Bishop of Vict. Corp. Sole v. Finley

Court of Appeals of Washington, Division Two

May 11, 2004, Filed

No. 29321-8-II

Reporter
2004 Wash . App. LEXIS 974 *

BISHOP OF VICTORIA CORPORATION SOLE, a British Columbia, Canada, corporation, Respondent, v. JOSEPH C. FINLEY, an individual, and the marital community composed of JOSEPH C. FINLEY and JANE DOE FINLEY, Appellants, CORPORATE BUSINESS PARK, LLC, a Washington limited liability company, Defendant. JOSEPH C. FINLEY, Appellant, v. BISHOP OF VICTORIA CORPORATION SOLE, a Canadian corporation; UNITED HOMES VICTORIA, LTD., a Canadian corporation, Respondents, CORPORATE BUSINESS PARK LLC, a Washington limited liability company; VICTORIA PROPERTIES, INC., a Canadian corporation; NORMAN ISHERWOOD, individually and as a marital community with JANE DOE ISHERWOOD; DAVID OSMOND, individually and as a marital community with JANE DOE OSMOND, Defendants.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Bishop of Vict. Corp. Sole v. Finley, 121 Wn. App. 1041, 2004 Wash. App. LEXIS 1660 (2004)*

Amended by, Reconsideration denied by *Bishop of Vict. Corp. Sole v. Finley, 2004 Wash. App. LEXIS 1212 (Wash. Ct. App., June 15, 2004)*

Prior History: Appeal from Superior Court of Thurston County. Docket No: 00-2-01783-6. Date filed: 09/06/2002. Judge signing: Hon. Daniel J Berschauer.

Disposition: Affirmed.

Counsel: For Appellant(s): Cleveland Stockmeyer, Cleveland Stockmeyer PLLC, Tukwila, WA.

For Respondent(s): Gayle Edward Bush,

Attorney at Law, Bush Strout & Kornfeld, Seattle, WA. Richard M Clinton, Dorsey & Whitney LLP, Seattle, WA. Todd Stuart Fairchild, Dorsey & Whitney LLP, Seattle, WA. Kenneth Wendell Masters, Attorney at Law, Bainbridge Island, WA. Katriana Louise Samiljan, Bush Strout & Kornfeld, Seattle, WA. Charles Kenneth Wiggins, Attorney at Law, Bainbridge Island, WA.

Judges: Authored by Christine Quinn-Brintnall. Concurring: Elaine Houghton, J Robin Hunt.

Opinion by: Christine Quinn-Brintnall

Opinion

QUINN-BRINTNALL, C.J. -- Following the trial court's entry of *CR 54(b)* findings, Joseph C. Finley, a member of a limited liability company in receivership, appeals a trial court order canceling his *lis pendens* and the trial court's corresponding award of fees and costs to the holder of the deed to the **[*2]** property against which the *lis pendens* was filed. Finley also appeals an order dismissing his claims against the holder of the deed, the assignee of a money judgment against the company, and the members personally. He further appeals "all . . . related, interlocutory orders" (7 Clerk's Papers (CP) at 1217), including the trial court's order authorizing partial settlement between the receiver and the judgment assignee authorizing sale of the property and the trial court's denial of his motions to treat judgment as satisfied and to prevent transfer of the deed to the assignee.

Finley claims that the judgment against the company and its members was satisfied by operation of law when it was transferred to the assignee, which he characterizes as a "straw man" for his company co-member. Viewing all issues in the light most favorable to Finley, there is no evidence that the assignee is his co-member's agent or "straw man" or that the claims Finley made against his company co-member apply to the assignee.

