No. 70111-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK AS SUCCESSOR IN INTEREST TO JP MORGAN CHASE BANK NA AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II INC. BEAR STERNS ATL-A TRUST 2005-5, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-5,

Plaintiff/Respondent

v.

DAVID MURESAN, MARIA MURESAN, and All Occupants of the Premises located at 1496 South Crestview Drive, Camano Island, WA 98282,

Defendants/Appellants

ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT

RESPONDENT'S AMENDED MOTION TO AFFIRM ON THE MERITS

Ronald E. Beard, WSBA No. 24014
David C. Spellman, WSBA No. 15884
Abraham K. Lorber, WSBA No. 40668
Attorneys for Plaintiff/Respondent The Bank of New York Mellon

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, Washington 98101-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107

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I. IDENTITY OF MOVING PARTY

This motion is brought by Respondent The Bank of New York Mellon (BNY Mellon). BNY Mellon was formerly known as The Bank of New York. In this suit, BNY Mellon is acting as the successor in interest to JP Morgan Chase Bank NA, which was the Trustee for Structured Asset Mortgage Investments II Inc. Bear Sterns Atl-A Trust 2005-5, Mortgage Pass-Through Certificates, Series 2005-5.

II. STATEMENT OF RELIEF SOUGHT

BNY Mellon respectfully moves under RAP 18.14(e)(1) for the affirmance on the merits of the order for writ of restitution because this appeal is clearly without merit.

Appellants David and Maria Muresan's (Muresan) pro se appeal stems from a post-foreclosure eviction that BNY Mellon (the trustee's sale purchaser) brought against Muresan (the foreclosed borrower). Muresan does not allege any error in the superior court's ruling on the eviction itself. Rather, he alleges that the underlying foreclosure should not have taken place. Muresan litigated and lost this claim in a related federal court case because a lender has no duty to review a borrower for a loan modification or grant such a modification. Further, no private right of action accrues to a borrower under the federal Home Affordable Modification Program (HAMP). Because these claims Muresan brought

were dismissed by the federal court, the doctrines of claim and issue preclusion barred Muresan from relitigating these claims in the unlawful detainer action below.

Since Muresan's theories for reversal are clearly without legal merit, RAP 18.14(e)(1) provides for affirmance of the order granting the writ of restitution.

III. COUNTERSTATEMENT OF ASSIGNED ERROR AND ISSUES PRESENTED

Did the trial court erroneously grant a writ of restitution against Muresan and in favor of BNY Mellon?

The four issues listed below are controlled by settled law and are matters of judicial discretion. Should the Court grant affirmance on the merits under RAP 18.4(e)(1)?

Issue (1): The federal district court dismissed Muresan's claims challenging the sale with prejudice, the Ninth Circuit has affirmed the dismissal, and the bankruptcy court granted BNY Mellon leave to pursue the eviction remedy. Do these final decisions preclude Muresan from relitigating the claims in the unlawful detainer action?

Issue (2): In the event there is no preclusion, has Muresan established that the federal court committed a prejudicial error in applying the law or abused its discretion?

Issue (3): Has Muresan raised a defect in the foreclosure sale warranting a postsale avoidance of the sale?

Issue (4): Has Muresan raised an equitable claim that warrants reversal of the writ?

IV. BACKGROUND/PROCEDURAL POSTURE

Muresan is the former owner of the real property on Camano Island (the "Property").[1] By December 2011, he was over $46,000 in default on a $369,000 loan.[2] His monthly payments were $2,471.19.[3]

Muresan began falling behind on his mortgage in June 2010.[4] Muresan applied several times for a loan modification under the HAMP program but was denied. Appellant Br. at 2. In November 2011, the deed of trust mortgage and note were formally assigned to BNY Mellon in a recorded assignment.[5] Wells Fargo acted as the attorney in fact for BNY Mellon.[6]

Muresan received the first notice of trustee's sale, which was scheduled for March 16, 2012.[7] Seeking to postpone the sale, Muresan filed suit against America's Servicing Company, a division of Wells Fargo

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[1] CP 49-50; id. ¶ 2.
[2] CP 83-84.
[3] CP 73.
[4] CP 50 ¶ 4.
[5] CP 50-51 ¶ 7.
[6] CP 80 (Appointment of Successor Trustee).
[7] CP 81-82 (declarations of mailing).

