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**United States Bankruptcy Court
Eastern District Of Washington**

In Re:

DAVID WALLACE BAYS,

Main Case Number: 01-05127

Debtor(s).

LINDA BAYS; KELLY CASE ,

**Adversary
Number:**

A03-00237

Plaintiff(s),

vs.
DAVID BAYS; DOUG
LAMBARTH and JANE DOE
LAMBARTH; JOE ESPOSITO
and JANE DOE ESPOSITO;
GARY STENZEL and JANE DOE
ESPOSITO; PAUL BASTINE and
JANE DOE BASTINE; JOE
WITTSTOCK and JANE DOE
WITTSTOCK; DAVID HARDY
and JANE DOE HARDY;
SPOKANE COUNTY COURT,

FILED

FEB 25 2008

**U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

Defendant(s).

DECISION RE: SLANDER OF TITLE

FACTS AND PROCEDURE

The decree dated October 30, 2002, that dissolved the marriage between Linda Bays and David Bays provides the following transfers of real property interests are set aside and void:

(5) the real estate contract dated 01/12/95 between Linda J. Svare, as seller, and Linjericks Society, an incorporated Religious Family of God, a pseudonym for Linda Bays, as purchaser,...

(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

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- beneficiary...
- (7) The Quit Claim Deed with David Bays, as grantor, and Linda Bays and Linjericks Society, a pseudonym for Linda Bays, a grantees...
- (8) The Quit Claim Deed dated November 27, 2000, with Linda Bays as grantor, and Kelly Case, as grantee...
- (9) The Statutory Warranty Deed dated October 13, 2000, with David Bays, as grantor and Linda Bays as grantee...

The decree also provides the following real property interests were reinstate and enforceable:

- (10) The real estate contract dated October 5, 1987, between Fergusons, as sellers, and the Symonds, as purchasers...
- (11) The deed and seller's assignment of real estate contract dated June 15, 1999, whereby David W. Bays acquired the Fergusons' vendor's interest in the original real estate contract between Fergusons, as sellers, and Symonds, as purchasers...

[DB CT #62].

After the entry of their decree and relying upon it's holding, Bankruptcy Trustee Joseph Esposito commenced forfeiture proceedings on the reinstated Fergusons contract.

Plaintiffs, Linda Bays, Kelly Case, and the Linjericks Society¹, challenge the validity of the decree to the extent it voids these transfers, reinstates the Ferguson contract and forfeits their interest. They also sue for damages resulting from the slander of their respective titles to the property. Defendants Trustee Joe Esposito, David Bays and Douglas Lambarth assert the plaintiffs are bound by the decree, it's voidance of the transfers and the subsequent contract forfeiture. Accordingly they assert that the plaintiffs have no cause of action for slander of title against them.

The matter comes before this court on Motion for Summary Judgment.

DISCUSSION

I. The Elements of Slander of Title

The Washington State Court of Appeals set out the elements of slander of title in the case of Pay'n Save Corp. v. Eads 53 Wash.App. 443 at 448; 767 P.2d 592 at 595 (1989) as follows:

¹The Linjericks Society has been dismissed without prejudice from this action because it was not represented by counsel. [AP #49, 135, 140, 192-199].

1 The necessary elements of a slander of title action are that the words; (1)
2 must be false; (2) must be maliciously published; (3) must be spoken with
3 reference to some pending sale or purchase of the property; (4) must result in
4 a pecuniary loss or injury to the plaintiff; and (5) must be such as to defeat
5 the plaintiff's title. *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 375, 617
6 P.2d 704 (1980).

7 The court will focus its analyses on the elements (1) and (3).

8 II. What is the Status of Title of the Plaintiff's in the Property in Questions?

9 The primary focus of the slander of title count of plaintiff's complaint is on the Kettle
10 Falls property. The court will examine the status of the title in that property, to determine if
11 the defendants' actions slandered the plaintiffs' interest.

12 A. Linda Bays

13 The defendants' actions were taken to enforce the decree entered in the dissolution
14 case and their actions were consistent with the terms of that decree. Linda Bays is bound
15 by the terms of that decree. Therefore Linda Bays has no cause of action for slander of
16 title by these defendants. The status of title between Linda Bays and David Bays,
17 including his successor in interest, the bankruptcy Trustee was finally decided by the
18 dissolution decree. That final decision, which is entitled to full faith and credit by this court,
19 precludes Linda Bays' claim. State v. Mullin-Coston 152 Wash.2d 107, 113, 95 P.3d 321,
20 324 (2004); In re Harman 250 F.3d 1240, 1246 (9th Cir. 2001).

21 B. Kelly Case

22 The dissolution decree purports to void a number of transfers affecting Kelly Case's
23 interest in the Kettle Falls property.

