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NO. 75433-5-I

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

SEAWIND HOMEOWNERS ASSOCIATION,

Plaintiff/Respondent,

v.

THE ROSALIND ROMANO LIVING TRUST, DATED THE 11th DAY
OF OCTOBER, 2006; ROSALIND L. ROMANO; ROSALIND L.
ROMANO, TRUSTEE OF THE ROSALIN ROMANO LIVING TRUST,
DATED THE 11th DAY OF OCTOBER, 2006; ANY SUCCESSOR
TRUSTEE or BENEFICIARY OF THE ROSALIND ROMANO LIVING
TRUST, DATED THE 11th DAY OF OCTOBER, 2006; HOUSEHOLD
FINANCE CORPORATION III;

and

DYNAMIC FUNDING, LLC

Defendant/Appellant.

RESPONSE BRIEF OF RESPONDENT ROSALIND L. ROMANO

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I. INTRODUCTION

Rosalind Romano submits this brief to address the first holding of the trial court's order of June 22, 2016, that "RCW 6.23.120 does not apply because the homestead exemption is not available, see RCW 6.13.080(2)(b)," and the briefing of the other parties to the extent that they concern the status of Ms. Romano's homestead. Ms. Romano takes no position on the trial court's second holding, that "the offer of \$53,500 was insufficient because it failed to include the amount of Household's lien on the property, see RCW 6.23.020(2)."

II. ASSIGNMENT OF ERROR

The trial court erred when it held that "RCW 6.23.120 does not apply because the homestead exemption is not available, see RCW 6.13.080(2)(b)."

III. STATEMENT OF THE CASE

Prior to the commencement of this action in 2014, Rosalind Romano had lived in her home at the Seawind Condominium for approximately 28 years. CP 11. In 2011, she fell behind in her payment of assessments to Seawind Homeowners Association ("Seawind"). CP 4. In October 2014, Seawind filed its Complaint for Lien Foreclosure and for Monies Due. The Complaint alleged, among other things, that "In the event of foreclosure and sale of the Unit at a foreclosure sale, the

purchaser at such sale is entitled to immediate possession of the Unit.” CP 5 (¶6.1). *See also* CP 7 (¶¶ 11.3, 11.5, 11.6). Ms. Romano denied this allegation and raised the affirmative defense that

Defendants have continuously occupied the Unit as Defendant Rosalind L. Romano’s homestead for approximately 28 years and are entitled to the homestead, occupancy, and redemption rights set forth in RCW 6.13 and RCW 6.23. Accordingly, the purchaser at a foreclosure sale would not be entitled to immediate possession as alleged in paragraphs 6.1, 11.3, 11.5 and 11.6 of the complaint.

CP 11-12.

Ms. Romano and Seawind resolved their dispute through a stipulated judgment. CP 20. They agreed, and the superior court ordered, that judgment would be entered against Ms. Romano in the amount of \$18,257.13, that the King County Sheriff would be directed to sell Ms. Romano’s condominium, and that Ms. Romano would be entitled to retain possession of the home until the end of the redemption period pursuant to RCW 6.23.110(4). CP 23-29.

With respect to the right to possession post-sale, the parties stipulated that “It is further agreed that Defendants Romano will be allowed to occupy the Unit during the twelve-month redemption period.” CP 24 (¶ 2.12). The judgment, in turn, ordered that “the rights of

Defendants Romano . . . are . . . foreclosed, except only for the statutory rights of possession and redemption that may be allowed by law” and that “Defendants Romano are entitled to retain possession during the period of redemption pursuant to RCW 6.23.110(4).” CP 27, 28.

The Sheriff sold the property on April 24, 2015. Seawind was the successful bidder at the sale. CP 37. Ms. Romano did live in the home during the twelve-month redemption period following the sale, pursuant to the stipulated judgment. She moved out of the home on April 24, 2016.

