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No. 73808-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PERFORMANCE CONSTRUCTION, L.L.C.,

Appellant/Cross-Respondent,

v.

DAVID KEENE,

Respondent/Cross-Appellant,

and

COLETTE GLENN, COBALT MORTGAGE, INC., and MORTGAGE
ELECTRONIC REGISTRATION SYSTEM, INC.,

Respondents.

RESPONSE BRIEF OF RESPONDENT COLETTE GLENN

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I. INTRODUCTION

Appellant Performance Construction, LLC (“Performance Construction”) filed a meritless lawsuit against Colette Glenn, Ms. Glenn’s lender, and the seller of her home. The trial court properly dismissed Performance Construction’s claims after reviewing all of the evidence in the light most favorable to Performance Construction.

Performance Construction claims that Colette Glenn should be ejected from her home under RCW 6.23.120. That statute, however, does not apply to this case. Ms. Glenn has no duty to accept Performance Construction’s offer to buy her home for less than half of what she paid for it. Moreover, Ms. Glenn is a bona fide purchaser. Because no legal or equitable basis exists for forcing Ms. Glenn to sell her home, this Court should affirm dismissal of Performance Construction’s claims.

II. STATEMENT OF THE CASE

A. Factual Background.

1. History and Ownership of the Property

Colette Glenn is the current legal owner of the property commonly known as 18930 Bothell-Everett Highway, Unit T-104, Bothell, Washington 98012, and legally described as:

Unit 104, Building T, Brookwood Place Condominium, according to the declaration thereof recorded under Snohomish County Rec. No. 200606210170, and any

amendments thereto, located on Survey Maps and Plans recorded under Rec. No. 200606215001, and any amendments thereto, records of Snohomish County, Washington.

(the "Property"). CP 209; CP 218.

Prior to Ms. Glenn purchasing the Property, the Property was owned by the company Slighter Property II, LLC ("Slighter"). CP 220-25. On June 12, 2013, the Brookwood Place Condominium Association commenced a lawsuit against Slighter to collect delinquent assessments and to judicially foreclose on the Property. CP 227-33. Also named in the action were the only other lienholders on the Property: lenders Greenpoint Mortgage Funding, Inc. and Nationstar Mortgage, LLC. *Id.* The Association filed a motion for summary judgment and prevailed against all defendants. CP 235-39. In the judgment, the court ordered "that the real property herein is not subject to the homestead exemption". CP 238.

Pursuant to the judgment, on January 3, 2014 the Snohomish County Sheriff sold the Property at public auction to David Keene and his company D&J Shires, LLC for \$36,000. CP 241-42. Slighter then assigned to David Keene all redemption rights in the Property. CP 173-75. On January 31, 2014, the court confirmed the Sheriff's sale. CP 244-45.

David Keene then moved the Court for an order directing issuance of a sheriff's deed free and clear of any rights of redemption. CP 247-58.

The factual basis for the motion was that the lender defendants had defaulted, judgment had been entered against them, and that Slighter had assigned its redemption rights to Mr. Keene. *Id.*; CP 260-62. Mr. Keene supported his motion with legal authority. CP 249-57. Thereafter, the court entered an Order Directing Issuance of Sheriff's Deed. CP 264-67. In the order, the Court held "[t]here are no qualified redemptioners for the above-described property as defined in RCW 6.23.010" and directed the Sheriff to issue a Sheriff's Deed for the Property "free and clear of any rights of redemption of any and all parties." CP 266. On April 14, 2014, the Sheriff issued the Sheriff's Deed. CP 241-42.

Mr. Keene and his company listed the Property for sale. CP 269-73. On May 3, 2014, Colette Glenn purchased the Property on the open market for \$175,000. *Id.*; CP 209-11. At that time she had no idea that Performance Construction or anyone else could or would make any claim for ownership of her home. CP 209-211.

2. Performance Construction's Attempts to Take the Property from Ms. Glenn

On January 3, 2015, Performance Construction mailed to Ms. Glenn an offer to purchase the Property for \$92,500, approximately half of what Ms. Glenn paid for the Property. CP 589-93. The Property was not listed for sale at the time of Performance Construction's offer.

CP 269-73.

Days later, Performance Construction filed this lawsuit seeking to force Ms. Glenn to sell the Property to Performance Construction for that low price. CP 601-12. This is the first time Ms. Glenn learned that anyone might try to claim an interest in her home (other than she and her lender). CP 209-211.