Finley also claims that he did not waive his claim to the company's only asset, property in Lacey, Washington. The trial court approved a settlement between the company's receiver **[*3]** and the judgment assignee authorizing the receiver to sell the property within one year or, if unable to do so, to deliver the deed for the property to the assignee. Finley, believing that the parties had found a buyer for the property, acquiesced in the settlement and his attorney even drafted an order to this effect. But when the receiver was unable to sell the property, Finley tried to stop delivery of the deed, claiming that he had an interest in the property and had not consented to its transfer. The record is to the contrary and shows that Finley actually consented to the settlement, thereby waiving any claim he might have had to the title to the property; the court's removal of *lis pendens* was appropriate.

We affirm the trial court. But we reject the respondents' contentions that the appeal is frivolous and decline to award attorney fees on appeal.

FACTS

Bishop of Victoria Corporation Sole (BV), holds real property assets of the Roman Catholic Diocese of Victoria, British Columbia, Canada. In 1997, Bishop Remy DeRoo, head of BV, entered into partnership with Finley, and together they created Corporate Business Park, LLC (CBP) in order to purchase a 160-acre parcel **[*4]** of land in Lacey, Washington. The Bishop hoped that sale of the Lacey property would generate proceeds to repay money the Bishop had previously loaned to Finley. CBP obtained a $ 5.25 million loan to purchase the property. BV, Finley, and CBP each co-signed a promissory note to the lender, and BV agreed to pay debt service after loan reserves ran out. CBP listed the property for sale in July 1997 for $ 18 million.

In June 1998, CBP refinanced the debt through AG Capital Funding Partners, L.P. (AGC). CBP, BV, and Finley each signed a $ 7.5 million promissory note and executed a deed of trust for the Lacey property as security. When loan reserves ran out in November 1998, BV resumed making mortgage payments. [1] **[*5]** In April 1999, after Raymond Roussin replaced DeRoo as Bishop, BV stopped making monthly payments on the property, and CBP defaulted on the loan. Apparently, BV refused to make further payments unless Finley agreed to sign an "addendum" to the company agreement, which he did in May 1999. [2] According to Finley, BV concurrently promised to resume payment of the debt service, although the addendum does not mention this.

BV did not make the mortgage payments, and on May 27, 1999, AGC sued for foreclosure in the Thurston County Superior Court. In response to the AGC lawsuit, BV negotiated a series of forbearance agreements with AGC while it tried to obtain new financing. BV brought interest payments on the loan current through the end of 1999, but again stopped paying after December 31, 1999. On March 17, 2000, AGC obtained a judgment **[*6]** for $ 8,154,895.83 against CBP and individually against BV and Finley, which included an order to apply the proceeds from a sheriff's sale of the property toward payment of the judgment. The AGC judgment accrued interest at a yearly rate of 18 percent, based on the contract rate of 13 percent, plus five percent "default interest" under the promissory note.

In order to protect its other Canadian assets (including hospitals, churches, and schools), BV issued an Offering Statement in which it

[1] BV's counsel estimated that after the loan proceeds ran out, BV's payments on the loan were $ 60,000 per month.

[2] But the record also indicates that the addendum was signed "largely at Finley's request, because he wanted to have an agreement to take into some other court proceeding to show that he had considerable debt." 4 CP at 701. *See also* CP 988 (May 7, 2002 Deposition of Vernon McLeish, BV financial officer ("McLeish dep.") at 16). The 1999 addendum set out the amounts Finley owed to BV and provided that when those amounts were paid off, BV would transfer its ownership interest to Finley. The addendum installed McLeish, BV's financial advisor, as Finley's co-manager of the company, replacing former co-manager Muriel Clemenger, financial advisor to the former Bishop.

proposed to issue debentures to Victoria Diocese parishioners who raised money to purchase the judgment from AGC. Under a June 1, 2000 Deed of Trust and Mortgage between BV and United Homes Victoria, Ltd. (UHV), [3] BV agreed to issue and be held liable on the debentures, and UHV would act as trustee under Canadian law for the parishioner debenture holders. The debentures, issued to 2,100 parishioners, were to pay simple interest at a rate of six percent per year, due on maturity. BV arranged for UHV to purchase the AGC judgment, and any proceeds from the judgment were to act as security for the debenture holders. BV also pledged its Canadian lands to UHV as collateral to secure repayment. In August **[*7]** 2000, UHV acquired the AGC judgment for $ 8.296 million. [4] And on January 9, 2001, UHV obtained a writ of execution and order of sale for the Lacey property.

