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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,

Adversary No. A03-00237-JAR

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.

DECISION RE: QUIET TITLE

THIS MATTER comes before the court upon motions for summary judgment on the issue of quiet title in real property located in Stevens County, Washington.

This adversary proceeding originated as a lawsuit in Stevens County Superior Court. It was removed to bankruptcy court by the then trustee of David Bays' bankruptcy estate, Joseph Esposito. The removed adversary proceeding included multiple causes of action against multiple defendants. During the litigation of this matter, this court has disposed of multiple causes of action and dismissed many of the parties to the adversary proceeding. The plaintiffs remaining are Linda Bays and her son, Kelly Case.

1 The defendants remaining are Tony Grabicki, successor trustee of the bankruptcy estate of David Bays
2 and David Bays. The last remaining cause of action is for quiet title in some Kettle Falls real estate.
3 Linda Bays and Kelly Case seek a determination that their interest in the real estate is not encumbered
4 by a Real Estate Contract awarded to David Bays in the Bays dissolution in which trustee Grabicki
5 claims David's interest. Trustee Grabicki's predecessor-in-interest, Joseph Esposito, had proceeded to
6 forfeit that contract. Linda Bays and Kelly Case ask this court to declare that forfeiture void and quiet
7 title in them free of the claims of the bankruptcy trustee and David Bays. This is the final issue left
8 unresolved in this adversary proceeding.

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

12 The court will commence its decision on the matters with a chronological review of the facts and
13 relevant pleadings.

14 FACTS

15 1. By a contract dated October 5, 1987, William and Karen Ferguson sold Terrance and
16 Anita Symonds real estate located in Stevens County and known as 1698 Nichols Road, Kettle Falls,
17 Washington (referred to herein as "the Ferguson Contract"). The real estate sold consists of two parcels
18 designated A and B, respectively (referred to herein collectively as "the Kettle Falls property").
19 [AP #600, Ex. A, pg. 17]. Parcel A is approximately 13 acres with a shed. Parcel B is approximately
20 one acre with a house and improvements. [DB #61, pg. 8, ¶ 29].

21 2. The plaintiffs Linda Bays and her then husband Eric Svare, acquired the vendee's interest
22 in the Ferguson Contract from the Symonds in 1987. [AP #686-1, pg. 4; Dep., pg. 7, lns. 1-10; Dep.,
23 pg. 8, lns. 10-21). Ms. Bays divorced Eric Svare and Linda Bays received the Kettle Falls property in
24 the divorce as her separate property. [AP #686-1, pg. 4; Dep., pg. 9, lns. 4-7; AP #686-1, pg. 5; Dep.,
25 pg. 10, lns 6-11]. Eric Svare quit claimed this property to Linda on November 27, 1989. [DB #61, pg. 8,
26 ¶ 30].

1 3. Linda J. Svare, as seller, entered into a Real Estate Contract with the Linjericks Society,
2 "an unincorporated Religious Family of God" dated January 12, 1995 and recorded January 13, 1995.
3 The subject of this contract was Parcel A of the Kettle Falls property. [AP #600, pg. 9, ¶ 4].

4 4. Linda Svare, as grantor, executed a Deed of Trust dated September 14, 1995, in the
5 amount of \$18,000 in which the Linjericks Society, a corporation, was the beneficiary, and recorded the
6 same day under Stevens County auditor No. 9509089. The Deed of Trust encumbered Parcel B of the
7 Kettle Falls property. [AP #382, pgs. 42-45].

8 5. The minutes of a special meeting the Linjericks Society called on January 29, 1996,
9 reflect that the Society had no way of collecting on its Deed of Trust without forfeiture and forfeiture
10 was authorized on the 1698 Nichols Road property. The minutes of the meeting were signed by "Kelly
11 Case, Secretary of Linjericks Society" and dated February 2, 1996. [AP #382, pg. 4].

12 6. On February 2, 1996, Linda Svare executed a Quit Claim Deed "in consideration of in
13 lieu of foreclosure/forfeiture of Deed of Trust, Stevens County #9509089" to the "Linjericks Society and
14 the Overseer of the Linjericks Society (a corporation sole)." This Quit Claim Deed related to Parcel B
15 of the Kettle Falls property. [AP # 382, pg. 6].

16 7. Linda Svare met David Bays in July of 1997. [AP #686-1, pg. 14; Dep., pg. 49, lns. 3-6].
17 It is Linda Bays' position, that shortly after meeting David Bays that they entered into a contract whereby
18 Linda agreed to clean out David's home in Ione, Washington, and in return David would pay off the
19 approximately \$52,000.00 balance of the Ferguson Contract. [AP #686-1, pg. 14; Dep., pg. 47, lns. 8
20 thru Dep., pg. 48, ln. 13; AP #686-1, pg.15; Dep., pg. 50, lns. 12-23; AP #739-1, pg. 5, ¶ 3.1].

21 8. Linda Svare and David Bays married on March 23, 1998 during the course of the clean
22 up of the Ione home. [AP #686-1, pg. 5; Dep., pg. 13, lns. 19-21].

23 9. The work on cleaning up the Ione residence continued until completion. The clean up
24 was completed by May 17, 1999, at which time Linda Bays paid off the Ferguson Contract. The money
25 used for this pay off was received from David Bays. She received a receipt for the sum of \$52,406.81.
26 [AP #382, pg. 18].

1 10. On May 18, 1999, the escrow officer sent a letter to the Fergusons and Linda E. Erickson
2 indicating that the contract has been paid in full and that the original statutory deed was being sent to
3 the Stevens County Auditor for recording. [AP #382, pg. 21]. A payment history was included with this
4 letter which indicated that the account balance was paid to Fergusons on May 17, 1999. [AP #382,
5 pg. 22].

6 11. It is Linda Bays' position that after the Ferguson Contract was paid off, Linda discovered
7 that John Troberg would attempt to enforce a judgment lien against the property. To protect her interest
8 in the property, she stopped the recording of the deed to her from Fergusons. Instead Linda Bays asserts
9 she and David Bays agreed that David Bays would be transferred the vendor's interest in the Ferguson
10 Contract to protect the property from the Troberg lien. Linda Bays further alleges that no payments were
11 due or expected from her by David Bays. [AP#739-1, pgs. 4-5; AP #686-1, pg. 16; Dep., pg. 54, lns.
12 18 thru Dep., pg. 56, ln. 25].

