millay*.

**E. Moi’s attempt to place conditions upon redemption violated the statute.**

The Washington courts have squarely addressed the issue of whether or not Moi could place conditions upon the redemption. In *Graham v. Findahl*, 122 Wn. App. 461, 468, (2004), the court stated:

Applying the *Millay* court’s observations to this case, it would contravene the Legislature’s intent to force Findahl to accept terms of an offer that are not contemplated in the statute. Requiring Findahl to convey the unit by statutory warranty deed, which is of a higher quality than a bargain and sale deed, would increase the

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<sup>2</sup> Moi would be unable to satisfy the other two prongs of the *Millay* rule because he would first be required to establish that Kruger “grossly exaggerated” the sum required to redeem and that Moi could not “with due diligence ascertain the sum required.” Neither circumstance applies in this case. At best, Moi could argue less than a potential 10% inflation. But more importantly, if he had exercised his due diligence he would have realized that Kruger was asking for *less* than he would have been entitled to under the statute.

burden that the redemption statutes would otherwise place upon him. In deed, it might increase the burden to the point of impossibility. If this court cannot increase the burden of the redemptioner it is reasonable to conclude that the court likewise cannot increase the burden of the seller.

In *Graham*, the perspective redemptioner attempted to offer to redeem from the seller if the seller would convey a “statutory warranty deed” and pay for a “standard form owner’s policy of title insurance.” *Id.*, at 466. The court soundly rejected the attempts of the redemptioner to place these additional burdens on the seller which were not contemplated by the statute.

Moi did exactly what the *Graham* court rejected. Moi attempted to condition his payment upon Kruger delivering the property “unencumbered” and securing the release of a third party, Chase Bank. In essence, Moi placed an improper condition upon redemption of which Kruger could not comply and was not required to comply. Moi improperly argues that this false condition excuses compliance with the requirement to pay the “sum required.”

**F. Moi failed to exercise due diligence.**

Implicit in any request for a tolling of statute of limitations is that the potential redemptioner exercise due diligence to ascertain the sum required to redeem within the time remaining for redemption. *Millay v.*

*Cam*, 135 Wn. 2d 193, 205, 955 P. 2d 791 (1998). “This rule requires more than good faith on the perspective redemptioner’s part.” *Id.* Pursuant to RCW 6.23.020(2), there are three categories which a redemptioner must pay in order to redeem. These readily ascertainable costs include:

1. The purchase price at sheriff’s sale (this amount is known to Moi and acknowledged to be known to Moi, C.P. 504).
2. Interest (this is a simple interest calculation based upon the underlying judgment. Moi acknowledges knowing of the interest calculation).
3. Property taxes.

Moi infers that he was somehow unable to determine the amount of property taxes paid during the period of redemption. This court may take judicial notice of the ease in which the internet can allow a person exercising due diligence to determine the property taxes paid during the redemption period. The King County Department of Assessments maintains a very user friendly webpage which allows any member of the public to access any parcel of property located in King County and determine the real property account information. Simply scrolling down the page to where there is a specific button providing for receipts reflecting payments made on the property. Public records clearly show

that during the period of redemption two tax payments totaling \$13,341.74 are easily ascertainable in the public record.

Moi argues the he could not determine the “sum required.”

However, this argument ignores the court’s ruling in *Millay*. The court stated:

Several statutory provisions aid a prospective redemptioner to determine the "sum required" for redemption. The Legislature has defined the "sum required" as: (1) the sum paid on the last previous redemption plus eight percent interest; (2) the amount of any assessments or taxes paid by the last redemptioner with like interest; and (3) the amount of any senior liens other than the judgment under which the property was sold held by the last redemptioner with interest. *RCW 6.23.040(3)*.

