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U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In re: DAVID WALLACE BAYS, Debtor.	Main Case No. 01-05127-JAR7
LINDA BAYS; KELLY CASE, Plaintiffs, vs. DAVID BAYS; DOUG LAMBARTH and JANE DOE LAMBARTH; JOE ESPOSITO and JANE DOE ESPOSITO; GARY STENZEL and JANE DOE STENZEL; PAUL BASTINE and JANE DOE BASTINE; JOE WITTSTOCK and JANE DOE WITTSTOCK; DAVID HARDY and JANE DOE HARDY; SPOKANE COUNTY SUPERIOR COURT, Defendants.	Adversary No. A03-00237-JAR DECISION RE: THE MOTIONS FOR RECONSIDERATION OF LINDA BAYS AND KELLY CASE

THIS MATTER comes before the court upon plaintiffs Linda Bays's and Kelly Case's "Motion for Reconsideration of Quiet Title Judgment" [AP# 750] of the decision and judgment entered in this adversary proceeding on February 9, 2009 [AP# 742 & # 743].

This court has previously made a number of decisions in this matter. This ruling regarding these two motions for reconsideration requires additional discussion of the facts and pleadings in the case and adversary proceeding. Unless explicitly indicated to the contrary, previous decisions stand as entered.

The record in the case is extensive. The court has in discussing the facts and procedure made numerous references to documents filed with the court in the parties' various cases. A Reference Code is attached as an appendix to this decision as an aid to find the referenced documents in court files.

The court commences with a chronological review of the facts and pleadings relevant to the

motion for reconsideration.

FACTS & PLEADINGS

1. The real estate contract between the Fergusons as sellers and Linda Bays as purchaser was paid off in May of 1999. The source of the money used to pay off the contract came from David Bays. Linda Bays contends that money was paid to her in fulfillment of a contract she had with David Bays. [AP# 742, pg.3 ¶ 7 & 8].

2. Rather than take title in Linda Bays's name, the vendor's interest in the contract was assigned to David Bays. Linda Bays contends that this was done to protect the property from the creditor claim of John Troberg. This contention is disputed. The assignment was recorded June 18, 1999. [AP# 742, pg. 4 ¶ 11 & 12].

3. David Bays deeded the property that was the subject of the real estate contract to Linda Bays on October 13, 2000. [AP# 742, pg. 4 ¶ 14].

4. Linda Bays and Kelly Case entered into a "Loan Contract" dated November 27, 2000 (CONTRACT # I). Linda Bays gave Kelly Case a "Quit-Claim Deed" to secure payment of CONTRACT # I. [AP# 742, pgs. 4-5 ¶ 15].

5. In April of 2001, David Bays sought dissolution of his marriage to Linda Bays. [AP# 742, pg. 5 ¶ 16].

6. On June 20, 2001, David Bays filed this bankruptcy case. Joseph Esposito was appointed trustee. [AP# 742, pg. 5 ¶ 17].

7. A trial in the dissolution case was conducted on October 7, 2002 in the absence of Linda Bays. [AP# 742, pg. 6 ¶ 20].

8. A decree of dissolution was entered on October 31, 2002. Among its terms it set aside the October 13, 2000 transfer from David Bays to Linda Bays, the November 27, 2000 transfer from Linda Bays to Kelly Case, and reinstated the real estate contract with $69,038.36 owing on the contract to David Bays. [AP# 742, pgs. 6-7 ¶ 24].

9. On February 27, 2003, Linda Bays and Kelly Case executed a document, CONTRACT # II, which provides as follows:

Linda Bays does agree and consent to the following:

> In exchange for continual ongoing loans for legal expenses, monies used for property improvement and maintenance, or monies extended for any reason to Linda Bays A.K.A. any other acquired name, or on behalf of Lingeric [*sic*] Society shall be reimbursed in full on the appointed day in November of 2005, according to the agreement we have. I consent and agree to the fact that 1698 Nicholes Rd., Kettle Falls, WA 99141 is also the home of Kelly Case until such time as he shall be reimbursed on the appointed day. It is understood that if the monies are not reimbursed on the appointed day, I will forever relinquish the right to redeem the property, but I will have an irrevocable life time estate on said property. Kelly agrees to help pay expenses and utilities without reimbursement.

[AP# 753, pg.10].

10. On July 11, 2003, Joseph Esposito, in his capacity as David Bays's trustee issued a "Notice of Intent to Forfeit" the real estate contract. [AP# 742, pgs. 7-8 ¶ 27].

11. Linda Bays tendered a $2,400.00 check dated September 26, 2003 to Kelly Case. The check bore on its face the language "contract dated November 2000 paid in full + extra money..." Kelly Case accepted and cashed the check. [AP# 742, pg. 8 ¶ 28].

12. Also on September 23, 2003, Linda Bays executed a "Notice of Forfeiture of Contract." [AP# 718, pg. 32]. This notice was given to Kelly Case advising him that unless he performed under the terms of "the contract dated 2-27-03" she would forfeit that contract (CONTRACT # II).

13. Linda Bays filed a suit October 15, 2003 in Stevens County Superior Court seeking to enjoin the forfeiture of the real estate contract. (INJUNCTION SUIT). The trustee removed the Stevens County case to Bankruptcy Court and it became this adversary proceeding. [AP# 742, pg. 8 ¶ 29].

14. Joseph Esposito caused to be filed a "Declaration of Forfeiture" with the Stevens County Auditor on October 22, 2003. [AP# 742, pg. 8 ¶ 30].