Bank, N.A., the servicer of his loan.[8] Wells Fargo removed the suit, and the federal court granted a 12(b)(6) motion dismissing the suit with prejudice on April 25, 2012.[9]

Three weeks before the dismissal, the trustee's sale went forward on April 6, 2012.[10] BNY Mellon purchased the Property.[11] Muresan requested that the district court grant an order preventing the resale of the house and remanding the case.[12] The district court, however, denied the renewed motion.[13] Muresan appealed the dismissal.[14]

While the federal appeal was pending, BNY Mellon served Muresan with the unlawful detainer suit.[15] Muresan sent BNY Mellon an answer, stating he was appealing the district court's dismissal and would soon file bankruptcy and arguing that the prior suit should have prevented the trustee's sale.[16]

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[8] CP 18-21 (federal court order); CP 18:20-24.

[9] CP 18:24-21:1.

[10] CP 52, ¶ 15.

[11] CP 92-94.

[12] CP 16 (Dkt. No. 12).

[13] CP 18-21 (Order Dismissing Case with Prejudice (Apr. 24, 2012); CP 20:23-25 ("Plaintiff's motion to remand (Dkt. No. 12) is DENIED. The case is hereby DISMISSED WITH PREJUDICE." Id.

[14] CP 16 (Dkt. No. 15).

[15] CP 39:5-6 (service on May 20, 2012).

[16] CP 44 (Answer, May 21, 2012); CP 43 (Decl. of Service, May 21, 2012).

Five weeks later, BNY Mellon filed the unlawful detainer suit.[17] Muresan filed a Chapter 7 bankruptcy case in July 2012.[18] The bankruptcy court granted BNY Mellon relief from the stay on September 17, 2012.[19] Eleven days later, Muresan moved for the superior court to vacate the sale of the house, claiming that the sale had violated his rights under RCW 61.24.130.[20] Muresan, however, did not note the motion for hearing.

Five months later, the Ninth Circuit summarily affirmed the dismissal on February 25, 2013.[21] Within two weeks, BNY Mellon moved the superior court to grant an order to show cause why the court should not issue a writ of restitution.[22] The show cause motion attached Muresan's unfiled answer to the complaint and the bankruptcy court's earlier order authorizing BNY Mellon to "proceed with its state law eviction remedies."[23]

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[17] CP 106 (Jun. 28, 2012).

[18] CP 47-48 (Order Granting Relief from Stay, Bankr. No. 12-17266-KAO).

[19] CP 47-48.

[20] CP 95-96(Sept. 28, 2012), CP 96:9-11 ("a violation of my right given by ... [RCW] 61.24.130 ...").

[21] CP 22.

[22] CP 38-40 (Mar. 5, 2013).

[23] CP 44 (Answer); CP 47-48 (Order Granting Relief from Stay), CP 48:4-6, Case 12-17266-KAO, Dkt. 22.

Muresan answered the motion for a writ of restitution, reiterating his arguments that the trustee's sale violated his rights under RCW 61.24.130 and he should have received a loan modification.[24] BNY Mellon replied that Muresan had waived a postsale challenge as a result of his failure to restrain the sale and as a result of the federal court's dismissal of his claims with prejudice.[25]

Over Muresan's objections, the court issued a writ of restitution restoring possession of the Property to BNY Mellon.[26] Muresan appealed from the issuance of the writ.

V. STATEMENT OF GROUNDS

A. The Standard of Review.

The construction of the unlawful detainer statute is a question of law reviewed de novo. Hartson P'ship v. Goodwin, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000). When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo. Housing Auth. of City of Pasco and Franklin Cnty. v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005)

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[24] CP 29-31.

[25] CP 23-38 (Pl.'s Reply in Supp. of Mot. for Order Issuing Writ of Restitution); CP 12-22 (Decl. of Valerie I. Holder in Supp. of Pl.'s Reply (attaching federal court docket, order of dismissal with prejudice, and appellate order affirming dismissal).

[26] CP 5-7 (Mar. 25, 2013).

(citing Progressive Animal Welfare Soc'y v. Univ. of Wn., 125 Wn.2d 243, 252, 884 P.2d 592 (1994)).