13 12. By letter dated June 9, 1999, the Fergusons were sent a "Deed and Seller's Assignment
14 of Real Estate Contract" and a "Hold Harmless and Indemnification Agreement" executed by David
15 Bays. [AP #382, pgs. 23-27]. The "Deed and Seller's Assignment of Real Estate Contract" was signed
16 by the Fergusons and recorded with the Stevens County Auditor on June 18, 1999. [AP #382, pgs. 28-
17 31].

18 13. Linda Bays and David Bays lived together as husband and wife until October of 1999.
19 [AP #686-1, pg. 19; Dep., pg. 68, ln. 24 thru Dep., pg. 69, ln. 20].

20 14. David Bays executed and delivered a Statutory Warranty Deed to Linda Bays on
21 October 13, 2000. [LB #57, pg. 36-38; AP #686-1, pg. 17; Dep., pg. 59, ln. 16 to Dep., pg. 61, ln. 4; AP
22 #600, pg. 15, ¶ 25]. This deed relates to both Parcels A and B of the Kettle Falls property and recites
23 "For and in consideration of non-assignable life estate on basement apartment at 1698 Nichols Road and
24 \$1.00." [LB #57, pgs. 36-38; AP #600, pg. 15].

25 15. Linda Bays and Kelly Case entered into a "Loan Contract" dated November 27, 2000.
26 [AP #686-3, pgs. 2-3; AP #686-1, pg. 20; Dep., pg. 72, ln. 5 to Dep., pg. 73, ln. 24; AP #686-2, pg. 7;
27

1 Dep., pg. 21, ln. 22 to AP #686-2, pg. 8; Dep., pg. 22, lns. 1-9; AP #686-2, pg. 8; Dep., pg. 25, ln. 18
2 to ln. 25]. As part of this contract, Linda Bays executed and delivered a Quit Claim Deed to Kelly Case
3 dated November 27, 2000 relating to Parcel B of the Kettle Falls property. [AP #686-4, pg. 2]. Under
4 the terms of this contract, Kelly Case was to loan money to Linda Bays, which loan was secured by the
5 real estate described in the Quit Claim Deed. [AP# 686-1 pg. 20; Dep., pg. 72, ln. 24 to Dep., pg. 73,
6 ln. 18; AP #686-1, pg. 21; Dep., pg. 77, ln. 17 to AP #686-1, pg. 22; Dep., pg. 78, ln. 24].

7 16. David Bays filed a petition for dissolution of his marriage to Linda Bays in April of 2001.
8 [AP #503, pg. 2, ¶3].

9 17. On June 20, 2001, David Bays filed this bankruptcy case. [DB #1]. Joseph Esposito was
10 appointed trustee of David Bays' chapter 7 bankruptcy estate.

11 18. On August 7, 2001, Kelly Case recorded the Quit Claim Deed referred to in ¶ 15 above.
12 [AP #686-1, pg. 22; Dep., pg. 78, lns. 20-22; AP #600, pg. 14, ¶ 22].

13 19. On October 1, 2002, Linda Bays filed a document in her dissolution case with the Pend
14 Oreille County Superior Court entitled "Responsive Declaration of Linda Bays," which provided in part:

15 Prior to our marriage I entered into a contract with David to do work for him in exchange
16 for him paying off my mortgage. David has admitted this by affidavit. It took me 2 years
17 to complete the work, and as promised, David gave me the money to pay off the
18 mortgage. [AP #385, pg. 31].

19 ...

20 David agreed to act as my trustee by taking the place of the seller, Bill Ferguson, in order
21 to protect me from Attorney Troberg. At first Bill Ferguson was reluctant to do this since
22 he had already been paid. Bill then made David signed a "Hold Harmless" agreement
23 so Attorney Troberg would not sue him (Bill). It was always understood that the home
24 was my separate property. David even asked Attorney Monasmith to draft the paperwork
25 showing the home was my separate property with nothing owing on it, in order to protect
26 me from David's own children. [AP #385, pg. 32].

27 ...

28 The house belonged to me, and I did not even suspect that David would claim an interest
in it. [AP #385, pgs. 32-33].

...

When David made my home an issue in the divorce, Mr. Monasmith told me to subpoena
him to court. He will testify why David took the sellers position after giving me the
money to pay off my home, and that David's position always was that "this home was
my separate property," not his. Contrary to the claim that David now makes, many

1 people have knowledge by David's own admission, that he only held the mortgage as
2 trustee to protect me from John Troberg. [AP #385, pg. 33].

3 20. The Bays dissolution case went to trial on October 7, 2002, without Linda Bays or anyone
4 representing her interests in attendance. [AP #503, pg. 10, ¶ 53]. David Bays testified at the trial that
5 it was his understanding when he paid the almost \$53,000 on the Ferguson Contract that he was to have
6 a half interest in that property right away. [AP #697, pg. 31].

7 21. Judge Bastine in his oral opinion delivered at the close of the trial said:

8 She does not make any reference to any other property items except for a claim indicated
9 as "work performed by wife" in the amount of \$75,000 which should be considered in
10 the distribution.

11 There is no evidence with regard to that. There is nothing to support that. And indeed,
12 I don't even know by what theory that would come into play here in any event. [AP #466,
13 pg. 23].

14 22. David Bays' dissolution attorney Douglas Lambarth, forwarded proposed Findings of Fact
15 and Conclusions of Law and Decree of Dissolution to Trustee Joe Esposito by letter dated October 11,
16 2002. [AP #503, pgs. 10-11, ¶ 55].

17 23. On October 11, 2002, Linda Bays had the Statutory Warranty Deed from David Bays to
18 her (¶ 14 above) recorded with Stevens County Auditor. [LB #57, pgs. 36-38; AP #600, pg. 15, ¶ 25].
19 Linda Bays recorded this deed after the dissolution trial had been completed and she was aware of the
20 proposed findings of fact. [AP #686-1, pg. 17; Dep., pg. 60, lns. 9 to 21].