After this lawsuit began, Performance Construction obtained a quit claim deed from the former owners of the Property, the Slighters. CP 290-92. Performance Construction claims this gives it a right to any excess proceeds from its offer under RCW 6.23.120. CP 491.

Performance Construction claimed that the \$92,500 offer should be disbursed as follows: \$48,412.41 to Ms. Glenn; \$5,550 to Thomas Sullivan (Performance Construction's member/manager) for commission; \$19,268.79 to Slighter Property II, LLC; and the remaining \$19,268.79 back into the pockets of Performance Construction/Thomas Sullivan. *Id.* In other words, Mr. Sullivan and his company Performance Construction would be out of pocket only \$67,681.20 to own a home for which Ms. Glenn paid \$175,000.

3. Mr. Sullivan's History of Using RCW 6.23.120

Thomas Sullivan is the member/manager of plaintiff Performance Construction. CP 294-96. He is also the member/manager of a number of

other entities. *Id.* This lawsuit is not the first time Mr. Sullivan has attempted to take a property under RCW 6.23.120. Mr. Sullivan and his companies have made similar complaints based on RCW 6.23.120 in at least four other lawsuits. CP 298-315.

B. Procedural Background.

Performance Construction filed this suit in January 2015 against Ms. Glenn and her lender seeking ownership of the Property under RCW 6.23.120. CP 601-12. Thereafter, Performance Construction amended its complaint to add David Keene as a defendant. CP 584-88. The parties filed cross-motions for summary judgment. CP 192-208, 320-331, 489-432. On June 30, 2015, the trial court entered an Order Granting Defendants' Summary Judgment Motions and Denying Plaintiff's Summary Judgment Motion, dismissing Performance Construction's claims with prejudice. CP 47-52. Performance Construction moved for reconsideration, which motion was denied. CP 32-46; CP 11-12. Performance Construction appealed the denials of both its motion for summary judgment and motion for reconsideration. CP 1-10.

III. SUMMARY OF ARGUMENT

Performance Construction's claims are based on one statute: RCW 6.23.120. That statute and the two cases interpreting it set forth the prerequisites for a third party to force a purchaser at a sheriff's sale to sell

its property. Performance Construction failed to meet those requirements. Ms. Glenn was not a purchaser at a sheriff's sale. She was a bona fide purchaser, paying \$175,000 for her home after it was listed on the open market. Since purchasing her home, it has not been listed for sale. Performance Construction's attempts to take Ms. Glenn's home from her under RCW 6.23.120 fail as a matter of law. The trial court in this action considered all of the parties' arguments and determined that Performance Construction had no legally supportable basis for its claims. The trial court properly dismissed all Performance Construction's claims and this Court should affirm the dismissal.

IV. ARGUMENT

A. **The standard of review is *de novo*.**

Summary judgments are reviewed *de novo*; the appellate court engages in the same analysis as the trial court. *See e.g., Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). The judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200, 1204 (1985) (*citing Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976)).

B. All of Performance Construction's claims fail because RCW 6.23.120 does not apply to this case.

The sole basis for Performance Construction's claims in this case is RCW 6.23.120. RCW 6.23.120 states:

(1) Except as provided in subsection (4) of this section, during the period of redemption for any property that a person would be entitled to claim as a homestead, any licensed real estate broker within the county in which the property is located may nonexclusively list the property for sale whether or not there is a listing contract. If the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then the property owner shall accept the highest current qualifying offer upon tender of full cash payment within two banking days after notice of the pending acceptance is received by the offeror. If timely tender is not made, such offer shall no longer be deemed to be current and the opportunity shall pass to the next highest current qualifying offer, if any. Notice of pending acceptance shall be given for the first highest current qualifying offer within five days after delivery of the sheriff's deed under RCW 6.21.120 and for each subsequent highest current qualifying offer within five days after the offer becoming the highest current qualifying offer. An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property and is at least equal to the sum of: (a) One hundred twenty percent greater than the redemption amount determined under RCW 6.23.020 and (b) the normal commission of the real estate broker or agent handling the offer.

(Emphasis added.) In interpreting this statute, the Washington State Court of Appeals stated that "Washington's redemption statutes contain a relatively unique upset process whereby, during the redemption period, a third party can force a purchaser at a sheriff's sale to sell" the property. *Graham v. Findahl*, 122 Wn. App. 461, 463, 93 P.3d 977 (2004). The court further stated that the "gist of the procedure is that, if a real estate

broker lists the property on an open listing, a third party can make a ‘qualifying offer’ through a real estate broker.” *Id.*

RCW 6.23.120 does not apply here based on a number of grounds, any one of which is a sufficient basis upon which to affirm dismissal of Performance Construction’s claims.