In December 2015, Respondent Household Finance Corp. (“HFC”) redeemed the property. CP 93. On April 25, 2016, Appellant Dynamic Funding, LLC sought to purchase the property pursuant to RCW 6.23.120, which offer HFC rejected. CP 96. Dynamic moved to require HFC to accept its offer. CP 41. The superior court denied Dynamic’s motion. CP 198-99.

IV. ARGUMENT

1. SUBJECTING A HOMESTEAD TO FORECLOSURE DOES NOT ELIMINATE THE HOMESTEAD.

In holding that “RCW 6.23.120 does not apply because the homestead exemption is not available, see RCW 6.13.080(2)(b),” the superior court confused two things: (1) the existence of a homestead, which is established by RCW 6.13.010; and (2) the exemption from forced sale that is granted to the homestead, which is established by RCW

6.13.070. The exemption from forced sale is subject to certain exceptions, primarily set forth in RCW 6.13.080, including the provision on which the superior court relied, RCW 6.13.080(2)(b). But the fact that such an exception permits foreclosure of homestead property does not do away with the existence of the homestead or its application to other issues.

RCW 6.13.010(1) provides, in pertinent part, that “The homestead consists of real or personal property that the owner uses as a residence.” The establishment of the homestead is “automatic once the property is occupied as a permanent residence.” *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d 219, 229, 758 P.2d 494 (1988).

RCW 6.13.070 provides, in pertinent part:

Except as provided in RCW 6.13.080, the homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified in RCW 6.13.030 [presently \$125,000].

RCW 6.13.080 creates exceptions to the general rule of RCW 6.13.070 that the homestead is exempt from execution or forced sale.

RCW 6.13.080(2)(b), upon which the superior court relied, provides:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained: . . . (2) On debts secured . . . (b) by mortgages or deeds of trust on the premises

The homestead, established by RCW 6.13.010, and the homestead's exemption from execution, established by RCW 6.13.070, are two different concepts. The homestead exists if the requirements of RCW 6.13.010 are met, i.e., if the owner uses the home as their personal residence. That is true whether the homestead is protected from foreclosure pursuant to RCW 6.13.070 or whether the homestead loses that protection pursuant to RCW 6.13.080. The fact that execution against the homestead is permitted, e.g., pursuant to RCW 6.13.080(2)(b), does not eliminate the existence of the homestead. *See also* RCW 6.13.040 (distinguishing between the homestead and the homestead exemption: "Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner.")

2. MULTIPLE STATUTES AND CASES CONFIRM THE EXISTENCE OF THE HOMESTEAD DESPITE THE ABILITY TO FORECLOSE.

Multiple Washington statutes, together with the cases construing them, confirm that the ability to foreclose against a homestead does not negate the existence of the homestead. The homestead exists and is relevant to these provisions even when the exemption from foreclosure

provided by RCW 6.13.070 does not apply because an exception under RCW 6.13.080 permits foreclosure. We address four examples below.

A. RCW 6.23.110: THE RIGHT TO POSSESSION FOLLOWING FORECLOSURE

RCW 6.23.110(4) provides that, following a judicial foreclosure:

In case of any homestead as defined in chapter 6.13 RCW and occupied for that purpose at the time of the sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or for value of occupation.

(Emphasis added).

Multiple decisions of the Washington Supreme Court have recognized that, even though RCW 6.13.080(2) and its predecessors have permitted mortgagees and deed of trust beneficiaries to foreclose on homesteads, the homestead is still entitled to the protection of RCW 6.23.110(4) after the sale.¹ That is, the exception provided by RCW 6.13.080(2) to the general rule against foreclosure does not do away with the homestead.

¹ See, e.g., *First Nat'l Bank of Everett v. Tiffany*, 40 Wn.2d 193, 197, 242 P.2d 169 (1952); *State ex rel. White v. Douglas*, 6 Wn.2d 356, 358-60, 107 P.2d 593 (1940); *Pease v. Stephens*, 173 Wash. 12, 15, 21 P.2d 294 (1933); *Perkins v. La Varne*, 171 Wash. 240, 242, 17 P.2d 857 (1933); *State ex rel. Fed. Land Bank of Spokane v. Superior Ct.*, 169 Wash. 286, 288-91, 13 P.2d 890 (1932); *Union Cent. Life Ins. Co. v. Fischer*, 169 Wash. 75, 77, 13 P.2d 889 (1932).