21 24. The dissolution court entered the final Findings of Fact, Conclusions of Law and Decree
22 of Dissolution on October 31, 2002. [DB #61 & 62]. The decree dealt with the various transfers relating
23 to the Kettle Falls property as follows:

24 (5) The real estate contract dated 01/12/95 between Linda J. Svare, as seller, and
25 Linjericks Society, an unincorporated Religious Family of God, a pseudonym for Linda
26 Bays, as purchaser, is set aside and is declared null and void and of no effect. The
27 Stevens County Auditor filing nos. of this contract are Vol. 186, page 0973 through 0878
28 and was recorded on January 13, 1995, document #9500414.

(6) The Deed of Trust dated September 14, 1995, between Linda Svare, as grantor and
borrower, and Linjericks Society, a pseudonym for Linda Bays, as beneficiary, is set
aside and is declared null and void and of no effect. The Stevens County Auditor's filing
nos. of this deed of trust are Vol. 192, pages 3234 through 3237 and was recorded on

1 September 14, 1995, document # 9509089.

2 (7) The Quit Claim Deed with David Bays, as grantor, and Linda Bays and Linjericks
3 Society, a pseudonym for Linda Bays, as grantees, is set aside and is declared null and
4 void and of no effect. The Stevens County Auditor's filing nos. are Vol. 240, pages 0284
5 through 286, document #1999-0010689.

6 (8) The Quit Claim Deed dated November 27, 2000, with Linda Bays as grantor, Kelly
7 Case, as grantee, is set aside and declared to be null and void and of no effect. The
8 Stevens County Auditor's filing nos. of the quit claim deed are Vol. 261, pages 3185
9 through 3787 and was recorded on August 7, 2001, document #2001-0007745.

10 (9) The Statutory Warranty Deed dated October 13, 2000, with David Bays, as grantor,
11 and Linda Bays, as grantee, involving both Parcels A and B, and not filed of record, is
12 set aside and is declared null and of no effect.

13 (10) The real estate contract dated October 5, 1987, between Fergusons, as sellers, and
14 Symonds, as purchasers, filed in the Stevens County Auditor's office on October 8, 1987,
15 at Vol. 116, pages 1904 through 1913 is reinstated and declared to be fully enforceable.

16 (11) The deed and seller's assignment of real estate contract dated June 15, 1999,
17 whereby David W. Bays acquired the Fergusons' vendor's interest in the original real
18 estate contract between Fergusons, as sellers, and Symonds, as purchasers, filed in the
19 Stevens County Auditor's office on June 18, 1999, file #1999-0107377, and located in
20 Vol. 237, pages 0998 through 1001, is reinstated and declared to be fully enforceable,
21 and is a first lien on the real property described therein in the amount of \$69,038.36,
22 including interest as of October 30, 2002.

23 [DB #62, pgs. 7-8].

24 25. Linda Bays timely appealed the decision of the dissolution court.

25 26. A Litigation or Trustee's Sale Guarantee from Tigor Title Insurance dated February 5,
26 2003 was obtained by Mr. Esposito's office on the Kettle Falls property. [AP #600, pgs. 2, 7-17]. This
27 action was taken in connection with initiation of contract forfeiture proceedings.

28 27. A "Notice of Intent to Forfeit" dated July 11, 2003 was recorded with the Stevens County
Auditor on July 14, 2003. [AP #502, pgs. 10-15]. The declared intent was to forfeit the Ferguson
Contract in which Joseph Esposito, David Bays' bankruptcy trustee, held the vendor's interest. Copies
of this "Notice of Intent to Forfeit" were mailed on July 11, 2003 to a number of parties, including Linda
Bays, Kelly Case and the Linjericks Society at the following addresses:

1	Linda J. Erickson a/k/a Svare a/k/a Bays 1698 Nichols Road Kettle Falls, WA 99141	Linjericks Society a/k/a The Overseer of the Linjericks Society c/o Linda J. Erickson a/k/a Svare a/k/a Bays 1698 Nichols Road Kettle Falls, WA 99141
2		
3	Linda J. Erickson a/k/a Svare a/k/a Bays PO Box 301 Kettle Falls, WA 99141	
4		Linjericks Society a/k/a The Overseer of the Linjericks Society c/o Linda J. Erickson a/k/a Svare a/k/a Bays PO Box 301 Kettle Falls, WA 99141
5	Kelly Case PO Box 301 Kettle Falls, WA 99141	
6		
7		

8 [AP #502, pgs. 9 & 16].

9 28. On September 26, 2003, Bank of America issued a cashier's check purchased by Linda
10 Bays payable to Kelly Case in the sum of \$2,400.00. The face of the check bore the handwritten words
11 "contract dated November 2000 paid in full + extra money . . ." [AP #696-1, pg. 4]. Kelly Case, after
12 obtaining legal advice, cashed the check and took the money. [AP # 686-2, pg. 9; Dep., pg. 28, ln. 9 thru
13 Dep., pg. 30, ln. 1].

14 29. Linda Bays and the Overseer of the Linjericks Society filed a "Complaint for Damages
15 and for Injunctive Relief" dated October 15, 2003 with the Stevens County Superior Court under docket
16 No. 03-2-00 528-1. [AP #1, pgs. 7-26]. The complaint included this language "THIS COMPLAINT is
17 made pursuant to RCW 61.30.110, . . ." among other terms. [AP #1, pg. 7]. The statutory provisions
18 referenced deal with enjoining forfeitures. This lawsuit was removed to bankruptcy court on October 17,
19 2003, and is this adversary proceeding. [AP #1, pgs. 1-3].