As a pro se litigant, Muresan is not entitled to "special favors" from the court. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). Pro se litigants are "bound by the same rules of procedure and substantive law as attorneys." Westberg v. All–Purpose Structures Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Reviewing courts will not address issues raised in passing or unsupported by authority or persuasive argument. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, the court may decline to address the issues that Muresan raises on appeal; he has not developed the arguments and claims. To discourage Muresan from filing more suits and appeals, BNY Mellon will, nonetheless, respond to both the issues raised below and the issues raised in this appeal.

B. RAP 18.4(e) Authorizes a Motion to Affirm When the Appeal Is Clearly Without Merit.

RAP 18.14 authorizes a motion on the merits. RAP 18.4(e)(1) provides that:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

"In essence, the rule seems to be designed to provide a way to deal expeditiously with cases that cannot in fairness be called frivolous, but that nevertheless can be resolved without full, traditional appellate treatment." 3 Karl B. Tegland Wash. Practice., Rules Practice RAP 18.14 at 541-42 (7th ed. 2013).

As a pro se appellant, Muresan may be unaware that he cannot relitigate the claims and issues he lost in federal court. Even if he could collaterally attack the federal court judgment, the federal court did not misapply the law or abuse its discretion. As demonstrated below, Muresan did not establish a claim supporting either a presale or postsale challenge to the trustee's sale. The grounds for reversal stated in his brief are indeed "clearly without merit," and therefore the court should grant RAP 18.4(e)(1) affirmance of the order for a writ of restitution.

1. The Final Federal Court Decision Precludes the Relitigation of Claims Challenging the Trustee's Sale in the Unlawful Detainer Action.

Res judicata and collateral estoppel (claim and issue preclusion) bar Muresan from relitigating the claims he lost and the issues that the federal court decided against him. BNY Mellon raised the doctrine of res

judicata below in response to the defenses that Muresan raised in response to the unlawful detainer suit.[27]

The purpose of the doctrine of res judicata (claim preclusion) is to avoid relitigation of a claim or cause of action. Deja Vu-Everett-Federal Way, Inc. v. City Of Federal Way, 96 Wn. App. 255, 262, 979 P.2d 464 (1999). "A threshold requirement for the application of res judicata is a valid and final judgment on the merits in a prior suit." Thompson v. King Cnty., 163 Wn. App. 184, 190, 259 P.3d 1138 (2011). The Ninth Circuit's affirmance of the 12(b)(6) dismissal satisfies this threshold requirement. "Supreme Court precedent confirms that a dismissal for failure to state a claim under Rule 12(b)(6) is a 'judgment on the merits' to which res judicata applies." Stewart v. US Bancorp, 297 F.3d 953, 957 (9th Cir. 2002) (quoting Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L.Ed.2d 103 (1981)). Judge Coughenour's order expressly dismissed the case "WITH PREJUDICE."[28]

"The test for res judicata under federal law is similar to the Washington test as it requires (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the parties." Thompson, 163 Wn. App. at 190 (citing Frank v. United Airlines, Inc.,

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[27] CP 27:14-28:5. RP (Mar. 25, 2013) at 7:9-24 (arguing prior litigation barred claims).

[28] CP 20.

216 F.3d 845, 850 n. 4 (9th Cir.2000), cert. denied, 532 U.S. 914, 121 S. Ct. 1247, 149 L.Ed.2d 154 (2001)). Because the result under either test would be the same, the court may simply apply the Washington test. Thompson, 163 Wn. App. at 190 (citing Kuhlman, 78 Wn. App. at 120 n.5, 897 P.2d 365).

"Different defendants in separate suits are the same party for res judicata purposes as long as they are in privity." Ensley v. Pitcher, 152 Wn. App. 891, 902, 222 P.3d 99 (2009). "The general rule is that a judgment is res judicata, and is therefore binding on all parties to the original litigation, plus all persons in privity with such parties." 14A Wash. Practice: Civil Procedure § 35.27.

Wells Fargo and BNY Mellon are in privity. Wells Fargo was the servicing agent for the mortgage loan. The notice of default was issued on behalf of BNY Mellon and copied, America's Servicing Company, a division of Wells Fargo. CP 72-75 (Notice of Default). Wells Fargo signed the Appointment of Successor Trustee as attorney (agent) for BNY Mellon. CP 80.