The Washington Supreme Court explained the difference between the existence of the homestead and the ability to foreclose in *First Nat'l Bank of Everett v. Tiffany*, 40 Wn.2d 193, 242 P.2d 169 (1952). There, the foreclosure sale purchaser, like Seawind, had also been the lienholder. It argued that, because the predecessor to RCW 6.13.080(2)(b) granted it an exception to the homestead exemption, permitting it to foreclose on the mortgage, it was also entitled to possession during the post-sale redemption period, even though the predecessor to RCW 6.23.110(4) granted the right to possession of the homestead to the former owner.

The Supreme Court rejected the creditor-purchaser's attempt to conflate the two provisions. It explained that the two statutes address the rights of the parties at two different times.

Prior to execution and forced sale, the rights of the parties are governed and defined by RCW 6.12.090 (Rem.Supp.1945, § 532) [now RCW 6.13.070] and RCW 6.12.100 (Rem.Rev.Stat. § 533) [now RCW 6.13.080]. The mortgaged homestead having been sold under execution or forced sale, these statutes have served their purpose and the future rights of the parties are then governed by an entirely different statute.

After execution or forced sale, the rights of the parties are governed by RCW 6.24.210 (Rem.Rev.Stat. (Sup.) § 602) [now RCW 6.23.110], which, so far as here material, reads as follows: "The purchaser from the day of sale * * * shall be entitled to the

possession of the property purchased * * *
in case of any homestead selected in the
manner provided by law and occupied for
that purpose at the time of sale, ***the
judgment debtor shall have the right to
retain possession thereof during the period
of redemption without accounting for
issues or value of occupation.***”

Tiffany, 40 Wn.2d at 197 (emphasis in *Tiffany*); see also 28 WASH. PRAC.,
CREDITORS’ REMEDIES – DEBTORS’ RELIEF § 7.22 (“The right to
possession exists even though the judgment debtor is precluded from
claiming the homestead exemption by one of the exceptions discussed in
this section.”) (citing *Tiffany*). In other words, while RCW 6.13.080(2)(b)
permitted the mortgagee to foreclose against the homestead, it did not
eliminate the homestead or the protection given to the homestead owner to
live in the home during the redemption period.

The stipulated judgment in the instant case recognized Ms.
Romano’s right to possession of her homestead during the redemption
period pursuant to RCW 6.23.110(4). See CP 24 (¶ 2.12), 27, 28
 (“Defendants Romano are entitled to retain possession during the period of
redemption pursuant to RCW 6.23.110(4).”) Had Seawind’s ability to
foreclose eliminated the homestead, Ms. Romano would not have been
entitled to possession as provided for in the judgment.

B. RCW 6.23.030: NOTICE TO THE HOMESTEAD OWNER OF THE EXPIRATION OF THE REDEMPTION PERIOD

RCW 6.23.030 provides, in pertinent part:

If the property is subject to a homestead as provided in chapter 6.13 RCW, the purchaser, or the redemptioner if the property has been redeemed, shall send a notice, in the form prescribed in subsection (3) of this section, at least forty but not sixty days before the expiration of the judgment debtor's redemption period.

(Emphasis added). The purpose of the notice is to inform the judgment debtor/homestead owner that their right to possession and right to redeem are about to expire. Failure to send the notice extends the redemption period by six months. RCW 6.23.030(2), (3).

RCW 6.23.030 applies during the redemption period following a judicial foreclosure. As such, the statute recognizes the existence of the homestead following the foreclosure, notwithstanding the fact that the creditor had the ability to foreclose against the homestead pursuant to RCW 6.13.080. Under the logic of the superior court's holding in the instant case, the exceptions to the protection against foreclosure granted by RCW 6.13.080 would mean that there is no homestead following the foreclosure and that RCW 6.23.030 would not have any application. The fact that it does apply illustrates the superior court's error.