20 30. On October 21, 2003, Joseph Esposito, bankruptcy trustee of David Bays, signed a
21 "Declaration of Forfeiture" which declared the Ferguson Contract forfeited. This "Declaration of
22 Forfeiture" was filed with the Stevens County Auditor on October 22, 2003. [AP #502, pgs. 21-25].
23 Copies of this "Declaration of Forfeiture" were mailed on October 22, 2003, to a number of parties,
24 including Linda Bays, Kelly Case and the Linjericks Society at the following addresses:

25
26
27

1	Linda J. Erickson a/k/a Svare a/k/a Bays 1698 Nichols Road Kettle Falls, WA 99141	Linjericks Society a/k/a The Overseer of the Linjericks Society c/o Linda J. Erickson a/k/a Svare a/k/a Bays 1698 Nichols Road Kettle Falls, WA 99141
2		
3	Linda J. Erickson a/k/a Svare a/k/a Bays PO Box 301 Kettle Falls, WA 99141	Linjericks Society a/k/a The Overseer of the Linjericks Society c/o Linda J. Erickson a/k/a Svare a/k/a Bays PO Box 301 Kettle Falls, WA 99141
4		
5	Kelly Case PO Box 301 Kettle Falls, WA 99141	
6		

7 31. Linda Bays and the Overseer of the Linjericks Society, a corporation sole, plaintiff, filed
8 a "Complaint To Set Aside Forfeiture and for Damages" signed December 16, 2003 and filed with the
9 Superior Court of Stevens County on December 19, 2003. [AP #739-3, pgs. 2-23; AP #739-6, pg. 2].
10 David Bays, Douglas Lambarth, John Troberg and John and Jane Does were named as defendants in that
11 case. The first paragraph of this complaint provides in part as follows:

12 THIS COMPLAINT is made pursuant to RCW 61.30.140(4)(5), and based upon the fact
13 that the plaintiff, Linda Bays, did pay off the real estate contract that was forfeited.
14 Therefore, the defendants or their agents were not entitled to forfeiture. . . .

15 The statutory provisions referenced deal with setting aside a forfeiture. Joseph Esposito, David Bays'
16 bankruptcy trustee, was not specifically named as a defendant in the original complaint nor does it
17 appear that he was ever served with a summons and complaint in that case. [AP #738, pg. 2].

18 32. During the course of this litigation, Joseph Esposito passed away and Tony Grabicki was
19 appointed successor trustee on July 15, 2008. [DB #108]. Mr. Grabicki is currently serving as trustee
20 for the estate of David Bays.

21 33. On December 10, 2008, Linda Bays filed an Amended Complaint in Stevens County
22 Superior Court Cause No. 2003-200-6333, the lawsuit referred to in FACTS ¶ 31 above. This Amended
23 Complaint adds Kelly Case as a party plaintiff and Joseph Esposito, his spouse and the Dave Bays
24 bankruptcy estate as party defendants. Among the relief sought in this Amended Complaint, the
25 plaintiffs seek to have the forfeiture set aside and title quieted in the plaintiffs. [AP II #4, pgs. 11-25].
26 On December 15, 2008, Linda Bays filed a Notice of removal of this Stevens County case with this
27 court. This removed action was assigned this court's adversary docket No. 08-80140. [AP II #1].

28 DECISION RE: QUIET TITLE - PAGE 9
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1 **DISCUSSION**

2 **I. LINDA BAYS VS. TRUSTEE AND DAVID BAYS**

3 A. The Parties' Contentions

4 The remaining issue before the court is whether Linda Bays retains any interest in the Kettle Falls
5 property.

6 The trustee bases his position on the decree in the dissolution case which awards the sellers
7 interest in the reinstated Ferguson Contract to the debtor, David Bays, and upon the trustee's actions to
8 forfeit Linda Bays' purchaser's interest in that contract.

9 Linda Bays' contention is that there was nothing due on the Ferguson Contract, that the money
10 provided to her by David Bays to pay off the Ferguson Contract was money due and payable to her for
11 the clean up of David's Ione residence, the issue of payment was never decided by the dissolution court,
12 the final decree in that case is not controlling in this case on these matters, and in any event, the trustee's
13 attempt at forfeiting the contract was unsuccessful because of failure to adequately comply with the
14 requirements of Washington's Real Estate Contract Forfeiture Act.

15 B. The Preclusive Effect of the Dissolution Decree

16 The parties disagree on the application of claim/issue preclusion doctrines to the dissolution
17 court's Findings of Fact, Conclusions of Law, and Decree. The Trustee/David Bays seek to apply the
18 Findings, Conclusions and Decree strictly by their terms. Linda Bays argues that the dissolution
19 judgment should not be given binding effect against her in this action. The court will examine the legal
20 requirements for application of the doctrines of claim preclusion (res judicata) and issue preclusion
21 (collateral estoppel). The court has found Professor Trautman's article "Claim and Issue Preclusion in
22 Civil Litigation in Washington," 60 Wash. Law Review 805 (1985) of great assistance in its analysis.

23 1. Claim Preclusion (Res Judicata)

24 The Washington Supreme Court has identified a number of conditions necessary for application
25 of issue preclusion (res judicata).

1 Res judicata occurs when a prior judgment has a concurrence of identity in four respects
2 with a subsequent action. There must be identity of (1) subject matter; (2) cause of
3 action; (3) persons and parties; and (4) the quality of persons for or against whom the
claim is made. Seattle First Nat'l Bank v. Kawachi, 91 Wash. 2d 223, 588 P.2d 725
(1978).

4 Rains v. State of Washington, et al., 100 Wash. 2d 660 at 663, 674 P.2d 165 at 168 (1983).

5 To assist courts in deciding whether the same cause of action is involved, the Rains decision,
6 ibid., at 100 Wash. 2d at 664, 674 P.2d at 168 referenced the following quote from Abramson v.
7 University of Hawaii, 594 F.2d 202, 206 (9th Cir. 1979):

8 (1) [W]hether rights or interests established in the prior judgment would be destroyed or
9 impaired by prosecution of the second action; (2) whether substantially the same
evidence is presented in the two actions; (3) whether the two suits involve infringement
10 of the same right; and (4) whether the two suits arise out of the same transactional
nucleus of facts.

11 2. Issue Preclusion (Collateral Estoppel)

12 The Rains court articulated the difference between the two concepts as follows:

13 The doctrine of collateral estoppel differs from res judicata in that, instead of preventing
14 a second assertion of the same claim or cause of action, it prevents a second litigation of
issues between the parties, even though a different claim or cause of action is asserted.