15. On December 19, 2003, Linda Bays filed a "Complaint to Set Aside Forfeiture and For Damages" in Stevens County Superior Court under cause # 2003-200-6333 (SET ASIDE SUIT). [AP# 739-3, pgs. 2-23]. The plaintiffs in this suit were "Linda Bays and the Overseerer of the Linjericks

Society, a corporate sole." The defendants were "David Bays and Doug Lambarth in his capacity as attorney, and John Troberg in his capacity as attorney, and John and Jane Does" that complaint provides in part:

> In the summer of 2003, the plaintiff was served with a notice that the bankruptcy court for the estate of David Bays was forfeiting the real estate contract between the Plaintiff and the Defendant... On October 20, 2003, a declaration of forfeiture was filed on a contract that had been paid in full on May 17, 1999 and there was no contract between the parties to establish a new legal vendors interest that the plaintiffs would have to pay off again...

[AP# 739-3, pg. 23 ¶ (4.57)].

In this complaint the plaintiffs sought the relief: "That the forfeiture be set aside." [AP# 739-3, pg. 23 ¶ (5.1)].

Neither Joseph Esposito nor the bankruptcy estate of David Bays were named as defendants in this lawsuit, although both were mentioned in the complaint. [AP# 739-3, pg. 20 ¶ (4.50), pg. 23 ¶ (4.57)]. Neither Joseph Esposito or his attorney were served. [AP# 738, pg. 2 ¶ 2].

16. On January 8, 2004, Joseph Esposito caused to be served on Linda Bays a "Notice of Automatic Stay Pursuant to 11 U.S.C. § 362." This was filed in the SET ASIDE SUIT on January 9, 2004. [AP# 751, pgs. 18-20]. It advised Linda Bays and the Superior Court that the attempt to set aside the forfeiture was in violation of the bankruptcy stay and that actions taken in violation of the stay were void.

17. On November 8, 2004, this court as part of an order disposing of 12(b) motions, stayed all proceedings in the SET ASIDE SUIT pending further order of this court. [AP# 197, pg. 2 ¶ 4].

18. After hearing the motions for summary judgment related to the issue of quiet title and taking the matter under advisement, this Court requested additional information from the parties relating to the SET ASIDE SUIT. This Court issued an order dated November 11, 2008, giving the trustee and the Esposito Estate until December 1, 2008 to supply the requested information. Linda Bays and Kelly Case were given until December 15, 2008 to respond. [AP# 735].

19. In response to the November 11, 2008 order, counsel for the trustee and Esposito filed

a "Superior Court Case Summary" which indicated that the SET ASIDE SUIT had been dismissed upon the Clerk's motion for failure to prosecute by order dated "04-08-08." [AP# 739-6, pg. 3].

20. On December 10, 2008, Linda Bays amended her complaint in the SET ASIDE SUIT. [AP II# 4, pgs. 11-25]. Kelly Case was added as a party plaintiff. Joseph Esposito, Mrs. Esposito, and the trustee of the David Bays Bankruptcy Estate were among those added as party defendants.

21. On December 15, 2008, Linda Bays filed a "Notice of Removal," seeking removal of the SET ASIDE SUIT to this court. [AP II # 1]. It was assigned docket #08-80140-JAR.

22. Linda Bays also supplied a copy of the "Order of Dismissal for Want of Prosecution" entered in the SET ASIDE SUIT on April 8, 2008. [AP II# 4, pg.8]. This order provides: "It is ordered that this matter is dismissed without prejudice as to defendants Troberg and Lambarth." It appears that the balance of the SET ASIDE SUIT was not dismissed.

23. On January 7, 2009, an objection to removal of the SET ASIDE SUIT to bankruptcy court was filed on behalf of Esposito/Grabicki. [AP# 740, MC 118]. Esposito/Grabicki challenged the removal on the basis among others of this Court's orders entered November 8, 2004 staying all proceedings in the SET ASIDE SUIT pending further order of this Court.

24. On February 9, 2009, this Court rendered its "Decision re: Quiet Title" and entered its "Judgment re: Quiet Title." [AP# 742 & # 743]. These are the matters that Linda Bays and Kelly Case seek reconsidered.

25. On February 9, 2009, Linda Bays filed her "Motion to Amend Adversary Complaint." [AP# 744]. As part of this filing Ms. Bays included a copy of the proposed Amended Complaint. [AP# 744-3, pgs. 1-16]. This proposed Amended Complaint is similar in most respects to the Amended Complaint filed in the SET ASIDE SUIT on December 10, 2008 in that it adds Kelly Case as a plaintiff and Esposito and the bankruptcy estate of David Bays as defendants. [AP# 744-3, pgs. 1-16].

26. Also on February 9, 2009, Linda Bays filed a "Motion to File at Public Expense and/or Consolidate Removal with this Adversary Case." [AP# 745].

27. On February 17, 2009, Linda Bays and Kelly Case filed "Motions for Reconsideration

of Quiet Title Judgment." [AP# 750].

28. On February 19, 2009, the court entered an "Order Denying Motion to Waive Fee and Striking Motion to Consolidate" [AP II# 17] and an "Order Dismissing Adversary Proceeding" [APII # 18] in the removed SET ASIDE SUIT. It was dismissed because it was "filed in violation of the stay" imposed by this Court's order of November 8, 2004.

29. On March 2, 2009, Linda Bays and Kelly Case filed a "Motion to Void Order of State Court Dismissing Parties During Stay". [AP# 757]. The relief sought is for this court to void the Stevens County Superior Court's order dismissing John Troberg and Douglas Lambarth referred to in ¶ 21 above.

30. On March 2, 2009, Linda Bays and Kelly Case filed a "Motion for Leave to Lift Stay and to Remove State Action", seeking to lift the stay as to the Stevens County SET ASIDE SUIT and remove it to bankruptcy court. [AP# 758] .

31. By "Scheduling Order" dated March 10, 2009, the court delayed decision on the plaintiffs' motions to amend complaint [AP# 744], void order of state court [AP# 757], lift stay and remove [AP# 758] until a decision is made on the motions to reconsider.

DISCUSSION

I. LINDA BAYS'S MOTION FOR RECONSIDERATION

Most of the issues Linda Bays raises in her motion for reconsideration have been adequately considered and decided by the court, however, the issue of the impact of the automatic stay on the suit to set aside the forfeiture warrants further examination.