*RCW 6.23.080(3)* and *6.23.050* further alleviate any guesswork in figuring the sum required to redeem. Both statutes serve to "inform subsequent redemptioners of the price which they must be prepared to pay" when redeeming property. *GESA Fed. Credit Union v. Mutual Life Ins. Co.*, 105 Wn.2d 248, 253, 713 P.2d 728 (1986) (quoting Darryl A. Hart, Comment, *The Statutory Right of Redemption in California*, 52 Calif. L. Rev. 846, 851 n.38 (1964)). See also 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE § 497, at 223 (5th ed. 1996); *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897, 904 (1957). If the redemptioner in possession fails to submit to the sheriff documentary evidence of any liens which are senior to the person seeking to redeem including the amount due on the liens, such liens may be disregarded in computing the sum required.<sup>1</sup> *RCW 6.23.080(3)*. The sum then becomes the last previous judgment plus interest and any recorded taxes or assessments paid by the redemptioner in possession. *RCW 6.23.080(3)*, *6.23.040(3)*. ***Such amount is usually ascertainable because it is recorded with the county.***

*Id.*, at 200-201 (emphasis added.)

By exercising even the most basic rudimentary due diligence, Mr. Moi could easily have determined that he owed no less than the following sums:

1. \$70,479.29 (amount bid at Sheriff's sale.) Moi acknowledges that he knows this amount. Docket 154, l. 19-21.
2. Interest: \$8,457.51 (Moi acknowledges this amount, Docket 154)
3. Property Taxes: \$13,341.74 based upon readily available public information.

Thus, the grand total any perspective redemptioner could have easily ascertained that the amount due and owing was no less than \$92,278.54. Mr. Kruger requested redemption only in the amount of \$87,032.61.

Moi has failed to redeem within the timelines allowed for by the redemption statute. He has failed to file an action for an accounting which would have been the only available remedy to extend the redemption period under the statute. He has also failed to file a declaratory relief action seeking equitable relief which is the only equitable avenue to extend the redemption period. The time to redeem has passed. Moi failed to redeem. As a result, he has no further right to redeem. Moi's remaining arguments are moot.

**G. The itemized statement for redemption fulfills the verified statement requirement.**

Under Washington law, an attorney signature on a pleading to the Court is a verification. In the matter of *Frieze v. Powell*, 79 Wash. 483, 140 P. 690 (1914), the court addressed this issue in the context of a garnishment action. Garnishment under statute required a verification from the claimant himself. *Id* at 485. The Court found that the signed pleading of an attorney met the verification requirement. The Court held that mere technicalities should not be used to circumvent justice or the application of the spirit of the law:

The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve rather than impede or defeat the ends of justice, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right.’

*Id* at 490.

Washington cases have continued to follow the reasoning of *Frieze*. In *Gates v. Port of Kalama*, 152 Wn. App. 82 (2009), the court defines verification as “attesting to the truth of the matter under oath,” citing *Haynes v. City of Seattle*, 87 Wash. 375, 377-78, 151 P. 789 (1915). Washington’s CR 11 is clear that the attorney signatory is attesting to the truth of the contents of the document:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact....

In *Zesbaugh, Inc. v. General Steel Fabricating*, 95 Wn.2d 600, 627

P.2d 1321 (1981), the Court found that an attorney signature fulfilled the verification requirement for garnishment proceedings under RCW 7.33, specifically because of CR 11.

Good faith in instituting the garnishment proceeding seems to be the gravamen of the verification requirement. See RCW 7.33.040, RCW 7.33.150, RCW 7.33.240 and RCW 7.33.250 of the verification requirement. This "spirit" of the verification requirement is adequately satisfied by CR 11. That rule explains that the signature of a party or his/her attorney constitutes a certificate by him that he had read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it . . .

*Id* at 604.

Most recently, the Court in *Putman v. Wenatchee Valley Med. Ctr.*, PS. 166 Wn.2d 974, 216 P.3d 374 (2009) struck down a verification requirement that demanded an attorney submit additional verification of pleadings beyond that required by CR 11:

First, RCW 7.70.150 conflicts with CR 11 because it requires the attorney to submit additional verification of

the pleadings—a requirement that CR 11 explicitly limits to “dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and [related modifications].” CR 11(a). Second, RCW 7.70.150 conflicts with CR 8 and our system of notice pleading, which requires only “a short and plain statement of the claim” and a demand for relief in order to file a lawsuit. CR 8(a). Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue [160] their claims. John Doe [v. Puget Sound Blood Bank Ctr.], 117 Wn.2d [772,] 782[, 819 P.2d 370 (1991)]. The certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence. For that reason, the certificate of merit requirement fundamentally conflicts with the civil rules regarding notice pleading—one of the primary components of our justice system.