15 Seattle First Nat'l Bank v. Kawachi, 91 Wash. 2d 223, 225-26, 588 P.2d 725 (1978).
16 The Court of Appeals in Seattle First Nat'l Bank v. Cannon, 26 Wash. App. 922, 927,
615 P.2d 1316 (1980) (quoting Lucas v. Velikanje, 2 Wash. App. 888, 894, 471 P.2d
103 (1970)) stated:

17 Affirmative answers must be given to the following questions before collateral estoppel
18 is applicable:

19 (1) Was the issue decided in the prior adjudication identical with the one presented in the
20 action in question? (2) Was there a final judgment on the merits? (3) Was the party
against whom the plea is asserted a party or in privity with a party to the prior
21 adjudication? (4) Will the application of the doctrine not work an injustice on the party
against whom the doctrine is to be applied?

22 Rains v. State of Washington, et al., 100 Wash. 2d at 665, 674 P.2d at 169.

23 The burden of persuasion on the application of either claim preclusion or issue preclusion
24 doctrines is on the party that advocates the preclusive effect of the prior judgment. In this case that
25 burden is on the trustee.

1 3. Application of Preclusion Principles

2 Linda Bays claims that she was not present at the dissolution trial because of illness. She had
3 sought to have the trial continued, but was unsuccessful. The trial was conducted in her absence. The
4 result was unfavorable to her. The court determined that David Bays had loaned Linda the \$52,406.81
5 which paid off the balance on the Ferguson Contract. It also ruled that David's loan was secured by
6 transfer to David of the seller's interest in the Real Estate Contract by the Fergusons. A subsequent deed
7 by David to Linda in satisfaction of the contract was set aside and the Real Estate Contract was
8 reinstated in David, with the balance owing on the contract of \$69,038.36, including interest. Linda
9 Bays challenged the dissolution court's Findings, Conclusions and Decree by post-trial motions, and
10 when those motions were denied, by appeal. The trial court's decisions were affirmed on appeal.

11 Linda argues that the Ferguson Contract was paid off and therefore could not be forfeited. The
12 trustee argues that Ms. Bays is precluded from taking that position by the dissolution decree. Linda Bays
13 challenges the preclusive effect of the dissolution decree on jurisdictional grounds, that the trial was
14 improperly conducted in her absence, and on the grounds that the question of pay off of the contract was
15 not decided by the dissolution court.

16 a. Jurisdiction of the Trial Judge

17 Linda Bays contends that Judge Bastine, a Spokane County Superior Court Judge, was
18 improperly assigned to hear the Pend Orielle County dissolution case and therefore had no jurisdiction
19 to decide the case. This challenge to Judge Bastine's authority to hear the case was raised by Ms. Bays
20 at the Court of Appeals. She lost on that issue and the Washington State Supreme Court denied her
21 request for review of that decision. Ms. Bays cannot challenge that decision in this court. She is barred
22 by both claim preclusion and issue preclusion.

23 b. Denial of Trial Continuance

24 The issue of whether the dissolution court erred when it denied Linda Bays' request for a
25 continuance based on her ill health, was also a subject of her appeal. The Court of Appeals considered
26 her argument and decided that the trial judge was within his reasonable discretion when he denied
27

1 Ms. Bays' motion for a continuance. In re Marriage of Bays, 2006 WL 281143 (2006). Ms. Bays is
2 bound by the decision of the Court of Appeals on the issue of the propriety of the denial of the
3 continuance. Ms. Bays cannot challenge that decision in this court. She is barred by both claim
4 preclusion and issue preclusion.

5 c. Was the Ferguson Contract Paid Off?

6 The dissolution court found that the balance owed by Linda Bays on the Ferguson Contract was
7 \$69,038.36 plus interest from October 30, 2002.

8 Linda Bays disputes that finding in this court. It is her contention that the Ferguson Contract was
9 paid in full. She contends that the money that she received from David Bays to pay off the Ferguson
10 Contract was received in full payment and satisfaction of the money David Bays owed her for cleaning
11 up his Ione residence. She explains the assignment to David of the vendor's interest in that contract, as
12 a device used to protect the Kettle Falls property from judgment creditor John Troberg.

13 The record reflects that Linda Bays filed a document with the dissolution court just prior to the
14 trial which articulates her position that the money received from David Bays which was used to pay off
15 the Ferguson Contract was money David owed to her for cleaning up his Ione residence. FACTS ¶ 19.
16 It is unclear whether Judge Bastine ever saw this pleading. If he did, his statement in his oral opinion
17 at the conclusion of the dissolution trial is puzzling. FACTS ¶ 21. Ms. Bays' sworn statement filed
18 with the dissolution court on October 1, 2002, six days before the trial, arguably explains Ms. Bays'
19 reference to work performed by her and how it would be applicable to the issues in the dissolution.

20 Likewise, David Bays' testimony at the dissolution trial, at least in the portion provided in the
21 record before this court, suggests he understood he was getting a half-interest in the Kettle Falls property
22 when he advanced the pay off funds. FACTS ¶ 20. This is at variance with the final decree, which
23 reinstates the Ferguson Contract and grants David Bays a vendor's interest in same, and treats the money
24 advance as a loan. Perhaps that inconsistency was explained in the balance of the dissolution trial
25 record, but that has not been provided to this court.

1 Ms. Bays filed post-trial motions challenging the court's Findings, Conclusions and Decree. It
2 is unclear what, if any, reference is made in those motions to her argument that the Ferguson Contract
3 was paid off with money David owed her. That argument does not appear in Ms. Bays' appellant's brief
4 filed with the Court of Appeals, nor is there mention of that argument in the Court of Appeal's decision
5 affirming the rulings of the dissolution court. [AP #137, pgs. 3-43; In re Bays, 2006 WL 281143 (2006)].
6 It is uncertain from the record before us that she ever pursued this argument before the dissolution court
7 beyond the October 1, 2002, pleadings or on appeal. One thing is certain however, she raised the issue
8 prior to the dissolution trial.

9 The failure to pursue an issue raised, or which could have been raised, before the trial court and
10 not pursued in the appeal of the trial court's decision is waived. Claim preclusion bars not only what
11 was raised, but what could have been raised.