David Bays started a dissolution action against Linda Bays. During the course of that action, David Bays filed for bankruptcy. The bankruptcy court lifted the stay in David's bankruptcy to allow the dissolution case to go to trial, which it did, resulting in a decree vesting the vendor's interest in the real estate contract at issue in David Bays with $69,038.36 owing by Linda Bays. Joseph Esposito, as David Bays's bankruptcy trustee, moved to forfeit the contract based on Linda Bays's

failure to pay. Linda Bays instituted a law suit in Stevens County to enjoin the trustee's attempt to forfeit the contract. Mr. Esposito removed that INJUNCTION SUIT to bankruptcy court. Ms. Bays failed to timely obtain an injunction of the forfeiture, and the trustee recorded a "Declaration of Forfeiture". In addition, Ms. Bays timely filed a law suit to set aside the forfeiture, but failed to name Mr. Esposito or the bankruptcy estate of David Bays as parties. Nor did she effect service on Esposito, the trustee. After the time had expired to institute suit and serve the parties, Mr. Esposito served Ms. Bays with a Notice of Automatic Stay and filed it with the Stevens County Court.

Ms. Bays contends that the trustee's actions in attempting to forfeit the contract were void because done in violation of the automatic stay. She also asserts that Mr. Esposito/the trustee was estopped from forfeiting the contract because he misled her into believing that she was stayed from timely naming and serving him on the suit to set aside the forfeiture. She then seeks, by various procedural means, to amend her pleadings to cure her failure to timely comply with the provisions of the Real Estate Contract Forfeiture Act (hereafter referred to as RECFA).

Analysis of these arguments starts with the automatic stay.

A. <u>The Automatic Stay</u>

There has been confusion about the impact of the automatic stay upon the litigation relating to contract forfeiture. The INJUNCTION SUIT was filed in Stevens County Superior Court by Linda Bays, and was removed by the trustee to bankruptcy court. Mr. Esposito did not take the position that the INJUNCTION SUIT was filed in violation of the automatic stay in this court, or, as far as the record reflects in the state court prior to removal. Esposito filed the "Declaration of Forfeiture" not because the INJUNCTION SUIT was void because filed in violation of the stay, but rather because Ms. Bays failed to request a restraining order prohibiting forfeiture pending litigation pursuant to R.C.W. 61.30.110 in either the state court pre removal or bankruptcy post removal. When Ms. Bays filed the INJUNCTION SUIT she did not believe that action was prohibited by the operation of the automatic stay. Mr. Esposito did not assert the stay voided the INJUNCTION SUIT, rather he removed the suit to bankruptcy court.

Likewise when Ms. Bays filed the SET ASIDE SUIT, she did not believe that the suit was barred by the automatic stay. It was only after the SET ASIDE SUIT was filed, and the time for service had lapsed under R.C.W. 61.30.140(2), that the trustee asserted that the suit was barred because filed in violation of the automatic stay.

Both Ms. Bays and the successor trustee now concede that the automatic stay did not bar Ms. Bays from filing either the INJUNCTION SUIT or the SET ASIDE SUIT. The trustee initiated the forfeiture proceeding, the only way Ms. Bays could protect her interest under the RECFA was to file these suits. The automatic stay did not deprive Ms. Bays of the ability to defend herself. In re White, 186 B.R. 700. 704-705 (9th Cir. BAP 1995); In re Merrick, 175 B.R. 333, 338 (9th Cir. BAP 1994); Martin-Trigona v. Champion Fed. Sav. And Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989).

The automatic stay did not bar Ms. Bays from filing either the INJUNCTION SUIT or the SET ASIDE SUIT. Nor did it bar the trustee from instituting the forfeiture proceeding. F. R. Bankr. P. 6009. We now examine the provisions of the RECFA and their application to the facts of this case.

B. Washington's Real Estate Contract Forfeiture Act (RECFA)

The Real Estate Contract Forfeiture Act, R.C.W. 61.30.010 through R.C.W. 61.30.911, provides a number of ways that a party can contest a contract forfeiture. One can seek to restrain or enjoin the forfeiture. R.C.W. 61.30.110(1). The procedure for accomplishing this is found in R.C.W. 61.30.110(2) which provides in part:

> Any person entitled to cure the default may bring or join in an action under this section.
>
> ...
>
> Any such action shall be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's agent or attorney, if any, who gave the notice of intent to forfeit.
>
> ...
>
> A court may preliminarily enjoin the giving and recording of the declaration of forfeiture upon a prima facie showing of the grounds set forth in this section for a

> permanent injunction. If the court issues an order restraining or enjoining the forfeiture then until such order expires or is vacated or the court otherwise permits the seller to proceed with the forfeiture, the declaration of forfeiture shall not be given or recorded. However, the commencement of the action shall not itself extend the time to cure.

Ms. Bays, a person entitled to cure the default, initiated the INJUNCTION SUIT in Stevens County and served Mr. Esposito. Mr. Esposito removed the INJUNCTION SUIT to bankruptcy court. Ms. Bays failed to obtain a restraining order or injunction prior to filing of the "Declaration of Forfeiture." Ms. Bays could have sought a temporary restraining order or injunction in either the Stevens County Court or this bankruptcy court but failed to do so. In the absence of the required restraining order, Mr. Esposito filed the "Declaration of Forfeiture." Ms. Bays failed to avail herself of the first line of defense available under the statute.