[3] UHV was incorporated in British Columbia in 1991 by realtor Wayne Strandlund. UHV later changed its name to Fisgard Asset Management but, at the request of the trial court, the parties continued to refer to the entity as UHV to avoid confusion; we continue that practice on appeal.

[4] Finley claims that any surplus funds from the sale of the Lacey property would go to BV, not UHV, and that UHV holds the deed to the Lacey property merely as collateral for what is essentially a loan to BV, rather than as an outright owner. In support, he points to the testimony of McLeish that if the funds from the sale of the property did not cover the entire amount owing under the debenture offering, BV would have to make up the difference. According to the McLeish deposition, as well as section 3.05 of the debenture offer's information statement, if the Bishop pays off the debentures, "the estate and rights hereby granted shall cease and become utterly null and void and the Lands shall revert to and revest in the Bishop." 2 CP at 217-18. But the declaration of Strandlund, UHV president, establishes that UHV used the debenture proceeds to purchase the AGC judgment, note, and deed of trust. And McLeish stated that if there was excess from a sale of the property, he was "not sure legally what happens to that money. My sense would be it belongs to the debenture holders." 6 CP at 1005. The record is therefore unclear as to what would happen to any excess money from such a sale.

[*8] In September 2000, over Finley's objections, BV filed a petition seeking appointment of a receiver for CBP. On November 17, 2000, Finley, acting for CBP, filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code (*11 U.S.C. §§ 1101 et. seq.*). On April 11, 2001, after the bankruptcy court had dismissed Finley's bankruptcy case for the second time, Finley filed claims against BV, UHV, and others, in the Thurston County Superior Court. He sought damages, a declaration that the judgment was satisfied when UHV purchased it, and a declaration that BV's and UHV's claims to CBP profits should be subordinated to those of all unsecured creditors.

On April 13, 2001, the trial court appointed a receiver for CBP and authorized him to sell the Lacey property. Soon after, the receiver and UHV agreed that UHV would cancel its execution sale and give the receiver one year to sell the property. If the property failed to sell within the year, then the receiver would tender a deed in lieu of foreclosure on April 27, 2002. Barclay's North, Inc. had approached the receiver and begun the process of negotiating the final price of the sale and, on May 3, 2001, the **[*9]** receiver moved that the court authorize the partial settlement and sale of the property.

On May 16, 2001, Finley filed a response to the receiver's motion, stating that he would not object to the proposed sale at the agreed price but that he did not "impliedly or expressly waive any claims against BV and/or the other cross-claim defendants in this matter." 1 Clerk's Papers (CP) at 29.

Finley also asked that any sales proceeds be deposited into the court registry pending resolution of his claims.

At the May 25, 2001 oral argument, the trial court stated that it would not include an express written reservation in the order, but it "indicated, at least orally, [Finley] would always have the right to raise some issue before [the receiver] runs the money over to [UHV]." Report of Proceedings (RP) (May 25, 2001) at 20. The court explained that putting this type of reservation in a written order would dissuade prospective buyers, and "it would be in everybody's interest to be silent." RP (May 25, 2001) at 20. The court confirmed that nothing in the order would prohibit Finley from seeking to bar transfer of any proceeds from a sale to UHV.