12 The general doctrine is that the plea of res judicata applies, except in special cases, not
13 only to points upon which the court was actually required by the parties to form an
14 opinion and pronounce a judgment, but to every point which properly belonged to the
subject of litigation, and which the parties, exercising reasonable diligence, might have
brought forward at the time.

15 Sayward v. Thayer, 9 Wash. 22 at 24, 36 P. 966 (1894). This is true even if the matter was decided by
16 default rather than actually litigated. Baskin v. Livers, 181 Wash. 370, 43 P.2d 42 (1935). In the words
17 of Professor Trautman:

18 Claim preclusion, or res judicata, precludes the relitigation of the same claim or cause
19 of action. Unlike issue preclusion, which applies only to issues actually litigated, claim
20 preclusion applies to what might, or should, have been litigated as well as to what was
actually litigated, if all part of the same claim or cause of action.

21 60 Wash. L. Rev. at 813-14.

22 Here the parties' claims to the Kettle Falls property was actually litigated by the dissolution court,
23 although in the absence of Ms. Bays. David Bays' claim to the Kettle Falls property was determined by
24 the dissolution court, and that court's judgment was affirmed on appeal. The action by the trustee to
25 forfeit the contract is essentially enforcement of the dissolution decree. Ms. Bays is precluded by the
26 doctrine of claim preclusion from arguing there was nothing owed on the contract.

1 Even if the principle of claim preclusion was not applicable to these facts, the principle of issue
2 preclusion would apply. The issue in the dissolution case, the status of Linda and David Bays' interest
3 in the Kettle Falls property, is identical with the issue in this court.

4 There was a final judgment on the merits in the dissolution case and that judgment was affirmed
5 on appeal.

6 David Bays' successor bankruptcy trustee is in privity with David Bays in this dispute. 11 U.S.C.
7 § 541(a)(1). In fact, Joseph Esposito offered suggestions as to the form of the dissolution court's
8 Findings, Conclusion and Decree.

9 Application of the doctrine of issue preclusion will not work an injustice on Linda Bays. It
10 appears that she did raise the issue of payment for clean up of David's Ione residence as explanation for
11 David's advance of funds to pay off the Ferguson Contract prior to the trial of the dissolution. If the
12 dissolution court ignored her position, the issue was for her to raise in her post-trial motions and appeal.
13 The bankruptcy court had granted stay relief so that the dissolution litigation could proceed and
14 determine Linda and David's rights in the contested property, including the Kettle Falls residence.
15 (DB #51). The dissolution court did that, and its decision has been upheld on appeal. This court is
16 under an obligation to afford the state court judgment full faith and credit. 28 U.S.C. § 1738. Affording
17 issue preclusion effect to the judgment of the dissolution court, is consistent with the law of the State
18 of Washington and with recent authority in the Ninth Circuit. In re: Lopez, 367 B.R. 99 (9th Cir. BAP
19 2007).

20 Linda Bays is precluded from challenging the determination of the dissolution court that she
21 owed David Bays \$69,038.36 on the Ferguson Contract as of October 30, 2002, by application of both
22 the doctrines of claim preclusion and issue preclusion.

23 C. Compliance with Real Estate Contract Forfeiture Statute

24 Joseph Esposito, as trustee of the bankruptcy estate of David Bays, acted to enforce the Bays'
25 dissolution decree by undertaking actions to forfeit Linda Bays' interest in the Ferguson Contract. He
26 was acting as the seller under the contract. R.C.W. 61.30.010(9).

1 Linda Bays contends that Joseph Esposito did not comply with the terms of the Real Estate
2 Contract Forfeiture Statute (R.C.W. 61.30.010 - 61.30.911) Therefore, she argues the contract as not
3 forfeited.

4 The record reflects that after the Bays' dissolution decree had been entered, the trustee Joseph
5 Esposito instituted contract forfeiture proceedings. In these proceedings, the trustee sought to forfeit
6 Linda Bays' vendee's interest in the Ferguson Contract, which the dissolution decree had reinstated and
7 awarded to David Bays. On July 11, 2003, the trustee filed a "Notice of Intent to Forfeit" with Stevens
8 County and mailed copies of this notice to Linda Bays, Kelly Case and the Linjericks Society, among
9 others. FACTS ¶ 27. This notice advises that the Ferguson Contract payments are in default and that
10 if these defaults are not cured by October 20, 2003, the contract will be forfeited. [AP #502, pgs. 12-13].

11 On October 15, 2003, "Linda Bays and the Overseer of the Linjericks Society Plaintiffs," filed
12 a complaint with the Stevens County Superior Court seeking, among other things, an injunction against
13 forfeiture of the Ferguson Contract pursuant to R.C.W. 61.30.110. [AP #1, pg. 7] Joseph Esposito,
14 trustee of David Bays' bankruptcy estate, one of the defendants, removed the matter to this court where
15 it became this adversary proceeding. [AP # 1, pgs. 1-3].

16 On October 22, 2003, trustee Esposito filed a "Declaration of Forfeiture" with the Stevens
17 County Auditor and mailed copies of the Declaration to Linda Bays, Kelly Case, and the Linjericks
18 Society, among others. FACTS ¶ 30. This Declaration advised that interested parties have until
19 December 29, 2003, to commence an action to set aside the forfeiture. [AP #502, pgs. 22-23].

20 On December 19, 2003, "Linda Bays and THE OVERSEER OF THE LINJERICKS SOCIETY,
21 A CORPORATION SOLE, plaintiffs" filed a "COMPLAINT TO SET ASIDE FORFEITURE AND
22 FOR DAMAGES" in Stevens County Superior Court. [AP #793-3, pgs. 2-23]. As grounds for setting
23 aside the forfeiture, Linda Bays asserts that she had paid off the contract. The complaint names neither
24 Joseph Esposito nor the bankruptcy estate of David Bays as defendants nor were they served with
25 process. FACTS ¶ 31.