The second line of defense, under the statute is an action to set aside the forfeiture, pursuant to R.C.W. 61.30.140, which provides in part:

> (1) An action to set aside a forfeiture not otherwise void under RCW 61.30.040(1) may be commenced only after the declaration of forfeiture has been recorded and only as provided in this section, and regardless of whether an action was previously commenced under RCW 61.30.110.
>
> (2) An action to set aside the forfeiture permitted by this section may be commenced only by a person entitled to be given the required notice under RCW 61.30.040(1) and (2). For all persons given the required notices in accordance with this chapter, such an action shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's attorney in fact, if any, who signed the declaration of forfeiture...
>
> ...
>
> ... (4) The forfeiture shall not be set aside unless... (b) the person bringing the action establishes that the seller was not entitled to forfeit the contract at the time the seller purported to do so or that the seller did not materially comply with the requirements of this chapter.

The first question to be considered in application of these provisions, is: Whether the forfeiture was void under R.C.W. 61.30.040(1)? That provision requires that all notices must be given to each "purchaser." Failure to give notice to a "purchaser" renders the attempt to forfeit void. Linda Bays qualifies as a "purchaser" under the terms of R.C.W. 61.30.010(7). There is no question that she was given the prescribed notice. The forfeiture is not void on that account.

Ms. Bays also argues that Kelly Case was not appropriately noticed pursuant to the RECFA's terms. She asserts that Kelly Case was a "purchaser" under the terms of the statute. Section R.C.W.61.30.040(1) requires statutory notice be given to each "purchaser". Failure to give the required notice to a "purchaser" voids the entire forfeiture process. Ibid. This argument fails. Kelly Case had a security interest in the property. RECFA's definition of a "purchaser" explicitly excludes one whose interest is "in the nature of a lien or other security interest," R.C.W.61.30.030(7). Failure to give notice to a lien holder voids the forfeiture only as to the party not appropriately noticed. R.C.W.61.30.040(2). Even if Kelly Case did not get appropriate notice, it does not void the forfeiture as to Linda Bays who did get notice.[1]

The SET ASIDE SUIT was filed within sixty days of the recording of the "Declaration of Forfeiture." The problem is that the complaint does not name as a defendant Joseph Esposito, David Bays's bankruptcy trustee, the "seller" pursuant to R.C.W. 60.30.010(9). Nor is there any evidence that Mr. Esposito, or his attorney, Mr. Richard George were ever served, much less within the sixty days prescribed by the statute. This appears fatal to Ms. Bays' position.

C. The Erroneous Notice of Stay

Ms. Bays responds that but for her reliance upon Mr. Esposito's "Notice of Automatic Stay Pursuant to 11 U.S.C. § 362" [AP# 751, pgs. 18-21], which was filed in the SET ASIDE SUIT, she could and would have resolved these problems.

The notice provided in part:

> You are further notified that the action commenced by the plaintiffs to the extent they purport to set aside the Declaration of Forfeiture or otherwise adjudicate the rights of any party or person in or to the Real Estate Contract, which is property of the bankruptcy estate, constitutes a violation of 11 U.S.C. § 362(a):

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[1]The language of the Court's February 9, 2009 decision which provides:

> "Rather, the matter would come before the court for fashioning of an appropriate remedy under the circumstances. Although Linda Bays would be entitled to being joined in that proceeding, she would still be precluded from asserting in her own behalf that there was nothing owing on the contract." [AP# 742, pg. 21 lns. 8-11].

is stricken as being speculative and beyond the scope of the facts before the court.

...

(3) Any act to obtain possession of property of the estate or property from the estate to exercise control over property of the estate.

...

[AP# 751, pg. 20]. Both Ms. Bays and the trustee, now agree that this language was a misstatement of the law. It is likely Ms. Bays and Mr. Esposito both thought that it was true at the time. Ms. Bays asserts she relied on the truth of the statement to her harm.

It is clear that Ms. Bays could not have relied on the erroneous notice in failing to join and serve the trustee within the time provided in R.C.W. 61.30.140. That time had expired on December 29, 2003 [AP# 502, pg. 23], before the notice was filed and served on Linda Bays, January 8th and 9th, 2004, respectively. [AP# 751, pgs. 18-20].

Ms. Bays recognizes the weakness of that argument. She now argues that the erroneous notice kept her from amending and serving her complaint on the trustee. This argument assumes that Ms. Bays could have successfully amended the complaint and served it after the statutory limitation period. Her argument is premised on a procedural analysis.

D. Is a Remedy Available?

Ms. Bays's position is that she filed the SET ASIDE SUIT and served the original named defendants within the limitation period set out in R.C.W. 61.30.140(2). This tolled the applicable statute of limitations. She argues that once the statute of limitations was tolled, she could amend the complaint to add the trustee, serve him, and these actions would relate back to the filing of the original complaint.

1. The General Rules

(a). R.C.W. 4.16.170

The filing of a complaint tolls the statute of limitation by commencing the case. R.C.W. 4.16.170. If service has not been had at the time of filing, it may be accomplished within ninety days of the filing of the complaint. Ibid.

(b). C.R. 10

The original complaint in the SET ASIDE SUIT named David Bays, Douglas Lambarth and John Troberg as defendants. Linda Bays also included in the caption "John & Jane Doe" as defendants. Mr. Esposito is mentioned specifically by name in ¶ (4.50) of the complaint [AP# 739-3, pg. 20]. The fact that the bankruptcy estate had forfeited the real estate contract was mentioned in ¶ (4.57). [AP# 739-3, pg. 23]. The relief sought in the complaint was "(5.1) that the forfeiture be set aside..." [AP# 739-3, pg. 23]. It was Mr. Esposito, trustee of the bankruptcy estate, who forfeited the contract, yet Ms. Bays failed to name either as parties to the complaint or to serve them. She sought to remedy these deficiencies by amending the complaint first in Stevens County [AP II# 4, pgs. 11-25] and then in this court [AP# 744].

The Washington Civil Rules require that all the parties be named in the caption of the complaint. C.R. 10(a)(1). The problem of unknown parties is dealt with in C.R. 10(a)(2) as follows:

> When the plaintiff is ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Ms. Bays's position is that Mr. Esposito, the bankruptcy trustee, and the bankruptcy estate of David Bays, were the "John and Jane Does" in the caption of her original complaint. She contends that she is entitled to substitute their true names for the fictitious "Does" by amending her complaint pursuant to C.R. 10. But Ms. Bays was not ignorant of the names of Mr. Esposito or the bankruptcy estate when she filed her complaint.