C. RCW 6.23.120: SALES OF HOMESTEAD PROPERTY DURING THE REDEMPTION PERIOD

RCW 6.23.120, the statute in issue on this appeal, provides in pertinent part:

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.

(Emphasis added).

As noted, the superior court held that because Ms. Romano's homestead would not have been protected from foreclosure, there would be no homestead to which RCW 6.23.120 would apply. Decisions interpreting RCW 6.23.120 confirm that the superior court erred in so holding. Even if a creditor is permitted to foreclose against the homestead, that does not affect the existence of the homestead for purposes of RCW 6.23.120.

For example, *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App. 281, 345 P.3d 20 (2015) considered the application of RCW 6.23.120 following a judicial foreclosure conducted by a condominium association, just as in the present case. Condominium associations are granted an exception to the normal protection from forced sale given to the

homestead, pursuant to RCW 6.13.080(6) and RCW 64.34.364(2).² Notwithstanding this exception, this Court still treated the property as “property that a person would be entitled to claim as a homestead” for purposes of RCW 6.23.120. 186 Wn. App. at 287-93.

Similarly, in *Performance Const., LLC v. Glenn*, 2016 WL 4272386, ___ P.3d ___ (Aug. 15, 2016), this Court also considered the application of RCW 6.23.120 following a judicial foreclosure conducted by a condominium association. Though the Court held in *Performance Const.* that the statute did not apply because an owner that is an LLC is not entitled to claim a homestead, the Court never suggested that a foreclosure by a party granted an exception to RCW 6.13.070 would eliminate the existence of an otherwise valid homestead. 2016 WL 4272386 at *7-*8.

D. RCW 61.24.030(4): THE ENTITLEMENT TO RENTS AND PROFITS FROM HOMESTEAD PROPERTY DURING NON-JUDICIAL FORECLOSURES

Chapter 61.24 RCW governs non-judicial foreclosures of property subject to deeds of trust. RCW 61.24.030 lists prerequisites to a trustee’s sale. It provides, in pertinent part:

² The appeal in *Viewcrest Condominium Ass’n v. Robertson*, No. 74115-2-1, presently pending in this Court, raises the question whether RCW 64.34.364(2), in addition to granting an exception to the normal protection against foreclosure provided by RCW 6.13.070, also eliminates the protection given by RCW 6.23.110(4) to the homestead following the sale. For the reasons set forth in the briefing and argument of Ms. Robertson in that case, RCW 64.34.364(2) permits the homeowner association to foreclose, but does not eliminate the homestead for purposes of RCW 6.23.110(4).

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) *if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010*. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed.

(Emphasis added.)

By its nature, a foreclosure pursuant to chapter 61.24 against homestead property can occur only because RCW 6.13.080(2)(b) grants an exception to the normal protection against foreclosure provided by RCW 6.13.070. Under the rationale of the superior court in this case, the exception provided by RCW 6.13.080(2)(b) would not only permit the foreclosure, but would also do away with the homestead itself. Were that the case, however, RCW 61.24.030(4) would be pronouncing a rule applicable to a null set. The only properties it regulates are properties being foreclosed pursuant to the exception granted by RCW 6.13.080(2)(b). Contrary to the rationale of the superior court, the statute

recognizes that a homestead can still exist in such properties, notwithstanding the RCW 6.13.080(2)(b) exception.

3. THAT TITLE TO MS. ROMANO'S HOME HAD ONCE BEEN HELD BY A TRUST DID NOT IMPACT HER HOMESTEAD.

Due to a fraud perpetrated on her in 2006, title to Ms. Romano's home, for approximately eight of the thirty years she lived there, was held by a trust. Counsel for HFC has suggested that HFC may argue on this appeal that Ms. Romano did not have a homestead because, during the period in question, title was not in her name. HFC would rely on this Court's recent decision in *Performance Const.* As noted above, *Performance Const.* held that a homestead could not be claimed with respect to a property in which title was held by an LLC.