1 On December 10, 2008, Linda Bays filed an "Amended Complaint to Set Aside Forfeiture, for
2 Fraud, for Due Process Violations, for Equal Protection Violations, for First Amended Violation and for
3 Damages" in Stevens County Superior Court, Cause No. 2003-200-6333. [AP II #4, pgs. 11-25]. This
4 Amended Complaint adds Kelly Case as a plaintiff and, among others, Joseph Esposito, personally and
5 as trustee of David Bays' bankruptcy estate, defendants. This Amended Complaint was filed in the
6 Linda Bays' December 19, 2003, action to set aside the forfeiture. On December 15, 2008, Linda Bays
7 removed Stevens County case No. 2003-200-6333 to this court. [AP II #1].

8 Based on the above-mentioned litany of events, Linda Bays argues that the trustee was
9 unsuccessful in his attempt to forfeit the Ferguson Contract.

10 Linda Bays does not challenge that the required Notice of Intent and Declaration of Forfeiture
11 were appropriately filed with the Stevens County Auditor and served on her by mail.

12 She initiated a lawsuit on October 15, 2003, in Stevens County to enjoin the trustee from filing
13 a Declaration of Forfeiture. This lawsuit was filed prior to October 20, 2003, the date set in the Notice
14 of Intent and thus timely under the statute. R.C.W. 61.30.110(2). However, Linda Bays never obtained
15 a restraining order to prevent the filing of the Declaration of Forfeiture. "... [T]he commencement of
16 the action shall not of itself extend the time for cure." R.C.W. 61.30.110(2). Therefore, the trustee was
17 not prohibited from filing the Declaration of Forfeiture on October 22, 2003.

18 Upon the filing of the Declaration of Forfeiture, a new time line becomes applicable. Parties
19 seeking to set aside the forfeiture must both file a complaint to set aside the forfeiture and serve it within
20 sixty days of the time the Notice of Forfeiture was recorded. R.C.W. 61.30.140(2). The Declaration of
21 Forfeiture filed by the trustee on October 22, 2003, and mailed to Linda Bays sets the time in which the
22 suit to set aside the forfeiture must be brought as December 29, 2003. Linda Bays met that time line by
23 filing her complaint to set aside the forfeiture with the Stevens County Superior Court on December 19,
24 2003. The record before this case does not reflect whether service of the required summons and
25 complaint on the defendants named in that complaint was made within the time line as outlined in the
26 statute. R.C.W. 16.30.140(2). The record does reveal, however, that Joseph Esposito, trustee of the

1 David Bays' bankruptcy estate, was neither named as a party defendant nor served within the statutory
2 time line. FACTS ¶ 31. Since the trustee was the one who initiated the forfeiture of the contract and
3 filed the Declaration of Forfeiture, the bankruptcy estate would be the beneficiary of the forfeiture. The
4 trustee was an absolute necessary party to a suit to set aside the forfeiture. Ms. Bays has tendered no
5 explanation which would excuse these omissions on her part. The amending of the complaint nearly five
6 years later to add the trustee as a party defendant does not solve the problem. Ms. Bays did not timely
7 seek to set aside the forfeiture as to the trustee and is barred from doing so now.

8 Ms. Bays' next challenge to the forfeiture process turns on an unresolved question of fact,
9 whether the trustee gave appropriate notice of the intended forfeiture to Kelly Case. Kelly Case alleges
10 that the address the forfeiture notices were sent to was not his address, that he did not reside there at the
11 time the notices were given and, therefore, the forfeiture process fails as to him. If Mr. Case prevailed
12 on the issue of improper notice, his interest was not forfeited. The seller would then be required to
13 proceed under the terms of R.C.W. 61.30.080(3) to seek a court order to allow forfeiture and would be
14 required to join and serve all the other parties which were given the required notices. It appears that
15 process allows the trial court some discretion in fashioning appropriate relief to fit the circumstances.

16 Ms. Bays argues that if Kelly Case was not properly given notice then the forfeiture is void as
17 to her. The statute specifically requires that notice be given to "the last holder of record of a purchaser's
18 interest." Failure to comply with this provision renders the forfeiture void. R.C.W. 61.30.040(1).
19 Assuming that Kelly Case did not receive appropriate notice in the forfeiture proceeding and he held a
20 purchaser's interest in the Kettle Falls property, then the trustee's attempts to forfeit would be for naught.

21 The Quit Claim Deed by which Kelly Case obtained an interest in the Kettle Falls property was
22 given as security for a loan of money. FACTS ¶ 15. The definition of this term "purchaser" in the
23 forfeiture statute provides, "However, 'purchaser' does not include an assignee or any other person
24 whose only interest or claim is in the nature of a lien or other security interest." R.C.W. 61.30.010(7).
25 By definition, Kelly Case did not hold a "purchaser interest" in the Kettle Falls property. Therefore, the
26 failure to give him appropriate notice of the forfeiture would not "void" the forfeiture pursuant to the
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1 terms of R.C.W. 61.30.040(1). Rather for a holder of a security interest given insufficient notice, the
2 remedy would be pursuant to R.C.W. 61.30.080(3), which allows the court to fashion a remedy
3 appropriate for the circumstances. In such a court action, all parties entitled to the required notice must
4 be joined as parties. Although the court may decide to set aside the forfeiture in that proceeding, R.C.W.
5 61.30.080(3) does not have the mandatory language of R.C.W. 61.30.040(1), which requires voiding the
6 forfeiture if a purchaser is not properly noticed.

7 Thus, even if Kelly Case was not given the required notices, that fact in itself would not render
8 the entire contract forfeiture procedure void and reinstate Linda Bays' interest. Rather, it would depend
9 on what remedy, if any, was available to Kelly Case.