*Id* at 982-983.

Washington law has followed the *Frieze* to the present day. An attorney signature on a pleading is verification. Accordingly, the Itemized Statement of Redemption with attorney signature is a verified statement for the purposes of RCW 6.23.

**H. There is no evidence of rejection of tender.**

Moi suggests that tender of redemption was somehow futile or not allowed by Mr. Kruger.

First, there is no evidence before this court of any actual redemption or even attempted redemption, e.g. actually tendering the amount due.

Second, whether or not Mr. Kruger would have accepted the tender is irrelevant in light of RCW 6.23.080(1). Payment can be made to the Sheriff. Moi ignored the procedures for redemption as set forth in the redemption statutes. RCW 6.23.080(1) provides in part:

At the time specified in such notice, a person seeking to redeem may do so by paying *to the Sheriff* the sum required.

Moi did not tender any amount to the Sheriff.

Third, the issue of futility of tender has been specifically addressed by the court in *Le Tastebin, Inc. et al v. Seattle First National Bank*, 95 Wn. App. 224, 974 P.2d 896 (1999). Relying upon the Washington Supreme Court decision in *Millay v. Cam*, 84 Wn. App. 369, 199, 928 P.2d 463 (1996), remanded on other grounds 135 Wn. 2d 193, 955, P.2d 791 (1998). The court reiterated the rule of law:

Central to the reasoning of the Supreme Court in *Millay* is that the redemption statutes require payment. *Id* at 899.

The court in *Le Tastebin*, following the Supreme Court's decision in *Millay*, outlined the statutory framework regarding tender of payment. (Although the *Le Tastebin* decision involved tender of an unpaid judgment, the court specifically held that the underlying rationale of the

redemption statutes and the statutory analysis in *Le Tastebin* applies consistently.) In doing so, the court held that actual payment of the money was required, *Id* at 899.

In *Le Tastebin*'s, a party contended that it was excused from tendering the unpaid judgment because to do so would have been a futile act. The court disagreed. *Id* at 897. The court went on to hold that the mere *offer* does not halt the process. *Id* at 228. A party who fails to pay the redemption amount fails to redeem pursuant to the plain language of the statute. The court in *Le Tastebin* confirmed the statutory analysis and rejected any common law rule regarding futility of tender.

Under the redemption statutes, is not up to Mr. Kruger to either accept or reject a tender of payment. The statute, RCW 6.23.080(1) provides for payment to be made to the Sheriff. If the Sheriff proceeds with transfer of title at that point in time, the Sheriff does so at his or her own peril. *Le Tastebin*, 95 Wn. App. 224, 228.

**I. Extending the redemption period to obtain financing undermines public policy.**

As set forth above, Mr. Moi conceded that he did not have funds available to actually redeem. But rather, he was attempting to obtain financing after the one year period of redemption. This issue was also

squarely addressed by the Supreme Court in *Millay v. Cam*, 135 Wn. 2d at

199. The court stated:

... And third, to allow a prospective redemptioner to file a declaratory action in lieu of paying *any* money to redeem encourages unqualified applicants to file suit to hold the redemption period to gain financing and undermines the well settled preference for finality in land title. *Id.* (emphasis added.)

Based upon the *Millay* decision, this court should not allow the redemption period to be extended in order to allow the potential redemptioner (debtor) to seek financing. Based upon Moi's own concessions, he was attempting to obtain financing, with no commitment from any lender, long after the expiration of the period of redemption. Such actions violate public policy and should not be allowed.

**J. The accounting procedures should only apply to rents and profits, the redemptioner must still pay the sum required within the time limits prescribed by the statute.**

One of the overriding themes of the redemption statutes and applicable Washington case law is that a redemptioner must pay the sum required in order to redeem. This should be considered separate and distinct from the dispute as to the accounting for rents and profits. As the courts have recognized, the "sum required" is an amount which is readily ascertainable by simple application of the statute.