"One is in privity with a party when he stands in a mutual or successive relationship to the same rights of property." McKown v. Driver, 54 Wn.2d 46, 54, 337 P.2d 1068 (1959). BNY Mellon is in privity with Wells Fargo, "stand[ing] in [both] a mutual and successive relationship to the

same rights of property"—namely the rights granted under the deed of trust mortgage. The loan had been transferred to a mortgage backed security trust, whose beneficiary was BNY Mellon. BNY Mellon later became the purchaser of the Property at the trustee's sale. "A purchaser of property, before or after judgment affecting it, is in privity with the vendor for the purposes of the judgment, and is concluded thereby." Riblet v. Ideal Cement Co., 54 Wn.2d 779, 782, 345 P.2d 173 (1959). Here, the vendor was the trustee.

Muresan sued America's Servicing Company/Wells Fargo (in its representative capacity as the servicer of the loan) claiming Wells Fargo was required to modify the loan, the trustee's sale should be postponed, and later that the sale should be unwound.[29] The federal district court dismissed those claims on the merits.[30] Muresan is reasserting the identical claims for loan modification and unwinding the sale as defenses to the unlawful detainer suit.[31] The trial court ruled that as to his claims "it's already been taken care of in – in Federal District Court."[32]

"[R]es judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity

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[29] CP 18 (Order Dismissing Case with Prejudice).
[30] Id.
[31] CP 29-30.
[32] RP (Mar. 25, 2013) 9:4-9.

of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 108, 297 P.3d 677, 684 (2013) (citation omitted). Collateral estoppel requires: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." Id. (citation omitted). In contrast to Schroeder where the preclusionary defenses did not apply since the successive lawsuits involved two different deeds of trust, this suit arises from the very same deed of trust.

Muresan as the plaintiff in the prior suit is bound by the judgment dismissing with prejudice his claims. His motion for the Ninth Circuit to reconsider its order does not alter the preclusive effect of its prior order. "If a judgment is appealed, the res judicata and collateral estoppel effects will not be suspended or denied during the pendency of the appeal." 14A Karl B. Tegland, Washington Practice, Civil Procedure § 35:23. Similarly, "[w]hen an appeal is pending, a party is precluded by res judicata from starting a new action ... in hopes of obtaining a contrary result while the appeal is pending." Spokane Cnty. v. Miotke, 158 Wn. App. 62, 67, 240 P.3d 811 (2010) (internal quotation marks omitted).

2. In the Event the Final Judgment Has No Preclusive Effect, the Federal Court Correctly Applied the Law and Acted Clearly Within its Discretion.

In this appeal, Muresan raises three "objective reasons" which are his alleged errors relating to issuance of the writ of restitution. Appellant Br. at 2:23-3:6. Each of the alleged errors is wholly without merit.

The first alleged error is that BNY Mellon /Wells Fargo was required to grant him a loan modification. Appellant Br. at 2:24-27. But the law does not compel a lender to grant a loan modification. The Washington Supreme Court has held that a lender is not obligated to review a borrower for a loan modification – the lender is entitled to "simply stand on it rights to require performance of a contract according to its terms." Badgett v. Sec. State Bank., 116 Wn.2d 563, 570, 807 P.3d 356 (1991). By December 2011, Muresan was in default for $46,000, continuing to live payment free at the property for another fifteen months while an additional $36,000 accrued.[33] The court is not in a position to decide when and how a lender must modify a loan, especially in this case where the default was growing over time.

Regarding the claim to compel a HAMP modification, the federal court dismissed the claim, ruling:

> Plaintiff's complaint rests on the notion that Defendant is required to modify his loan if he meets the requirements. However, as district

[33] CP 84 ($49,952 arrearage in December 2011), CP 73 ($2,589/m x 15 months = $38,335.)