Following oral argument, **[*10]** the court orally authorized the sale of the property to Barclay's [5] and authorized the partial settlement agreement between UHV and the receiver. The court's written order authorized the receiver's settlement and specified that "[UHV] will not proceed with its foreclosure actions, and, if the Property has not been sold by the Receiver by 26 April 2002, the Receiver will surrender a Deed-in-lieu of foreclosure" to UHV. 1 CP at 64. On August 1, Finley's counsel moved for entry of a similar order ("Order Re: Stay of Foreclosure Action") directing that UHV not proceed with foreclosure, emphasizing that the receiver "*shall* surrender a deed in lieu of foreclosure" to UHV. 3 CP at 545 (emphasis added). This order was approved by consent of the parties on August 10, 2001.

The sale to Barclay's fell through and the receiver was unable to sell the property before the transfer deadline. On April 5, 2002, three **[*11]** weeks before the deadline, Finley filed a motion that the court treated as a summary judgment motion (1) seeking an order that the foreclosure judgment had been satisfied and (2) directing the receiver not to transfer title to UHV, pending a trial on the merits of Finley's claims. On May 17, 2002, the court ruled against Finley on both issues. That same day Finley filed a *lis pendens* and an amended *lis pendens* against the property.

On July 7, 2002, the receiver recorded the deed transferring the property to UHV. The following month, in August 2002, UHV moved to dismiss all of Finley's claims against UHV and to cancel the *lis pendens*. Then, on September 6, 2002, following oral argument, the trial court dismissed the claims against UHV, canceled Finley's *lis pendens*, and awarded $ 640 attorney fees to UHV. On October 11, 2002, the trial court entered *CR 54(b)* findings.

Finley appeals the trial court's September 6, 2002 order granting UHV's motion for an order canceling *lis pendens* and the corresponding award of fees and costs, as well as its order dismissing Finley's claims against UHV. Finley also appeals "all . . . related, interlocutory orders" (7 CP at 1217) **[*12]** including the court's May 25, 2001 order authorizing sale of property and authorizing partial settlement, the court's

[5] The receiver was negotiating to sell the property for between $ 9.1 and $ 10 million.

entry of the August 10, 2001 order staying the foreclosure action, and its May 17, 2002 order denying Finley's motion to treat judgment as satisfied and to prevent transfer of the deed to UHV, which the court treated as a summary judgment motion.

ANALYSIS

Finley raises a number of issues in support of his argument that the trial court's summary judgment was error.

CONSTRUCTIVE FRAUD

Finley contends that BV engaged in constructive fraud by breaching a duty of undivided loyalty to CBP, analogous to the duty owed by partners in a general partnership. BV responds that Finley cannot appeal this matter because the trial court did not rule on it. We agree with BV.

Under chapter 25.15 RCW:

Unless otherwise provided in the limited liability company agreement:

(1) A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross **[*13]** negligence, intentional misconduct, or a knowing violation of law.

(2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member.

RCW 25.15.155.

Generally, a LLC may be managed in one of two ways: by its members or by a centralized manager. *See* *RCW 25.15.150*. Although CBP's operating agreement does not appear in the record, the May 1999 addendum to the operating agreement states that Finley and BV's agent, McLeish, are to act as co-managers of CBP. The role of members in a member-managed LLC is analogous to that of **[*14]** partners in a general partnership, and partners are held accountable to each other and the partnership as fiduciaries. *See* John Morey Maurice, *Operational Overview of the Washington Limited Liability Company Act*, *30 GONZ. L. REV. 183, 200 (1995)* (citing former RCW 25.04.210 (1994)).

The record establishes that over the years Finley and BV disagreed regarding the sale of CBP's only asset, the Lacey property. Finley argues that CBP's financial difficulties occurred when a new Bishop and new financial advisor took over management of BV; he also argues that BV tried to conceal a sales opportunity from

him in order to orchestrate a "sham purchase" by UHV and receive a windfall on the sale of the property. On the other hand, BV attributes CBP's financial difficulties to a conflict of interest created when Finley stalled the sale of the Lacey property because he wanted to complete another land sale.