10 **II. KELLY CASE VS. TRUSTEE AND DAVID BAYS**

11 The court now turns to the question of what interest, if any, Kelly Case has in the Kettle Falls
12 property.

13 Kelly Case and Linda Bays entered into a "Loan Contract" dated November 27, 2000, whereby
14 Kelly Case agreed to loan money to Linda Bays. Linda Bays agreed to give Kelly Case a Quit Claim
15 Deed as security for repayment on her Kettle Falls residence. [AP #686-3, pgs. 2-3]. On the same date,
16 Linda Bays executed a "Quit-Claim Deed" to Kelly Case. [AP 686-4, pg. 2]. FACTS ¶ 15. Kelly Case
17 recorded this "Quit-Claim Deed" on August 7, 2001. FACTS ¶ 18. On July 11, 2003, Joseph Esposito,
18 then trustee of David Bays' bankruptcy estate, had a "Notice of Intent to Forfeit" mailed to Kelly Case
19 and addressed to "Kelly Case, P.O. Box 301, Kettle Falls, WA 99141." FACTS ¶ 27. Kelly Case
20 disputes that was his correct address at the time. On September 26, 2003, Linda Bays obtained a
21 cashier's check in the sum of \$2,400.00 payable to Kelly Case. [AP #686-5, pg. 2]. This cashier's check
22 bore the handwritten words "contract dated November 2000 paid in full + extra money" Kelly
23 Case, after first obtaining legal advice, cashed this check and took the money. FACTS ¶ 28. At the time
24 Kelly Case took the money tendered by Linda Bays, he understood it was being tendered to him in
25 complete satisfaction of all obligations owed by Linda Bays on the contract. [AP #686-2, pg. 9; Dep.,
26 pg. 28, ln. 9 thru Dep., pg. 30, ln. 1]. By accepting that money under those terms, Linda Bays' obligation

1 to Kelly Case on the Loan Contract secured by the Quit-Claim Deed was paid in full. Upon acceptance
2 of that money, there was no debt secured by the Quit-Claim Deed/Mortgage. With no debt to secure,
3 there was no longer a mortgage.

4 If Kelly Case received the Notice of Intent to Forfeit and the Declaration of Forfeiture, this fact
5 would explain why he didn't seek to join his mother's lawsuit to enjoin the forfeiture or in her lawsuit
6 to set aside the forfeiture. If he was properly noticed, this failure would bar his attempts to challenge
7 the forfeiture at a later time. Being added by amendment as a plaintiff to the injunction suit and in the
8 suit to set aside the forfeiture would be time barred pursuant to the terms of the statute. R.C.W.
9 61.30.110; R.C.W. 61.30.140.

10 Even if the court was to conclude that the notices sent to Kelly Case were defective pursuant to
11 the statute, he would have no remedy under R.C.W. 61.30.080(3). His mortgage on the property having
12 been paid off prior to the Declaration of Forfeiture, he would have no standing to challenge the
13 forfeiture.

14 Whether Kelly Case received appropriate notice of the foreclosure proceedings or not, he is
15 barred from challenging this forfeiture.

16 **III. CONCLUSION**

17 **A. As to Linda Bays**

18 Linda Bays seeks in her complaint to quiet title in the Kettle Falls property and to clear that
19 property of the claims of the David Bays' bankruptcy estate and David Bays. To do this, she must
20 challenge the Findings of Fact, Conclusions of Law and Decree entered in the Bays' dissolution and
21 affirmed on appeal by arguing that the Ferguson Contract had been paid in full and that nothing was
22 owed on it to David Bays. Linda Bays is precluded from making that argument by both the doctrine of
23 claim preclusion (res judicata) and issue preclusion (collateral estoppel).

24 Ms. Bays also challenges the trustee's forfeiture of her interest in the Ferguson Contract. The
25 essence of that challenge is her claim that nothing was owed on the contract, which argument is
26 precluded as a result of the dissolution decree. However, she also asserts a number of other procedural
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1 challenges to the forfeiture. She sought to enjoin the forfeiture, but she did not obtain an injunction
2 before the Declaration of Forfeiture was filed. She also sought to set aside the forfeiture, but failed to
3 name or serve the forfeiting trustee in the time frame required by the forfeiture statute. She is therefore
4 barred from challenging the forfeiture in her own capacity.

5 Linda Bays also seeks to set aside the forfeiture on the grounds that Kelly Case was not properly
6 noticed in the forfeiture proceeding and therefore the whole process is void. Even if Kelly Case was not
7 properly noticed, a fact that the trustee disputes, that would not in itself void the forfeiture of Linda
8 Bays' interest in the contract. Rather, the matter would come before the court for fashioning of an
9 appropriate remedy under the circumstances. Although Linda Bays would be entitled to being joined
10 in that proceeding, she would still be precluded from asserting in her own behalf that there was nothing
11 owing on the contract.

12 B. As to Kelly Case

13 The evidence reflects that Kelly Case's interest in the Kettle Falls property was based on a Quit
14 Claim Deed given to him by his mother Linda Bays as security for a loan. The evidence also reflects that
15 Linda Bays tendered payment in full satisfaction of that loan and that Kelly Case accepted that payment.
16 As a result, nothing was owed to Kelly Case on the obligation secured by the Quit Claim Deed. He
17 therefore had no personal interest in the Kettle Falls property and therefore was not entitled to notice in
18 the forfeiture proceeding and has no standing to challenge the forfeiture, whether he received appropriate
19 notice or not.

20 C. Judgment Should Be Entered

21 A judgment should be entered quieting title in the Kettle Falls property in Tony Grabicki, trustee
22 of David Bays' bankruptcy estate, and confirming that the interests of Linda Bays and Kelly Case in that
23 property have been forfeited.

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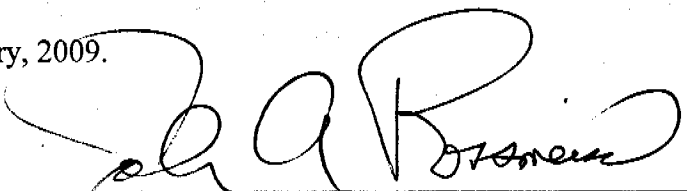
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The court having herewith resolved these claims and issues, and they being the only matters remaining unresolved in this adversary proceeding, the judgment entered in this case shall be the final judgment in this adversary proceeding.

DONE this 9th day of February, 2009.



JOHN A. ROSSMEISSL
Bankruptcy Judge

APPENDIX

REFERENCE CODE

[AP # ____]	Adversary Proceeding No. 03-00237 - Docket No.
[AP II # ____]	Adversary Proceeding No. 08-80140, Docket No.
[DB # ____]	David Bays Bankruptcy Case, No. 01-05127, Docket No.
[LB # ____]	Linda Bays Bankruptcy Case, No. 02-07687, Docket No.
FACTS ¶ ____	The indicated paragraph in the FACTS section of this decision