> courts around the country, including in this Circuit, have concluded, HAMP "does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even [for failing] to modify an eligible loan." *Simon v. Bank of Am., N.A.*, Case No. C10-0300, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010); *see also Hoffman v. Bank of America, N.A.*, Case No. C10-2171, 2010 WL 2635773, at *4 (N.D. Cal. June 30, 2010) (finding that HAMP does not create enforceable rights to loan modification, even for qualified borrowers); *Escobedo v. Countrywide Home Loans, Inc.*, C09-1557, 2009 WL 4981618, at *3 (S.D. Cal. 2009) (finding that HAMP does not require lenders to modify all mortgages that meet eligibility requirements). Therefore, because Plaintiff does not have a right to loan modification even if he is eligible for that modification, he does not have a right to stop a trustee's sale of his property on the basis that his loan modification request was improperly denied.[34]

The well-settled law is that Muresan has no right to a loan modification. Wells Fargo's refusal to grant a modification is not a valid basis for reversing the writ of restitution.

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[34] CP 20:5-17. See Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, *7 (noting "the statute provides that loans may be modified 'where appropriate' – a phrase that limits the [Treasury] Secretary's obligation and evinces a Congressional intent to afford discretion in the decision whether to modify loans in certain circumstances .... Congress did not intend to mandate loan modifications."); Chapel v. Mortgage Elec. Registration Sys., Inc., C10-1345BHS, 2010 WL 4622526, *4 (W.D. Wash. Nov. 2, 2010) (dismissing claims that defendants violated TARP by failing to modify the loan as no private right of action exists under TARP against private lenders); Aleem v. Bank of Am., No. EDCV 09-01812-VAP, 2010 WL 532330, *4 (C.D. Cal. Feb. 9, 2010) ("There is no express or implied right to sue fund recipients . . . under TARP or HAMP."); Gonzales v. First Franklin Loan Servs., No. 1:09-CV-00941, 2010 WL 144862, *18 (E.D. Cal. Jan. 11, 2010) (no private right of action under either EESA or TARP); Mangosing v. Wells Fargo Bank, N.A., No. CV-09-0601, 2009 WL 1456783 (D. Ariz. May 22, 2009) (no private right of action under EESA); Marks v. Bank of Am., N.A., No. 3:10–cv–08039–PHX–JAT, 2010 WL 2572988 (D. Ariz. June 21, 2010) ("Plaintiff is precluded from asserting a private cause of action under HAMP, even disguised as a breach of contract claim ...").

The second alleged error is that the removal of the case prevented Muresan from objecting to the sale and "forced the sale to be non-judicial instead of judicial ..." Appellant Br. at 3:1-2 (Item 2, "moved my case ... to prevent the Appellant to object to the sale" and "forced the sale to be nonjudicial instead of judicial ..."). But the record is that Muresan objected to the sale in federal court and he used the judicial system to stave off the trustee's sale and later the unlawful detainer.[35]

The federal court denied his motion for a remand.[36] 28 U.S.C. § 1332 provides for removal of state cases on the basis of diversity jurisdiction, and the federal court properly accepted removal of the lawsuit on that basis.[37] Muresan has failed to establish the removal was erroneous and prejudiced the outcome of this suit for unlawful detainer.

The third alleged error relates to the dismissal order by the federal court and presents three issues: (a) whether the federal court prematurely decided the dismissal motion on April 24 instead of on May 8, 2012, (b) whether he had a right to appear in person, and (c) the effect of the

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[35] CP 83 (Notice of Trustee's Sale, Dec. 14, 2011), CP 92 (Trustee's Deed, Apr. 16, 2012), CP 18-21 (order dismissing case, Apr. 25, 2012), CP 5-7 (writ of restitution, Mar. 25, 2013).

[36] CP 16 (Dkt. No. 12, Mot. to Remand), CP 20:23-2 (denying remand).

[37] CP 18-21.

reconsideration motion pending before the Ninth Circuit. Appellant Br. at 3:3-6.

Regarding Muresan's Issue (a) the timing of the dismissal order, the dismissal was not premature. Appellant Br. at 3:3-6. The dismissal motion was noted for hearing on March 16, 2012.[38] Five weeks later, the court granted the April 24, 2012 dismissal order.[39] The order was not premature. The dismissal order denied the renewed motion for remand that Muresan filed on April 20, 2012.[40]

Regarding Muresan's Issue (b) whether he had a right to appear in person, he had no right to appear in person. The Western District of Washington Local Rules provide that all motions will be decided without oral argument unless the court orders otherwise. LCR 7(b)(4). The Ninth Circuit has held that a district court's decision to deny oral argument is within the discretion of the district court. Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865, 869 (1991) (affirming order granting Rule 12(b)(6) dismissal without benefit of oral argument). As in Spradlin, Muresan's pleadings did not "offer the district court any insight into what

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[38] CP 16 (Dkt. No. 8).