1. Ms. Glenn was not a purchaser at a sheriff’s sale, thus RCW 6.23.120 does not apply.

RCW 6.23.120 applies only to allow a third party to force “a purchaser at a sheriff’s sale” to sell the property it so purchased. *Graham*, 122 Wn. App. at 463 (emphasis added). Performance Construction admits that the statute “creates an incentive for third parties to offer an upset price to the successful sheriff’s sale purchaser or redemptioner” and that “a successful low bidder risks losing the property to an upset offer.” Brief at 6-7. It is undisputed that Ms. Glenn was neither a purchaser at a sheriff’s sale nor a redemptioner. Instead, Ms. Glenn is an innocent third party that purchased her home on the open market. Because Ms. Glenn is not a purchaser at a sheriff’s sale, RCW 6.23.120 does not apply.

Performance Construction tries to remedy this fatal flaw by claiming that Ms. Glenn has the same obligations as a purchaser at a sheriff’s sale because she is the successor in interest to someone who did purchase it at a sheriff’s sale. No authority exists for such proposition.

Performance Construction's reliance on RCW 6.23.010 to claim Ms. Glenn should be considered a purchaser at a sheriff's sale fails because that statute refers to redemptioners and does not address bona fide purchasers. Moreover, *Graham v. Findahl* expressly states that RCW 6.23.120 applies only to allow a third party to force "a purchaser at a sheriff's sale" to sell the property it so purchased. *Graham*, 122 Wn. App. at 463. It does not extend the power of RCW 6.23.120 over any future owners. Ms. Glenn is not a purchaser at a sheriff's sale, thus RCW 6.23.120 cannot apply.

2. Performance Construction's offer is not a qualifying offer under RCW 6.23.120.

Performance Construction's claims also fail because its offer is not a qualifying offer under the terms of the statute. RCW 6.23.120(1) states that "[i]f the property is not redeemed by the judgment debtor and a sheriff's deed is issued under RCW 6.21.120, then the property owner shall accept the highest current qualifying offer." Ms. Glenn's offer was the highest offer at \$175,000, far higher than Performance Construction's offer of \$92,500. Moreover, Performance Construction's offer was not a qualifying offer at all.

For an offer to be "qualifying" it must be made during the redemption period and through a licensed real estate broker "listing the

property”. RCW 6.23.120(1); *see also Graham*, 122 Wn. App. at 463 (discussing the essence of RCW 6.23.120 is “if a real estate broker lists the property on an open listing, a third party can make a ‘qualifying offer’”). Performance Construction’s offer was not made through a licensed real estate broker listing the property. There was no “listing” of Ms. Glenn’s home. CP 269-73; CP 210, ¶ 11.

Performance Construction attempts to rely on *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App. 281, 345 P.3d 20 (2015), to claim that somehow the property in this case had been listed. In that case, however, the property at issue had been listed for sale on Zillow by Thomas Sullivan (the same Thomas Sullivan in this case) prior to the offer made under RCW 6.23.120. *Id.* There is no dispute here: neither Thomas Sullivan nor anyone else listed the Property for sale. Ms. Glenn never authorized anyone to find a buyer for her home. Her home was not listed for sale in any way. The mere fact that Performance Construction’s member, Mr. Sullivan, was a real estate agent does not transform Ms. Glenn’s home into property “listed for sale” when Mr. Sullivan wrote her an offer. No amount of wordsmithing by Performance Construction can eliminate the requirement that the property be listed for sale prior to any offer to purchase.

Not only was there no listing, the court in the *Brookwood v.*

Slighter matter found that the redemption period was properly terminated because Mr. Keene obtained an Assignment of Redemption Rights from the Slighters, after which there were no qualified redemptioners remaining. No one with standing challenged the early termination of the redemption period. Performance Construction had and has no interest in the Property. A party without a distinct and personal interest in the issue raised and its outcome does not have standing. *See Paris Am. v. McCausland*, 52 Wn. App. 434, 438, 759 P.2d 1210 (1988); *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987). Because there was no listing and no redemption period, Performance Construction could not make a qualifying offer under RCW 6.23.120 as a matter of law.