24 The dissolution dealt with the marital status of David and Linda Bays and their
25 respective interests in their separate and community assets. Kelly Case was not a party to
26 that dissolution case and his interest in the Kettle Falls property was ancillary to the
27 primary marital dispute. This is not an issue of claim preclusion (*res judicata*), but rather of
28 issue preclusion (*collateral estoppel*).

1. The Elements of Issue Preclusion

1 The elements of issue preclusion under Washington law were stated in the case of
2 State v. Mullin-Coston, where the court said:

3 The party seeking to enforce the rule must show that:
4 “(1) the issue decided in the prior adjudication must be identical with the one
5 presented in the second; (2) the prior adjudication must have ended in a final
6 judgment on the merits; (3) the party against whom the plea of collateral
7 estoppel is asserted must have been a party or in privity with a party to the
8 prior litigation; and (4) application of [the] doctrine must not work an injustice.”

9 152 Wash.2d 107, 114, 95 P.3d 321, 324 (2004)(citing State v. Bryant, 146 Wash.2d 90,
10 98-99, 42 P.3d 1278 (2002)).

11 The court will analyze how these elements apply on the issue of Kelly Case's
12 interests in the Kettle Falls property.

13 2. Identical Issue

14 The issue presently before this court is the status of Kelly Case's interest in the
15 Kettle Falls property. The dissolution decree purports to determine Kelly Case's interest in
16 that property. It is the same issue.

17 3. Final Judgment on the Merits

18 The Court of Appeals in affirming the decision in the Bays dissolution dealt with
19 interest of Kelly Case in the property as follows:

20 The issue is whether the court erred in voiding transactions between Mr.
21 Bays, Ms. Bays, Kelly Case and the Linjerick Society.

22 ...[We] decline to consider this issue for lack of argument.

23 This is not a decision on the merits of the argument.

24 4. Against a Party or a Person in Privity

25 Kelly Case was never a party in the Bays' dissolution case. David Bays, Douglas
26 Lambarth and Joseph Esposito all argue that Kelly Case was in privity with Linda Bays and
27 as a result is bound by the dissolution decree.

28 The concept of privity in the context of issue preclusion is an issue of timing, i.e.
when did the litigant obtain an interest in relation to the adjudication.

Privity within the meaning of the doctrine of res judicata is privity as it

1 exists in relation to the subject matter of the litigation, and the rule is
2 construed strictly to mean parties claiming under the same title. It denotes
3 mutual or successive relationship to the same right or property. The binding
4 effect of the adjudication flows from the fact that when the successor
5 acquires an interest in the right it is then affected by the adjudication in the
6 hands of the former owner.

7 United States v. Deaconess Med. Center, 140 Wash.2d 104, 111, 994
8 P.2d 830 (2000). Why privity is strictly construed in the context of claim or
9 issue preclusion has been explained as follows: The justification for a strict
10 construction is simple. Where the parties against whom collateral estoppel is
11 being asserted have had no previous opportunity to raise certain issues, their
12 claim on those issues should not be barred. On the other hand, one whose
13 property interests have already been asserted and litigated by his or her
14 predecessor should be prevented from reasserting and relitigating the same
15 issues.

16 State ex rel. Dean by Mottet v. Dean, 56 Wash.App. 377, 381, 783
17 P.2d 1099 (1989).

18 According to the rule as stated in Deaconess Medical Center and
19 Mottet v. Dean, privity based on a successive relationship to the same
20 property arises only if the adjudication of an owner's asserted rights in the
21 property has already occurred when the owner transfers the property to a
22 successor. In that situation, collateral estoppel applies to prevent the
23 successor from relitigating issues already determined against the original
24 owner.

25 Spahi v. Hughes-Northwest, Inc. 107 Wash.App. 763, 775-776, 27 P.3d 1233, 1238-1239
26 (Div. 1, 2001).

27 Kelly Case acquired an interest in the Kettle Falls property from Linda Bays by
28 documents dated November 27, 2000, a "Loan Contract" [AP # 464, appendix "B"] and a
"Quit Claim Deed" [AP # 464, appendix "C"]. This predates the filing of the Bays'
dissolution in April of 2001. It was recorded August 7, 2001. [AP # 464 pg. 4]. The trial of
the dissolution took place on October 7, 2001. The Findings of Fact, Conclusions of Law
and Decree were entered on October 30, 2002. [DB CT # 61 & 62].

Kelly Case acquired his interest in the Kettle Falls property prior to the filing of the
dissolution case and prior to the adjudication of the disputes between David and Linda
Bays. He is not in privity with Linda Bays for purposes of application of issue preclusion.

5. Work an Injustice

An action to set aside a fraudulent conveyance ordinarily requires joinder of the
transferee as a necessary party. Washington State Superior Court Rule CR19. Failure to

1 join the transferee threatens depriving the transferee of his interest in property without due
2 process of law.