The substitution of a true name for a fictitious party constitutes an amendment substituting or changing parties. Kiehn v. Nelsen's Tire Company, 45 Wash. App 291, 295, 724 P.2d 434, 436 (1986). This triggers the operation of C.R. 15.

(c). C.R. 15

Ms. Bays filed an amended complaint in the SET ASIDE SUIT in Stevens County on December 10, 2008, after this court requested further information concerning the status of the SET

ASIDE SUIT. It is not clear from the record if any responsive pleadings had been filed in that suit, or any other factors were present which would bar amendment by the plaintiffs as a matter of course pursuant to C.R. 15(a).

The amended suit was removed to this court by Ms. Bays. That removed suit was dismissed by the court because Ms. Bays' actions in both amending the complaint and removing the case to this court were done in violation of this court's order of November 8, 2004. [AP# 197, pg. 2 ¶4]. These actions taken by Linda Bays in violation of the stay order were void. In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992).

On February 9, 2009, Linda Bays filed a "Motion to Amend Adversary Complaint" in this adversary proceeding. [AP# 744, pgs. 1-3]. Along with the motion Ms. Bays filed "Amended Complaint to Set Aside Forfeiture, For Fraud, For Due Process Violations, For Equal Protection of the Laws Violations, For First Amendment Violations, For RICO violations, & For Other Damages." [AP# 744-1, pgs. 1-16]. This document is nearly identical to the amended complaint filed in the Stevens County case on December 10, 2008. In it she seeks to set aside forfeiture of the real estate contract by the trustee. This motion was filed on the day this court entered the order dismissing Linda Bays' complaint.

The court will consider whether the Stevens County suit might be subject to amendment and whether this court should grant relief from stay so it might proceed.

The critical issue here is whether amendment of the complaint by adding the trustee as a party would relate back to the time of the filing of the original complaint.

Washington Civil Rule C.R. 15(c) which deals with relation back of amendments provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The proposed amendment relates to conduct of forfeiting the real estate contract complained of in the original complaint. If the amendment does not relate back to the timely filed original complaint it is time barred.

On the record before the court, it is arguable that the trustee had notice of the SET ASIDE SUIT. Why else did he file the erroneous notice of stay? The timing of the notice is more of a question. Whether the trustee is prejudiced in his defense on the merits is an open question. The trustee could certainly still argue that Ms. Bays is barred on the basis of claim/issue preclusion from contesting the amount owing and the default on the contract by the dissolution decree which was affirmed on appeal. The trustee should have known that Ms. Bays had sued the wrong party. It was Mr. Esposito, the trustee of David Bays bankruptcy estate that forfeited the contract, not David Bays or the lawyers Lambarth and Troberg.

There is an additional condition to those spelled out in C.R. 15(c). The court will "not permit joinder if the plaintiffs delay is due to inexcusable neglect." North Street Ass'n v. City of Olympia, 96 Wash.2d 359, 368, 635 P.2d 721, 726 (1981), Tellinghuisen et al v. King County, 103 Wash.2d 221, 224, 691 P.2d 575, 577 (1984). In both these cases the plaintiffs were aware of the identities of the necessary parties but still failed to name them. This failure was found to be inexcusable neglect. Ms. Bays's failure, in a suit to set aside a forfeiture, to name and serve the party that accomplished the forfeiture is inexcusable neglect. This failure bars any attempt to now amend the complaint and add the trustee or the bankruptcy estate from relating back.

(d). C.R. 81

Ms. Bays's arguments assume application of the general statutes and rules in support of her position that she could have amended her complaint and effected service after the expiration of the statute of limitations in R.C.W. 61.30.140(2) but for her mistaken reliance on the erroneous notice of stay. She has not taken into consideration that these general statutes and rules may not be applicable.

Washington Civil Rule C.R. 81(a) provides in pertinent part:

Except where inconsistent with rules or statutes applicable to special proceedings,

these rules shall govern all civil proceedings. ...

A suit to set aside a real estate contract forfeiture is such a "special proceeding." Section R.C.W. 61.30.140(1) provides:

> (1) An action to set aside a forfeiture not otherwise void under RCW 61.30.040(1) may be commenced only after the declaration of forfeiture has been recorded and only as provided in this section, and regardless of whether an action was previously commenced under RCW 61.30.110. (emphasis added).

It is clear from this language that the general rules for commencement of an action and time for service don't apply if they are in conflict with the statute.

Section R.C.W. 61.30.140(2) requires "such an action shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded." This statutory provision conflicts with the general rules relating to commencement of a suit for tolling the statute of limitations and extension of time for service of process. "When a general rule of civil procedure conflicts with a rule governing a special proceeding, the general rule of civil procedure does not apply. C.R. 81(a)." Pacific Erectors Inc. v. Gall Landau Young Construction Co., 62 Wash.App. 158, 167, 813 P.2d 1243, 1250 (1991).

Washington's RECFA establishes a procedure for setting aside a contract forfeiture requiring that:

> ...an action shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's attorney in fact, if any, who signed the declaration of forfeiture...

R.C.W. 61.30.140(2).

The Act provides the following definition of "seller:"

> "Seller" means the person denominated in a real estate contract as the seller of the property or an interest therein or, if applicable, the seller's successors or assigns in interest to all or any part of the property or the contract, whether by voluntary or involuntary transfer or transfer by operation of law. If the seller's interest in the property is subject to a proceeding in probate, a

> receivership, a guardianship, or a proceeding under the federal bankruptcy laws, "seller" means the personal representative, the receiver, the guardian, the trustee in bankruptcy, or the debtor in possession, as applicable....

R.C.W. 61.30.010(9).