The factual background for this issue is as follows: For a number of years, a man named Steven Janda, engaging in the unauthorized practice of law, defrauded a number of victims. His scheme involved having people pay him to prepare estate planning documents that served no useful purpose. His exploits are described in *State v. Janda*, 174 Wn. App. 229, 298 P.3d 751 (2013).

Ms. Romano was one of Mr. Janda's victims. In October 2006, he persuaded her to establish an entity entitled The Rosalind Romano Living Trust and to transfer title to her home to the trust. *See* King Co. Recording

No. 20061211001301. Ms. Romano was the trustor, trustee, and life beneficiary of the trust. After obtaining counsel, Ms. Romano restored title to herself individually, via a November 2014 quitclaim deed from the trust. *See* King Co. Recording No. 20150114001222.³

Were HFC to contend that the years in which formal title to Ms. Romano's home was in the trust prevented the application of RCW 6.23.120, that argument would be erroneous for several reasons.

First, RCW 6.23.120 speaks of the homestead "during the period of redemption." The period of redemption began with the date of the sale, April 24, 2015. *See also* RCW 6.23.110(4) (homeowner entitled to possession during redemption period if the homestead is "occupied for that purpose at the time of sale."). As of the date of the sale, title to Ms. Romano's home was in her name, not in the name of the trust.

Second, it would be inappropriate to hold that Ms. Romano had no homestead on the basis of documents that she was persuaded to execute as part of a fraud, the effect of which she later rescinded, via the November 2014 quitclaim deed.

Third, even during the time that title was held by the trust, Ms. Romano was the beneficiary of the trust. Washington's courts have long

³ The Court may take judicial notice of these recorded documents. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709-725-26, 189 P.3d 168 (2008).

held that an equitable interest in property is sufficient to claim a homestead; legal title is not required.⁴ Ms. Romano had an equitable interest in her home during the eight years in question, and legal title for the remaining 22 years.

Finally, the stipulated judgment in this case did recognize the existence of Ms. Romano's homestead. It provided that she was "entitled to retain possession during the period of redemption pursuant to RCW 6.23.110(4)," CP 28, which grants the homeowner the right of possession "In case of any homestead as defined in chapter 6.13 RCW and occupied or that purpose at the time of the sale."

Accordingly, if HFC attempts to argue that Ms. Romano was not entitled to claim her homestead, that argument should be rejected.

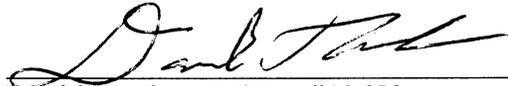
V. CONCLUSION

For the reasons set forth above, the superior court erred in its first holding, concerning the existence of the homestead. Ms. Romano takes no position with regard to the superior court's second holding.

⁴ See, e.g., *Felton v Citizens Fed. Sav. & Loan Ass'n*, 101 Wn.2d 416, 419-20, 679 P.2d 928 (1984) (rejecting argument "that one must have a legal, as opposed to equitable, interest in a declared homestead. . . . What was required . . . was that homestead claimants live on the property as their home, or intend to do so."); *Edgley v. Edgley*, 31 Wn. App. 795, 797-98, 644 P.2d 1208 (1982) ("Thus, the right to a homestead does not depend upon title, but upon occupancy and use."); accord *In re Dougan*, 350 B.R. 892, 895-97 (Bankr. D. Idaho 2006) (determining, under Idaho law, that devisee's equitable interest in home granted by will established right to homestead).

RESPECTFULLY SUBMITTED this 13th day of October, 2016.

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I declare under penalty of perjury under the laws of the State of Washington that on this 13th day of October, 2016, I caused to be delivered via ABC Legal Messenger, Inc., a true and correct copy of this RESPONSE BRIEF OF ROSALIND L. ROMANO, addressed to following:

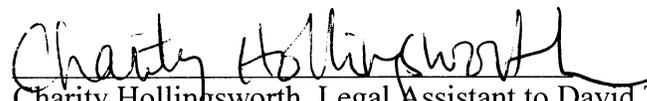
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