But the trial court did not address Finley's constructive fraud claims. Thus, the trial court could not have entered the requisite finding that the constructive fraud claim was appealable. *See RAP 2.2(d)*; *CR 54(b)*.

At the hearing **[*15]** on Finley's motion to treat the judgment as satisfied and to block transfer of the deed, the court stated, "To the extent that Mr. Finley believes that there are valid claims that can be pressed against any party here, my decision on this motion does not attempt to extinguish all of his claims. . . . My ruling today is limited." RP (May 17, 2002) at 107. And regarding the trial court's dismissal of UHV as a party from the case and removing his *lis pendens*, the court's *CR 54(b)* Finding 11 clarifies "[t]he adjudicated claims concern Finley's allegation that he has property rights in the Lacey property and claims against [UHV]. *The unadjudicated claims . . . are damage claims by and between Finley and [BV] allegedly arising from relationships between those parties.*" 7 CP at 1337 (emphasis added). Thus, the trial court never dealt with Finley's constructive fraud claim against BV. Accordingly, Finley's constructive fraud claim is not before us on appeal.

SATISFACTION OF JUDGMENT BY ASSIGNMENT TO UHV

Finley next contends that the trial court should have found that the AGC judgment was satisfied when UHV purchased the judgment, because UHV is **[*16]** merely a "straw man" for BV. In the alternative, Finley argues that he was entitled to a trial on the matter to determine whether UHV and BV are a single entity. Finley goes on to argue that if the judgment was satisfied and there was no judgment to enforce, any later settlement by Finley is irrelevant because the judgment was already extinguished; as such, according to Finley, the Lacey property remains in the hands of CBP (or more accurately, the receiver). We disagree.

In reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)*. Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c)*. The trial court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party, and it should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson, 98 Wn.2d at 437*.

Finley **[*17]** bases this claim largely on *Lachner v. Myers, 121 Wash. 172, 208 P. 1095 (1922)*. [6] In *Lachner*, Edwards

[6] Finley also argues that this court's opinion in ***Plein v. Lackey, 111 Wn. App. 143, 43 P.3d 1268 (2002)***, *rev'd*, ***149 Wn.2d 214, 67 P.3d***

obtained a judgment against Goddard & Company ("Goddard"). Goddard also owed money to its attorney, Myers, and Goddard did not have sufficient funds to satisfy both the judgment and the debt to Myers. In order to protect itself from execution by Edwards, yet still provide assurance of payment to Myers, Goddard gave Myers the funds to pay the Edwards judgment with the understanding that Myers would pay Edwards and take assignment of the judgment as security for the balance Goddard owed Myers. Later, Goddard conveyed the property to Lachner, although the property was subject to the Edwards judgment lien. Lachner brought an action seeking cancellation of the Edwards judgment lien against the property, relying on the rule that "payment of a judgment by one primarily liable will extinguish it." *Lachner, 121 Wash. at 174*.

[*18] While the court said this was the rule "if the judgment debtor and judgment creditor are the only parties to the transaction," in *Lachner* the judgment was not extinguished because the parties did not so intend: "[T]he law gives to the acts of people the result which they intend, unless there is some legal reason forbidding it . . . . [T]he parties intended to continue the lien of the judgment as security for a *bona fide* debt. No fraud was intended nor effected." *121 Wash. at 174*.

Finley argues that the *Lachner* decision, upholding assignment of a judgment, contains two factors that are not present here: (1) assignment to a creditor who holds a pre-existing debt and (2) the absence of fraud. But we find no requirement in *Lachner* that the debt be pre-existing. *Lachner* does impose a requirement that the judgment assignee not be the party responsible for the debt, but here not even Finley can dispute that neither UHV nor the debenture-holding parishioners were responsible for the original debt.

When issuing its May 17, 2002 oral ruling denying Finley's motion to treat the judgment as satisfied, the trial court held:

In my opinion, the Lachner **[*19]** case is still good law.

. . . .