The *Millay* court went through the statutory provisions which aid the prospective redemptioner in determining the “sum required.” It is a very simple calculation pursuant to RCW 6.23.040(3). The court stated:

“The sum then becomes the last previous judgment plus interest and any recorded taxes or assessments paid by the redemptioner in possession.”

RCW 6.23.080(3), 6.23.040(3). Such amount is usually ascertainable because it is recorded with the county. *Millay*, 135 Wash. 2d. at 200-201.

In this case, the underlying property at issue is a vacant piece of property. As a result, there were no rents and profits. It is a very simple process through the exercise of any due diligence for a prospective redemptioner to determine the sum required. Moi already concedes that he knew of the previous judgment and the interest and the taxes paid. As the court in *Millay* recognized, the taxes paid are readily ascertainable because they are recorded with the county. See Appendix A. Thus, if Moi had exercised due diligence, he would have been able to readily ascertain the sum required to redeem. RCW 6.23.040 and RCW 6.23.080 suggest the sum required must be paid in order to redeem. The sum required is essentially an undisputed amount.<sup>3</sup>

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<sup>3</sup> Kruger waived all expenses aside from simply the judgment amount plus interest due – which the parties agree upon the amount.

A reasonable reading of the statute indicates that the “sum required” be paid is not susceptible to dispute because it is an easily calculated and verified figure. The rule of law should be, in any event, that the “sum required” must be paid in order to extend any redemption period.

In the event that there is a dispute as to rents and profits as contemplated under RCW 6.23.090, then only the issue of rents of profits should be evaluated in the accounting action. The amount of the judgment, interest, and taxes paid should not be determined in an accounting action, as those sums are readily ascertainable. As the court has recognized in *GESA Federal Credit Union* and *Millay v. Cam*, the creditor is entitled to be paid. It would be bad policy to permit a redemptioner to delay matters with an accounting action on rents and profits, without the redemptioner paying the undisputed “sum required.” This would effectively allow a party to delay payment of undisputed amounts as defined by the statute while contesting nominal sums. For example, the underlying “sum required” may be one million dollars. The property may generate no rents and profits (as in this case) and yet, the debtor can further avoid payment to the creditor by contesting and engaging an extended accounting procedure. This defeats the purpose behind the redemption statute, which seeks clarity and finality of titles. Such a situation would thwart the ability of the creditor to be paid.

Kruger urges this court to adopt a rule of law which indicates that under any circumstance, tender of the “sum required” must be made within the redemption period. If there is a legitimate dispute as to rents and profits, the redemptioner must pay the “sum required” within the redemption period and must also bring an accounting action must be brought within the timeframe set forth in RCW 6.23.090. The only amount to be disputed in the accounting action would be the amount of rents and profits.

**K. Lis Pendens**

Mr. Kruger requestfully requests that if the court finds in his favor on this appeal that the order of remand should contain specific instructions to quash the lis pendens filed by Moi. Pursuant to RCW 4.28.328, the court shall direct entry of awarded fees and expenses incurred in this appeal which results in dismissal of the lis pendens.

**V. CONCLUSION**

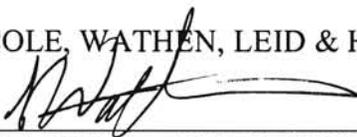
As the statute makes clear, in order to redeem, the redemptioner must actually pay the money. Actual payment is required within the one year period of redemption. The only method for extending that period of redemption is when the potential redemptioner requests the statement of rents and profits from the person receiving rents and profit. If the person receiving rents and profits refuses and/or fails to provide the statement of

rents and profits, the sole remedy available to a potential redemptioner at that point in time is to “bring an action within sixty days after making such demands, *but not later...*” RCW 6.23.090(2).