Joseph Esposito, trustee in bankruptcy of the estate of David Bays, is the "seller" of the contract at issue. Only a "seller" can initiate a forfeiture proceeding under this statute. Mr. Esposito did so and ultimately filed a "Declaration of Forfeiture." It is this forfeiture which Ms. Bays seeks to set aside. It is beyond argument that, in such an action to set aside a forfeiture, the seller who forfeited the contract is a "necessary party." Here the trustee was neither named as a party in the SET ASIDE SUIT nor served within the time specified in R.C.W. 61.30.140(2).

The situation is analogized to that found in mechanic lien foreclosures--, another area of law, where the specific provisions of the statute, control over the general rules. In Pacific Erectors Inc. v. Gall Landau Young Constructions Co., which dealt with the lien foreclosure statute, the court ruled that commencement of an action by filing was tentative only until service was perfected on all necessary parties - 62 Wash.App. 158, 165, 813 P.2nd 1243, 1249 (1991). Failure to serve a necessary party within the statutory period rendered the action "absolutely void." See, e.g.,Queen Anne Painting Company v. Olney & Associates, 57 Wash.App 389, 395, 788 P.2d 580, 583 (1990) (lien foreclosure); Tellinghuisen v. King County, 103 Wash.2d 221, 223, 691 P.2d 575, 576 (1984) (zoning writ of review); North St. Ass'n v. City of Olympia, 96 Wash.2d 359, 635 P.2d 721 (1981) (zoning writ of review).

Applying these precedents Ms. Bays's failure to either name the trustee, a necessary party in the original SET ASIDE SUIT, or failure to serve him within the time limit specified in R.C.W. 61.30.140(2) renders her filing of the SET ASIDE SUIT void. Attempts to amend that complaint or effect service are in vain. The statute of limitation period has run.

Reliance on the erroneous notice of stay is of no avail. In Pacific Erectors even reliance on the court's own order failed to excuse strict compliance with the service requirement, 62 Wash.App. at 167, 813 P.2d at 1250. In North Street Ass'n the counsel's failure to understand the requirements

of the law did not constitute excusable neglect allowing amendment with relation back. 96 Wash.2d 371, 635 P.2d 727.

E. Conclusion- Linda Bays's Motion for Reconsideration

Mr. Esposito, trustee of the David Bays bankruptcy estate, as "seller" was a necessary party to any suit to set aside the forfeiture. The automatic stay did not bar Ms. Bays from timely filing and serving such a suit on the trustee. Her failure to do so is fatal to her attempt to set aside the forfeiture. Her claim of reliance on the erroneous notice of stay does not excuse her failure. Her requests for stay relief so that she might amend her Stevens County complaint to name the trustee and serve the bankruptcy estate or amend this adversary proceeding are futile. She has lost her opportunity to set aside the forfeiture. Ms. Bays' motion for reconsideration should be denied.

II. KELLY CASE'S MOTION FOR RECONSIDERATION

Kelly Case's Motion for reconsideration raises an issue not addressed in this court's original decision, the impact of the agreement between Linda Bays and Kelly Case dated February 27, 2003, CONTRACT # II. [AP# 753, pg. 10]. The court's original opinion focused on the November 22, 2000, CONTRACT # I. [AP# 686-3, pgs. 2-3]. The court concluded in that opinion that CONTRACT # I had been paid in full and therefore the quit claim deed (in reality a mortgage) that had secured it had been satisfied. This left Kelly Case without standing to challenge the real estate contract forfeiture. If however CONTRACT # II was also secured by the quit claim deed, and it was not paid off by the September 26, 2003 check [AP# 686-5, pg. 2] then there would still be an obligation secured by the quit claim deed (mortgage) and Kelly Case would have standing to challenge the forfeiture.

The court will review the evidence on whether anything was owing on CONTRACT # II.

A. Amount Owing on CONTRACT # II

Kelly Case and Linda Bays entered into a "Loan Contract" dated November 27, 2000, CONTRACT # I. [AP# 686-3, pgs. 2-3]. Under this agreement Kelly Case was to loan Linda Bays up to $2,000.00 per year plus pay insurance premiums taxes and upkeep of the property. All the

money advanced pursuant to the agreement was to be reimbursed by November 27, 2005. Linda Bays gave Kelly Case a Quit Claim Deed to her home to secure repayment of the loan. [AP# 686-4, pg. 2].

David Bays filed a dissolution action against Linda Bays. On October 31, 2002, the Steven County Superior Court entered a decree of dissolution. This decree awarded David Bays a vendor's interest in the home and reinstated that contract with nearly $70,000.00 due. The decree also purported to declare the Quit Claim Deed given by Linda Bays to Kelly Case to be null and void. Kelly Case was not a party to the dissolution. Linda Bays appealed this decree.

On February 27, 2003, Linda Bays and Kelly Case entered into a second agreement, CONTRACT # II. [AP# 753, pg. 10]. In this agreement Kelly Case agreed to "ongoing loans for legal expenses" and other purposes and that were to "be reimburst [*sic*] in full on the appointed day in November of 2005." If the money was not paid timely Linda Bays will "relinquish the right to redeem the property..." It is implicit in CONTRACT # II that it is secured by the Quit Claim Deed. Kelly Case in his June 30, 2008 deposition estimated the amount he advanced under CONTRACT # II was in the range of $3,000.00. [AP# 686-2, pg. 10]. Linda Bays testified in her June 30, 2008 deposition that the amount loaned on CONTRACT # II was less than $5000.00. [AP# 686-1, pgs. 22-23].

Joseph Esposito, as trustee of the bankruptcy estate of David Bays, on July 11, 2003 filed and noticed an "Intent to Forfeit" the real estate contract awarded to David Bays in the dissolution decree. Kelly Case disputes that he was given appropriate notice of this Intent to Forfeit.