3. Ms. Glenn's home was not subject to any homestead rights.

RCW 6.23.120 applies only to a property claimed as a homestead. RCW 6.23.120(1). Ms. Glenn's home, however, was not one that a person could claim as a homestead at the time of the foreclosure sale. The trial court in the foreclosure action ordered that the Property "is not subject to the homestead exemption". CP 238. Because the Property is not subject to the homestead exemption, again RCW 6.23.120 does not apply.

4. The purpose of RCW 6.23.120 is not met on these facts.

As Performance Construction concedes, the purpose of RCW 6.23.120 "is to generate funds for judgment debtors who lose their

residential property at sheriff sales.” Brief at 6. RCW 6.23.120 is a “unique” process in which a third party can attempt to compel a purchaser at a sheriff’s sale to sell the foreclosed property to that third party. *See* RCW 6.23.120. Such sale benefits the judgment debtor by allowing the home to be sold for a higher price, with the balance of the proceeds going to the judgment debtor. RCW 6.23.120(2)(c).

The facts here cannot meet the purpose of RCW 6.23.120 when the judgment debtor, Slighter, had no ability to benefit from a sale under RCW 6.23.120. Slighter assigned its redemption rights to Keene long before Performance Construction made its offer to Glenn. CP 173-75. Because any sale under RCW 6.23.120 would not benefit the judgment debtor, the statute should not apply here.

C. Ms. Glenn’s rights as a bona fide purchaser are superior to any claims by Performance Construction.

Not only do Performance Construction’s claims fail because it cannot meet the terms of RCW 6.23.120, its claims also fail because Ms. Glenn, as a bona fide purchaser, has a superior interest in the Property.

A bona fide purchaser is one who pays valuable consideration for property without notice of another’s claim of right to, or equity in, the property. *Kirk v. Tomulty*, 66 Wn. App. 231, 239-40, 831 P.2d 792 (citing

Miebach v. Colasurdo, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984)). The doctrine provides a strong protection for the innocent purchaser of land:

The land law has seen its years of progress marked by a continual struggle between one who had legal title to, or an equity or interest in or claim against real estate and one who in good faith parts with consideration in the honest belief that he is acquiring title from another. The law has long recognized that the massive public policy in favor of stimulation of commerce demands the fullest possible protection to a good faith purchaser for value. The bona fide purchaser for value without notice is the favored creature of the law.

Tomlinson v. Clarke, 118 Wn.2d 498, 508, 825 P.2d 706 (1992) (quoting 8 G. Thompson, Real Property § 4290, at 222-23 (1963 repl.)) (emphasis added).

Ms. Glenn did not purchase the Property at a foreclosure sale nor would she have purchased it at a foreclosure sale. CP 210 ¶ 8. Instead, Ms. Glenn purchased the Property on the open market after the Property had been listed for sale. CP 209 ¶ 3, 210 ¶ 11; CP 269-73. She paid the valuable consideration of \$175,000. CP 209 ¶ 3. When she bought her home, she had no idea that Performance Construction or anyone else could or would make any claim for ownership of her home. CP 210 ¶ 10. Even the public records at the time of Ms. Glenn's purchase showed that the Property was not subject to the homestead exemption and that there was no redemption period for the Property. CP 235-39, 241-42, 244-45. No previously recorded lis pendens changes those rulings or records.

In contrast, not a single record or document shows that Performance Construction had or could have had any interest in the Property at the time Ms. Glenn purchased it in May 2014. Performance Construction did not even make a claim for any interest until its offer in January 2015. The first time Ms. Glenn had any idea that anyone might try to claim an interest in her home was when she was served with Performance Construction's complaint. CP 210 ¶ 10.

Under the bona fide purchaser doctrine, Ms. Glenn's claims to the Property are superior to any claim by Performance Construction. Moreover, application of the doctrine prevents the injustice that would result from taking Ms. Glenn's home from her at a financial loss of over \$125,000. For these reasons alone, Performance Construction's claims fail.

D. Ms. Glenn is entitled to an award of her costs on appeal.

Rule of Appellate Procedure 14.2 authorizes an award of costs "to the party that substantially prevails on review". Ms. Glenn requests an award of her costs as the substantially prevailing party in this action.

V. CONCLUSION

Performance Construction has not and cannot prove that it has any legal basis for its claims in this lawsuit. This Court should affirm the trial court's dismissal of Performance Construction's claims and award

Ms. Glenn her costs.

RESPECTFULLY SUBMITTED this 22nd day of December,
2015.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 22nd day of December, 2015, I caused to be served the foregoing document on counsel, as noted below, via email and U.S. Mail at the following addresses:

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Dated: December 22, 2015

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