[39] CP 18-21.

[40] CP 19:15 ("Plaintiff renewed his request for remand in a motion filed on April 20, 2012."); CP 20:18-21 (ruling "the failure to approve his loan modification application ... is not an actionable claim ... -- the Court denies as futile Plaintiff's request to remand the case to the Island County Superior Court.").

allegations or evidence he would add, ... and, even on appeal, he offers no specific factual allegations which support his arguments." Id. "Argument ... serves only to elucidate the legal principles and their application to the facts at hand; it cannot create the factual predicate." Id. Muresan has not established that the federal court abused its discretion.

Regarding Muresan's Issue (c) (the effect of the reconsideration motion pending before the Ninth Circuit), the pending motion has no immediate effect on the finality of the prior decision. The reconsideration motion requests the case to be remanded to the superior court, for an order vacating the sale, and requiring the sale of the house to him. Case No. 12-35368 Dkt. No. 16. If the court denies the motion, the dismissal remains a final order.

In summary, these "legal reasons" that Muresan offers for reversal clearly have no merit. The settled law controls the legal issues, and the federal court acted well within its judicial discretion. Therefore, the court should grant an order affirming on the merits the order for writ of restitution.

3. Muresan Failed to Establish a Defect in the Foreclosure Sale Warranting the Postsale Avoidance of the Sale.

Muresan argues that the Order for Writ of Restitution should be reversed on equitable Grounds – Muresan claims he paid his mortgage for 10 years and that he will suffer harm if he loses his house. Br. of Appellant 3. BNY Mellon does not make light of the harm that Muresan

is likely to suffer when he is evicted; however, the threat of harm is not sufficient to reverse the Superior Court's order.

RCW 61.24.060(1) grants the purchaser at the trustee's sale "a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW." The initial questions before the court in an unlawful detainer action brought by a purchaser are (1) did the trustee's sale occur, (2) have the requisite 20 days since the sale elapsed, and (3) has the plaintiff complied with the other procedural requirements of the unlawful detainer statute? See RCW 61.24.040(7) (stating the effect of the trustee's deed); RCW 61.24.060(1) (requiring 20 days' notice following the sale to the borrower to commence an unlawful detainer suit); Laffranchi v. Lim, 146 Wn. App. 376, 383, 190 P.3d 97 (2008) ("To take advantage of these summary proceedings, the purchaser must comply with all statutory requirements.").

In an unlawful detainer action, plaintiff bears the burden to prove, by a preponderance of the evidence, the right to possession of the premises. Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). BNY Mellon's evidence was the trustee's deed, the affidavit of the foreclosing trustee, the bankruptcy court's order authorizing the eviction,

the federal district court's dismissal order, and the order dismissing the appeal.[41]

The affidavit and trustee's deed are evidence of a properly conducted sale. RCW 61.24.040(7) (providing a trustee's deed "shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value...."). Muresan has not alleged that the recitals are inaccurate and does not allege that the trustee violated the requirements of the Deed of Trust Act.

Muresan waived any postsale challenge by failing to pursue a presale injunction. "[W]aiver is an equitable doctrine, and 'we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.'" Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 783 n. 7, 295 P.3d 1179, 1185 (2013) (quoting Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 569, 276 P.3d 1277 (2012)). "Where the interest-holder believes noncompliance results in prejudice, an injunction should be sought." Albice, 174 Wn.2d at 581 n.4 (Stevens, J., concurring). "The same standard applies to defects occurring at or after

[41] CP 12-22, CP 49-94.

the time of the sale—absent actual prejudice from the error, a claim is waived if no action is taken to set aside the sale." Id.

There are three requirements for the waiver of defects in a trustee's sale. "[W]aiver of any postsale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." Albice, 174 Wn.2d at 569 (2012) (citing Plein v. Lackey, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003)); see Frizzell v. Murray, 179 Wn.2d 301, 313 P.3d 1171, 1172, 1174-75, 1177 (2013) (holding borrower waived her claims for invalidating the sale by failing to comply with the requirements of RCW 61.24.130 to restrain sale). The record establishes those three requirements.