On September 26, 2003 Linda Bays purchased a cashiers check in the sum of $2,400.00 made payable to Kelly Case. [AP# 686-5, pg. 2]. It bore this language "Contract dated November 2000 paid in full + extra money because I can't remember exact amount only that I owed you $2,300 something, I'll check my paperwork when I get home." Kelly Case after consulting with a lawyer cashed this check.

Also dated September 26, 2003, Linda Bays executed a "Notice of Forfeiture of Contract"

directed to Kelly Case. [AP# 718, pg. 32]. This notice provides in part "your refusal to comply with the terms of the contract dated 2-27-03 shall cause a forfeiture of the contract... notice is given for you to comply with terms you agreed to, or your agreement dated 2-27-03 will be forfeited by you... If you fail to perform, I will not be held liable under the law, to give up my rights to my home if I can not pay you back by November 2005." Linda Bays now states "It is my position that said 2nd contract is null & void since Kelly did not perform and it is my position, Kelly tried to get over me, knowing he was not going to perform." [AP# 718, pg. 14].

Kelly Case was not named as a party in either Linda Bays' original INJUNCTION SUIT filed October 15, 2003 or in the original SET ASIDE SUIT filed December 19, 2003. Kelly Case did however join his mother as a plaintiff in the amended complaint filed in this adversary proceeding March 11, 2004.

Defendants Esposito, Grabicki and Bays take the position that Kelly Case's acceptance of the $2,400.00 check was in full payment of ALL obligations owed Kelly Case by Linda Bays. Therefore there is no outstanding obligation to be secured by the quit claim deed. The court came to this conclusion in its February 9, 2009, decision and judgment.

Kelly Case argues in his motion for reconsideration that this is a misreading of the evidence. Viewed in the light most favorable to him the evidence suggests that the $2,400.00 check paid off only CONTRACT # I not the approximately $3,000.00 owed on CONTRACT # II. Therefore Kelly Case would have standing to challenge the real estate contract forfeiture if he had not received appropriate notice.

Kelly Case's current position was not clearly articulated prior to this court's decision of February 9, 2009, rather it appears in response to the court's decision. Can it be asserted post judgment?

B. <u>Is Post Judgment Relief Available to Kelly Case?</u>

The defendants Esposito, Grabicki and David Bays have contended from their initial pleadings for summary judgment re quiet title that the $2,400.00 cashier check satisfied all

obligations owed by Linda Bays to Kelly Case secured by the quit claim deed. [AP# 685, AP# 692]. Kelly Case's pleadings relating to the quiet title summary judgment did not specifically refer to obligations owed on CONTRACT # II. Mr. Case even requested that his own motion for summary judgment on the quiet title issue be dismissed and the court so ordered on October 29, 2008. [AP# 693, AP# 713, AP# 730]. His oral argument at the November 6, 2008 Summary Judgment hearing did not mention an obligation owed on CONTRACT # II. Neither the December 10, 2008 Amended Complaint filed in the Stevens County SET ASIDE SUIT, nor the amended complaint proposed in this court on February 9, 2009 mention CONTRACT # II. [AP II# 4, AP# 744]. Kelly Case's first pleading in this case articulating a reliance on CONTRACT # II is found in his declaration in support of his motion for reconsideration filed herein on February 17, 2009, eight days after this court rendered its decision. [AP# 753].

Was there any evidence before the court at the time of its decision, which would create a question of fact as to whether Kelly Case was owed any obligation secured by the quit claim deed? The court will examine the documentary evidence before the court prior to the court's February 9, 2009 decision.

CONTRACT # I, dated November 27, 2000, is an agreement whereby Kelly Case was to loan money to Linda Bays [AP# 686-3, pgs. 2-3]. The sums loaned were to be repaid by November 27, 2005. Repayment was secured by a quit claim deed to Kelly Case of Linda Bays' residence. [AP# 686-4, pg. 2].

CONTRACT # II, dated February 27, 2003, is another agreement where Kelly Case agreed to loan Linda Bays money for legal expenses and other purposes. [AP# 753, pg. 10]. Repayment of the money borrowed was due "on the appointed day in November of 2005 according to the agreement we have". If the money was not paid by the due date Linda Bays relinquished her rights to redeem the property. The obligations incurred under this agreement were seemingly secured by the quit claim deed.

The September 26, 2003 $2,400.00 check made payable to and cashed by Kelly Case

contained the following language, "contract dated November 2000 paid in full & extra money because I can't remember exact amount. Only that I owed you $2,300.00 something. I'll check my paper work when I get home." [AP# 686-5, pg. 2]. It makes specific reference to payments for CONTRACT # I. It makes no reference to CONTRACT # II.

The "Notice of Forfeiture of Contract" also dated September 26, 2003 given by Linda Bays to Kelly Case makes specific reference to "the contract dated 2-27-03." [AP# 718, pg. 32]. It gives Kelly Case notice that if he doesn't perform the contract will be forfeited and he would give up his rights in her home. The language of the notice threatens future action by Ms. Bays. It is difficult to reconcile this notice with the position that acceptance of the $2,400.00 check would pay off CONTRACT # II. The inference most favorable to Mr. Case is that CONTRACT # II is still unpaid and secured by the quit claim deed.

Kelly Case's deposition testimony as to the status of CONTRACT # II is ambiguous. [AP# 686-2, pgs. 2-20]. Evidently he did not have copies of the check or CONTRACT # II when he gave this testimony. There are inconsistencies between his testimony and the documentary evidence.

Mr. Case has been handicapped in the presentation of his own position by his lack of familiarity with the law and legal proceedings. This is illustrated by his first filing a motion for summary judgment on the issue of quiet title [AP# 693, pgs. 1-2] and then moving to dismiss it. [AP# 713, pgs. 1-2]. These pleadings demonstrate a confusion as to the consequences of his actions. They also demonstrate the tension between Mr. Case and Ms. Bays. Ms. Bays, although not a lawyer, has substantial experience with legal matters and is more knowledgeable. Her interests and Kelly's interest in their litigation do not always coincide, as is demonstrated by her position that CONTRACT # II is null and void. [AP# 718, pgs. 13-14]. Her influences on Kelly's action in this quiet title summary judgment litigation are unclear.