"If a debtor pays his judgment creditor a sum equal to the amount of the judgment, and thereupon causes the judgment to be

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1061 (2003), supports his contention that the judgment is satisfied. In that case, a junior lienholder sued the sole shareholder of a corporation, as assignee of a corporate note secured by property on which the shareholder foreclosed, to reverse the trustee sale of the property on foreclosure. The trial court entered summary judgment in favor of the shareholder, and the junior lienholder appealed. We held that there was a genuine issue of material fact whether the shareholder was personally liable on the corporate note (and therefore an issue as to whether the debt was extinguished before the foreclosure). But the Supreme Court reversed on the grounds that the shareholder was an accommodation party and had the right to enforce the note against the accommodated party, the corporation. ***Plein, 149 Wn.2d at 221-22***. Here, even before reversal by the Supreme Court, the trial court held that the *Plein* case was inapplicable, and that *Lachner* controlled the result:

[T]he holding of the Plein case I think should be stated.

". . . A property owner who is personally liable on a debt may not purchase the interest of a primary creditor that is secured by his property to cloak himself with the status of that primary creditor and thereby defeat the priority of junior creditors. . . ."

That's quite a specific holding and, quite frankly, that specific holding can only be applied to the facts of this case by analogy because there are no junior creditors whose liens are somehow being distinguished by a purchase of a lien by one of the lienholders.

But I realize the analogy [to *Plein*] has been made, and I'm not saying it's invalid just on the basis of analysis, but I simply reject it.

RP (May 17, 2002) at 104 (quoting ***Plein, 111 Wn. App. at 152***).

assigned as a payment to another of his creditors, the transaction does not discharge the judgment but the same continues valid in the hands of the assignee."

Even in a worst case scenario, and what I mean by worst case scenario, even in a factual analysis that renders every possible inference against the Bishop of doing this for nefarious purposes, for doing this with a straw man approach. It appears to me that this case law does not say you need to have an existing creditor to do this, you can, in fact, have a creditor such as the debenture holders of whom the trustee, [UHV], is here representing those holders.

RP (May 17, 2002) at 105-06 (citing *Lachner, 121 Wash. at 176*.)

Finley claims that the debentures were issued so that BV could gain control of the property and profit at the expense of CBP and Finley. [7] BV and UHV assert that the debentures were issued at the request of concerned parishioners who wanted to prevent the waste of church assets through the rapidly mounting interest on the AGC judgment. **[*20]** [8] Regardless of BV's motives, UHV is clearly a separate entity, and the trial court was correct when it held as a matter of law that the judgment was not satisfied when it was assigned to UHV.

FINLEY'S ACQUIESCENCE TO PARTIAL SETTLEMENT

Finley also contends that he expressly reserved all claims to the Lacey property and is free to assert them **[*21]** now. We disagree. The property is owned by the company, not Finley individually. In addition, at the time of the settlement, the property was in receivership.

The trial court appointed a receiver for CBP under chapter 7.60 RCW. A receiver is a person appointed by a court or judicial officer to take charge of property in order to manage and dispose of it as the court or judicial officer directs. *RCW 7.60.010*. A receiver may be appointed in a wide variety of circumstances (enumerated in *RCW 7.60.020*), one of which is "an action between partners, or other persons jointly interested in any property or fund." *RCW 7.60.020(2)*. And a receiver has "power, under control of the court . . . generally to do such acts respecting the property, as the court may authorize." *RCW 7.60.040*.