Thus, there are only two scenarios which would have extended the period of redemption here. First, when Mr. Kruger provided his statement of amounts due, Moi was required to pay the amount due. Second, if there was a failure or refusal to provide a statement, then the *only* option to extend the redemption period beyond the one year timeframe was to file an action for an accounting “within sixty days after making such demand, *but not later...*” As per the plain language of RCW 6.23.090(2) (emphasis added.) Moi failed to do either. The unanimous Supreme Court decision in *Millay v. Cam*, 135 Wn. 2d 193, 955 P. 2d 791 (1998) specifically addresses Moi’s arguments and rejects them. The Supreme Court clearly held that payment of the sum due is a pre-requisite to tolling any expiration of the one year right of redemption.

Dated this 3<sup>rd</sup> day of June, 2014.

COLE, WATHEN, LEID & HALL, P.C.

  
Rick J Wathen, WSBA #25539  
Attorney for Kruger

## **APPENDIX A**



[KING COUNTY HOME](#) | [NEWS](#) | [SERVICES](#) | [DIRECTORY](#) | [CONTACT](#)

## King County E-commerce

Property Tax Web: Real Property Account Information

### Account/Parcel Summary

<b>Tax Account Number</b>	026900024600		
<b>Parcel Number</b>	0269000246		
<b>Account Status</b>	This account is active.		
<b>Tax Payer Name</b>	KRUGGER DOUG 3D0044		
<b>Mailing Address</b>	4463 26TH AVE W SEATTLE WA 98199		
<b>Payment Status</b>	FIRST HALF 2014 DELINQUENT. AMOUNT DUE IF PAID OR POSTMARKED BY JUNE 30, 2014.		
<b>Annual Statement Requested By</b>			
<b>Statement Request</b>	<a href="#">Request Statement to be Mailed</a>		
<b>Select Payment Amount</b>	Current Year Tax		Select
	Pay First Half 2014	\$2,556.42	<input type="checkbox"/>
	Pay Second Half 2014	\$2,334.64	<input type="checkbox"/>
<b>Actions</b>	<a href="#">Add To Cart</a>	<a href="#">View Cart</a>	<a href="#">Search Again</a>

**TO PAY MULTIPLE ACCOUNTS WITH ONE PAYMENT:** After clicking on the appropriate select box(es) and the "Add to Cart" button, click "Search Again" to continue locating and adding parcels/accounts.

If you would like to pay by mail, make your check payable to King County Treasury. Write your tax account number on your check and send it to:

King County Treasury  
500 Fourth Avenue, Room 600  
Seattle, WA 98104

[Tax Year Details](#)   [Receipts](#)   [2014 Tax/Fee Distribution](#)

### Receipt Information

Date	Receipt	Amount
04/11/14	278349	2,454.88
04/30/13	095518	7,265.01
01/04/13	055847	6,076.73

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No.: 70503-2-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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**DOUG KRUGER,**

**Respondent,**

**vs.**

**MICHAEL MOI,**

**Appellant.**

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**RESPONDENT'S REPLY BRIEF: CERTIFICATE OF  
SERVICE**

---

Rick J Wathen, WSBA #25539  
Attorneys for Respondent Kruger

**Cole | Wathen | Leid | Hall, P.C.**

303 Battery Street  
Seattle, WA 98121  
206.622.0494  
206.587.2476

**ORIGINAL**

**CERTIFICATE OF SERVICE**

I, Kathleen Forgette, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

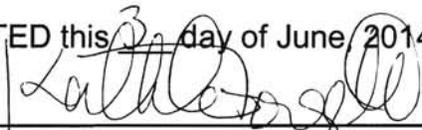
I certify that on June 3, 2014, I had one original and two copies of the Respondent's Reply Brief delivered to the Court of Appeals Division One via legal messenger; and a copy of the same was emailed and sent out for service by US Postal Service to be served on the following:

**Counsel for the Appellant**  
Elena S. Garella  
3201 1<sup>st</sup> Avenue S., Suite 208  
Seattle, WA 98134

William John Crittenden  
Attorney at Law  
300 E. Pine Street  
Seattle, WA 98122

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of June, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Kathleen Forgette, Legal Assistant

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STATE OF WASHINGTON  
2014 JUN -3 PM 3:46