The documentary evidence submitted on the issue of summary judgment prior to the court rendering its decision viewed in the light most favorable to Kelly Case, suggests that the $2,400.00 check was not tendered in payment of CONTRACT # II. There is allegedly a sum still due on

CONTRACT # II, approximately $3,000.00 per Kelly Case's deposition. This sum is arguably secured by the quit claim deed. Therefore, there is a factual issue whether Kelly Case has a security interest in the residence and that this security interest would give him standing to challenge the forfeiture of his interest in the property. Given the circumstances of the case, his failure to clearly articulate his position prior to this Court's February 9, 2009 decision constitutes excusable neglect on Mr. Case's part. Kelly Case has standing to challenge the forfeiture and proceed with litigation on the propriety of the trustee's contract forfeiture of his interest.

C. Conclusions Re Kelly Case

Kelly Case's motion for reconsideration should be granted. The litigation to resolve his interest in the subject real estate will continue. To facilitate the process, the court makes the following rulings.

1. Kelly Case's interest in the real estate is at most a security interest.

2. Kelly Case is not a "purchaser" of the property pursuant to the terms of R.C.W.61.30.101(7). That section specifically excludes one that holds an interest in the nature of a security interest from the definition of "purchaser".

3. A "purchaser" is entitled notice under the statue. Failure to give the required notice to a "purchaser" "shall render any purported forfeitures based upon the required notice void". R.C.W.61.30.040(1).

4. The statute also requires that the appropriate notices be given to lien holders such as Kelly Case. R.C.W.61.30.040(2). The consequences of failure to give the appropriate notice to a lien holder, are different than the consequences of failure to give appropriate notice to a "purchaser". R.C.W.61.30.404(2) provides:

> Any forfeiture based upon the required notices shall be void as to each person described in this subsection (2) to whom the notices are not given in accordance with this chapter in any material respect.

The failure to give the appropriate notice to a lien holder voids the forfeiture as to the lien holder

only, it does not void the entire forfeiture process.

5. All parties, given the statutory required notices, have sixty days from the date of filing of the declaration of forfeiture to file and serve a summons and complaint seeking to set aside a forfeiture. A party not given the required notices is not bound by this time limitation. R.C.W.61.30.140(2).

6. It is a contested question, whether Kelly Case received the required statutory notice.

7. It is a contested question, what if anything, is owed to Kelly Case on CONTRACT # II.

8. It is a contested question, whether any money owed under CONTRACT # II is secured by the quit claim deed.

9. Kelly Case's Amended Complaint filed in this adversary proceeding on March, 11 2004 does not seek to set aside the October 22, 2003 "Declaration of Forfeiture" but rather to quiet title in the property.

10. Kelly Case's Amended Complaint filed in the Stevens County SET ASIDE SUIT on December 10, 2008 does seek to set aside the forfeiture. That case was removed to this court but since has been dismissed. [AP II# 18]. The filing of that amended complaint was in violation of this court's order of November 8, 2004.

11. Kelly Case signed an amended complaint in this adversary proceeding to set aside the forfeiture. [AP# 744-1, pgs. 1-16]. This was filed with Linda Bays's "Motion to Amend Adversary Complaint". [AP# 744, pgs. 1-3]. Kelly Case, however, did not join in Linda Bays's motion to amend. He is seeking only to quiet title in this case at this time.

12. Kelly Case's motion for reconsideration should be granted and the "Judgment re Quiet Title" entered herein February 9, 2009 [AP# 743] be vacated as it relates to Kelly Case.

III. SUMMARY OF DECISION

A. As to Linda Bays

Linda Bays's motion for reconsideration should be denied. An amended judgment will be

entered quieting title in favor of Tony Grabicki, trustee of the bankruptcy estate of David Bays and against Linda Bays. Linda Bays's pending motions to amend her complaint in this adversary proceeding, to lift stay as to the SET ASIDE SUIT, and to remove that suit to this court are all predicated upon the premise that she is able to amend her complaint, serve omitted necessary parties and have those actions relate back to the filing of the original complaint. That premise is false. The court will enter orders denying those motions with prejudice as they apply to Linda Bays.

As to the Linda Bays "Motion to Void Order of State Court Dismissing Parties During Stay", this court lacks jurisdiction over the state court. The motion will be denied.

Entry of the "Amended Judgment Re: Quiet Title - Linda Bays" resolves the last of Linda Bays's claims and issues outstanding in this adversary proceeding. The judgment to be entered is a final judgment as to her claims and the court finds there is no just reason for delay.

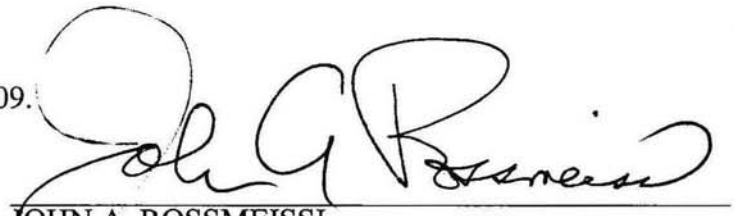
B. As to Kelly Case

Kelly Case's motion for reconsideration should be granted and the court's judgment entered against him on February 9, 2009 should be vacated.

Kelly Case's "Motion for Leave to Lift Stay and to Remove State Action" will be denied without prejudice to allow Mr. Case to consider his options in light of this decision.

Kelly Case's "Motion to Void Order of State Court Dismissing Parties During Stay" will be denied with prejudice. This court lacks jurisdiction over the Stevens County Superior Court.

DONE this 8th day of September, 2009.



JOHN A. ROSSMEISSL
Bankruptcy Judge