A court-controlled receiver's powers include the power to dispose of the receivership property. *Walton v. Severson, 100 Wn.2d 446, 451, 670 P.2d 639 (1983)* (citing *In re Liquidation of Spokane Savings Bank, 198 Wash. 665, 89 P.2d 802 (1939))*. But chapter 7.60 RCW does not **[*22]** dictate the manner in which receivers' sales are to be conducted, and, in the absence of statutory limitations, the receivership court has broad discretion in determining the manner of disposition of receivership

[7] Finley estimated that if the Lacey property could be sold at the same price as a nearby property on the basis of square feet alone, the sales price would be $ 15.7 million and he would receive a balance of $ 2.3 million under the 1999 CBP operating agreement addendum. BV's counsel disagreed with this assessment, pointing out that even at a sale of $ 15.7 million, there would be a deficit of $ 780,000 after taking into account various taxes and fees. It appears that the property was last appraised at $ 6.5 million in late 1999 by Terra Property Analytics, L.L.C.

[8] BV's counsel estimated that interest on the AGC judgment was accruing at $ 120,000 per month.

property. *Walton, 100 Wn.2d at 452*. Where the trial court's order is a matter of discretion we will not disturb it except on a clear showing of abuse of discretion; that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ferree v. Fleetham, 7 Wn. App. 767, 773, 502 P.2d 490 (1972)* (citing *State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)), review denied, 81 Wn.2d 1010 (1973).*

Finley does not appeal the appointment of the receiver -- he appeals only the court's May 25, 2001 order authorizing sale of property and partial settlement.

We hold that the trial court did not abuse its discretion in approving the receiver's settlement. The receiver had received an offer to purchase the property (property which had been on the market since 1997) that would have paid off most, if not all, of CBP's debt. If after another year the property had not sold, **[*23]** the receiver was to transfer a deed in lieu of foreclosure to UHV. In reaching this settlement, the receiver avoided the possibility of personal liability for the company members, including BV and Finley, who were otherwise personally liable on the AGC note. *See Thompson v. Smith, 58 Wn. App. 361, 366, 793 P.2d 449 (1990)* (holding that a deed in lieu of foreclosure is the legal equivalent of a non-judicial foreclosure under *chapter 61.24 RCW*, the Deed of Trust Act, and extinguishes all claims concerning the property at issue).

We also observe that even though Finley later moved to block transfer of the deed in April 2002, he did not appeal the trial court's initial approval of the settlement a year earlier. In fact, his counsel actually *proposed* an order specifying that "the Receiver shall surrender a deed in lieu of foreclosure" to UHV. 3 CP at 545. Contrary to Finley's current position, he did receive a benefit from the settlement -- avoidance of potential personal liability to UHV. And as the trial court correctly pointed out, Finley's reservation of claims concerned only the distribution of proceeds of a sale, not the transfer of the deed.

[*24] The trial court properly approved the settlement.

REMOVAL OF *LIS PENDENS* AND AWARD OF ATTORNEY FEES TO UHV

Finley next contends that the court erred in canceling the *lis pendens* and awarding UHV attorney fees because he "asserted claims to void the judgment which gave UHV its title. This affects title." Reply Br. of Appellant at 52. Again, we disagree.

Under *RCW 4.28.328(3)*:

Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

A *lis pendens* is not proper where it is filed in anticipation of recovering a money judgment. *Bramall v. Wales, 29 Wn. App. 390, 395, 628 P.2d 511 (1981)*. Notice of *lis*

pendens is properly filed in an action where a purpose of the action is to directly affect the title to the land in question. *Bramall, 29 Wn. App. at 395*. It is not proper where the purpose of the action is **[*25]** to secure a personal judgment for the payment of money, even though such a judgment is a lien on the defendant's land. *See Bramall, 29 Wn. App. at 395*.

Finley is correct that, in approving the receiver's settlement, the trial court did not resolve all of Finley's claims against BV. But the transfer of the deed in lieu of foreclosure was part of the settlement, and given Finley's own acquiescence to the settlement and his proposed order *mandating* transfer of the deed, there was no substantial justification for Finley to file the *lis pendens*. The court did not err in removing the *lis pendens* and, under the statute, it was proper for the trial court to award $ 640 in attorney fees to UHV.