First, Muresan concedes he received the notice of trustee's sale. "Notice of sale was given to me on Dec. 16, 2011."[42] The notice of trustee's sale in § IX warned:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such as lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.[43]

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[42] CP 29:18.
[43] CP 85.

Second, Muresan "had actual or constructive knowledge of a defense to foreclosure prior to the sale ..." Albice, 174 Wn.2d at 569. He asserted in his HAMP claim in federal court.

Third, he lost in his efforts to stop the sale and to make a postsale challenge in federal district court, the court of appeals, and bankruptcy court.[44]

Some post-sale challenges to a trustee's sale may be raised in response to an unlawful detainer suit. See Schroeder v. Excelsior Mortg. Group, LLC, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013). Id. ¶¶ 16-17 (ruling the non-agricultural status of the property was a requirement of the Deed of Trust Act and not a waivable right of the debtor). Id. at 110-13 ¶¶ 23-29 (ruling failure to enjoin sale did not support dismissal of injunction claim based on failure to comply with the statutory requirements). See Albice, 174 Wn.2d at 569, 571-73 (grantor did not know a presale remedy was even necessary when the grantor had a forbearance agreement, was tendering each monthly payment, and promptly filed suit two months after the sale).

In stark contrast, Muresan lost a federal suit to enjoin the sale. Below, Muresan claimed that the sale violated his rights under RCW

[44] CP 18-22, CP 47-48 (Order Granting Relief from Stay, Bankr. No. 12-17266-KAO).

61.24.130. RCW 61.24.130 grants interested parties a right to seek a presale injunction preventing a trustee's sale. RCW 61.24.130(1) states:

> Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed: ... (Emphasis added.)

Muresan mistakenly believes that filing the prior suit satisfied the requirement for a "restraining order or injunction." RCW 61.24.130(1). The well-settled law is that one must move for a TRO or injunction or one loses the temporary statutory remedy to enjoin the sale.

The federal court never reached the issue of an interim injunction pending trial, since the court granted summary judgment dismissal of the claims with prejudice. Also, the presale remedy became moot, when the trustee's sale went ahead, and the federal court dismissed with prejudice his substantive claims.

In the event that Muresan had moved for a presale injunction, he could not satisfy the requirements for a RCW 61.24.130 injunction — namely "pay[ing] to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed." RCW 61.24.130. The issue of whether BNY Mellon

should be permitted to go forward with the sale was also litigated in his bankruptcy case. The issue was also litigated in the federal court case.

Muresan raises equitable grounds to reverse the order authorizing the writ of restitution. Identical and similar equitable reasons were raised and rejected in the federal suit. The standard for setting aside a prior judgment is extraordinarily stringent. See Civil Rule 60. Even if Muresan moved in federal court to vacate the judgment, he would lose under the doctrines of claim and issue preclusion.

None of the equitable reasons for reversal set forth in Muresan's Opening Brief have merit. Accordingly, RAP 18.14(e)(1) affirmation of the Superior Court's Order for Writ of Restitution is appropriate.

CONCLUSION

The doctrines of claim and issue preclusion bar Muresan from relitigating the claims that were asserted or could have been asserted in the federal court case. He has failed to establish a bona fide defense to the unlawful detainer action. Each of his legal and equitable reasons for reversal of the writ of restitution is clearly without merit. Therefore, BNY Mellon respectfully requests that the Court affirm the Superior Court pursuant to RAP 18.14(e)(1).

RESPECTFULLY SUBMITTED this 20th day of March, 2014.

LANE POWELL PC

By_____
Ronald E. Beard, WSBA No. 24014
David C. Spellman, WSBA No. 15884
Abraham K. Lorber, WSBA No. 40668
Attorneys for Plaintiff/Respondent The Bank of New York Mellon

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury and the laws of the United States and the State of Washington that on March 20, 2014, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

David Muresan
Maria Muresan
1496 South Crestview Drive
Camano Island, WA 98282

- ☐ by **CM/ECF**
- ☐ by **Electronic Mail**
- ☐ by **Facsimile Transmission**
- ☑ by **First Class Mail**
- ☐ by **Hand Delivery**
- ☐ by **Overnight Delivery**

Patricia King