3 The defendants David Bays, Douglas Lambarth and Joseph Esposito argue that
4 their failure to join Kelly Case in the dissolution is excused by Kelly Case's knowledge of
5 and participation in the dissolution case.

6 The record reflects that Kelly Case did provide a number of statements to the
7 dissolution court. [AP # 464, pg. 5-6]. One dated August 12, 2002, filed by Linda Bays with
8 the Superior Court October 1, 2002. [AP # 464, appendix D] and another filed with the
9 Superior Court December 4, 2002. [AP # 464, appendix E]. In both of these documents
10 Kelly Case asserts interest in the Kettle Falls property.

11 The defendants David Bays, Douglas Lambarth and Joseph Esposito assert that
12 this participation by Kelly Case bars him from challenging the application of issue and claim
13 preclusion doctrines in this court. In support of this argument these defendants rely on the
14 case of Hackler v. Hackler 37 Wash.App. 791, 683 P.2d 241 (Div. 2, 1984).

15 In Hackler, the father of one of the parties to a dissolution, testified at trial that the
16 real property in question had been transferred to the married couple. He did not mention
17 that the property had been subsequently quit claimed back. After an adverse decision by
18 the dissolution court, the parents recorded the quit claim deed and asserted their interest in
19 the property. Because the parents had acquired their interest by quit claim deed prior to
20 the dissolution, they were not in privity. Hackler 37 Wash.App. 795, 683 P.2d 243.
21 However the court ruled that the parents were bound by the dissolution decree in light of
22 their testimony at the trial.

23 One who was a witness in an action, fully acquainted with its character
24 and object and interested in its results, is estopped by the judgment as fully
as if he had been a party.

25 Hackler 37 Wash.App. at 795, 683 P.2d at 243 (citations omitted).

26 The Court notes that in Hackler the party against whom issue preclusion was
27 applied testified in the trial and was estopped by that inconsistent testimony. Here Kelly

28 DECISION/6
02/25/08

1 Case did not testify and his position in the documents filed is consistent with his current
2 position. There is no issue of estoppel arising from his previous statements.

3 These defendants argue that Kelly Case, knowing that his property rights were an
4 issue in the dissolution case, could have intervened in the dissolution case pursuant to
5 Washington State Superior Court CR 24. The defendants attempt to avoid the mandate on
6 them in CR 19 of joining necessary parties. This impermissibly shifts their burden of joining
7 a necessary party. Intervention under CR 24 is not mandatory but rather a choice of the
8 intervening party. If David Bays, Douglas Lambarth and Joseph Esposito intended to bind
9 Kelly Case by the rulings in the dissolution decree they should have joined him as a party.
10 Failure to obtain **in personam** jurisdiction over Kelly Case is fatal to their argument. In re
11 McKean 110 Wash.App. 191, 38 P.3d 1053 (Div. 2, 2002).

12 6. Conclusion re Status of Title

13 Kelly Case is not bound by the dissolution decree as it applies to his interest in the
14 Kettle Falls real estate. The defendants David Bays, Douglas Lambarth, and Joseph
15 Esposito, can not rely on that decree to establish their title in the property and use that title
16 in their defense of the case slander of title cause of action. The status of Kelly Case's
17 interest in the Kettle Falls property is unresolved. None of these parties is entitled to
18 summary judgment on this element of the cause of action.

19 III. In Reference to a Pending Sale

20 Neither Linda Bays or Kelly Case allege that there was a pending sale in regard to
21 any of the property in question. Since this is a necessary element of an action for slander
22 of title, summary judgment should be rendered against the plaintiffs. See Pay'n Save
23 Corp. v. Eads 53 Wash.App. at 448, 767 P.2d at 595 (affirming a dismissal of a slander of
24 title claim because the plaintiff failed to prove a pending sale or purchase of property).

25 IV. Contract Forfeiture

26 Joseph Esposito in his capacity as Trustee of the David Bays bankruptcy estate has
27 moved to forfeit the real estate contract between David Bays as successor in interest to

28 DECISION/7
02/25/08

1 Fergusons sellers and Linda Bays purchaser. Kelly Case has raised questions as to the
2 adequacy of the notice given in that forfeiture process. The court makes no determination
3 in this decision as to consequences of Esposito's contract forfeiture on the title to the Kettle
4 Falls property.

5 CONCLUSION

6 Linda Bays' motion for summary judgment on her slander of title cause of action
7 should be denied and her slander of title cause of action dismissed.

8 Kelly Case's motion for summary judgment on his slander of title cause of action
9 should be denied and his slander of title cause of action dismissed.

10 David Bays', Douglas Lambarth's, and Joseph Esposito's motion for summary
11 judgment on the slander of title cause of action should be granted and Linda Bays' and
12 Kelly Case's cause of action for slander of title dismissed.

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14 DATED this 25 day of February, 2008

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19 _____
20 JOHN A. ROSSMEISSL, Bankruptcy Judge