DISMISSAL OF CLAIMS AGAINST UHV

Finley also contends that the trial court erred in dismissing his claims against the judgment assignee, UHV. We disagree.

We will affirm the trial court's dismissal of a complaint if the facts do not support a cause of action. *Snyder v. Med. Serv. Corp. of E. Washington, 98 Wn. App. 315, 321, 988 P.2d 1023 (1999)* (citing *Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996)), aff'd,* **[*26]** *145 Wn.2d 233, 35 P.3d 1158 (2001)*.

The trial court dismissed Finley's claims against UHV on September 6, 2002. At the oral argument on its motion, UHV pointed out that while Finley's "causes of action" mentioned UHV, any claims against UHV were either unsupported by Finley's factual allegations or resolved by the receiver's settlement. For example, paragraph 51 of the complaint states, "BV breached its duty [to Finley and CBP] by purchasing the AGC Judgment through UHV and attempting to collect it against the [Lacey] Property." 1 CP at 10. Paragraph 54 alleges that "UHV has wrongfully represented that it is the owner of the AGC Judgment." [9] 1 CP at 11.

The trial court correctly dismissed **[*27]** Finley's claims against UHV because, as stated in the trial court's *CR 54(b)* findings, UHV was "not party to any of the unadjudicated claims." 7 CP at 1337. Neither the facts nor the law supported Finley's claims against UHV.

FINLEY'S REQUEST FOR ATTORNEY FEES

Finally, Finley requests attorney fees, arguing that attorney fees should be awarded against a party who breaches a fiduciary duty. [10]

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[9] UHV is also mentioned in paragraphs 57 ("BV and/or UHV's claims against CBP under the AGC Judgment should be equitably subordinated") and 58 ("BV's purchase of the AGC Judgment and assignment of it as collateral to UHB [sic] operates to fully satisfy the AGC Judgment"). 1 CP at 11.

[10] Finley bases his claim on *Hsu Ying Li v. Tang, 87 Wn.2d 796, 557 P.2d 342 (1976), Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795 (2000)*, and other cases. In *Tang*, the Court held that an award of attorney fees to prevailing plaintiff in a partnership accounting and dissolution action was appropriate, where the defendant was guilty of a negligent breach of his fiduciary duty to the plaintiff. The Court held that "the power to award attorney fees 'springs from our inherent equitable powers, [and] we are at liberty to set the boundaries of the exercise of that power.'" *Tang, 87 Wn.2d at 799* (internal citations omitted). *Green* held that while a fiduciary's

[*28] We agree with UHV that it owed no fiduciary duty to Finley. As for BV, whether it breached its fiduciary duty is not before us. Accordingly, we reject Finley's request.

UHV'S AND BV'S REQUEST FOR ATTORNEY FEES

Arguing that Finley's appeal is frivolous, both BV and UHV request attorney fees under *RAP 18.9(a)* and *Streater v. White, 26 Wn. App. 430, 613 P.2d 187, review denied, 94 Wn.2d 1014 (1980)*, for the costs of responding to the appeal.

RAP 18.9(a) states:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

In determining whether an appeal is brought for delay under this rule, our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, *i.e.*, whether it presents no debatable issues and is so devoid of merit that **[*29]** there is no reasonable possibility of reversal. *Streater, 26 Wn. App. at 434*. In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, we are guided by the following considerations: (1) a civil appellant has a right to appeal under *RAP 2.2*; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Streater, 26 Wn. App. at 434-35*.

Given the voluminous briefing by all parties and complexity of the case, we hold that the issues are debatable, and the appeal was not frivolous. We decline to award attorney fees to UHV and BV.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to *RCW 2.06.040*, it is **[*30]** so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HOUGHTON, J.

HUNT, J.

breach does not *mandate* an award of fees, the decision to award fees and the amount of the fees awarded is within the sound discretion of the court, and the appellate court will overturn the award only for a manifest abuse of discretion. *103 Wn. App. at 467*.