69194-5

69194-5

CASE NO. 69194-5-I

COURT OF APPEALS

DIVISION I OF THE STATE OF WASHINGTON

STEPHANIE TASHIRO-TOWNLEY; and
SCOTT C. TOWNLEY
Appellants

vs.

THE BANK OF NEW YORK MELLON, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and OCWEN LOAN SERVICING, LLC
Respondents

RESPONDENTS' BRIEF

Appeal from Judgment of King County Superior Court
Case No.: 12-2-06921-2 KNT
The Honorable Leroy McCullough
The Honorable Hollis

Robert W. Norman, Jr. (WSB 37094)
HOUSER & ALLISON, APC
A Professional Corporation
3780 Kilroy Airport Way, Ste. 130
Long Beach, California 90806
Telephone: (562) 256-1675
Facsimile: (949) 679-1112

Attorneys for Respondents, The Bank of New York Mellon, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York, Mortgage Electronic Registration Systems, Inc., and Ocwen Loan Servicing, LLC

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I. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

This appeal arises out of an unlawful detainer action. The Appellants, Scott Townley and Stephanie Tashiro-Townley ("Townleys"), are improperly trying to relitigate issues and matters argued and ruled upon before the Trial Court. Despite having resided in the Property for over 16 months after Bank of New York Mellon purchased the property and having moved out of the Property pursuant to the Writ of Restitution, the Townleys continue to contest the unlawful detainer action.

The Trial Court did not err when it issued the following: (1) Order dismissing the Counter and Cross Complaint; (2) Order granting Writ of Restitution; (3) Order denying Townleys' Motion for Revision of Commissioner's Order of Writ of Restitution based on the Townleys' request for jury trial; (4) Order denying Petition for Declaratory Judgment; and (5) Order denying the Townleys' motion for reconsideration of order denying petition for declaratory judgment. In denying the Townleys' relief, Judge McCullough and Commissioner Hill ruled on the basis that the Superior Court does not have subject matter jurisdiction to decide the Townleys' claims within the context of an unlawful detainer action.

Additionally, the Townleys' appeal is untimely as to the first 3 orders because the notice of appeal was filed beyond the 30-day limit and

the narrowly defined exceptions to extend the time limit do not apply to the Townleys' case. RAP 5.2(a). The Townleys' appeal as to the Order denying Petition for Declaratory Judgment and Order for reconsideration both fail as a matter of law because the Trial Court's records clearly state that the issues are outside the context of an unlawful detainer action. The equitable claims are also barred by statute. RCW 61.24.127 Thus, no assignment of error has occurred in the Trial Court proceedings. The Court should uphold all the orders in its entirety, dismiss the appeal and award fees to Respondents.

II. STATEMENT OF THE CASE

A. The Townleys Obtained a $297,000 Mortgage Loan.

On July 26, 2005, the Townleys executed a promissory note and deed of trust with Countrywide Home Loans, Inc. in the amount of $297,000 (the "Loan") secured by the property located at 23639 SE 267th Pl., Maple Valley, WA 98038-5836. (the "Property"). The Deed of Trust identifies Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary in a nominee capacity for Lender, Countrywide, its successors and assigns, and Landsafe Title of Washington as the Trustee with the power of sale in the event of default.

B. The Townleys Defaulted Under the Loan in January 2009

Beginning in January 2009, the Townleys failed to make their monthly payments. On or about July 8, 2009, as a result of the Townleys' default on payments due under the Note, the Townleys were sent a Notice of Default. On July 17, 2009, MERS executed an Assignment of the Deed of Trust, memorializing the assignment of the beneficial interest in the Deed of Trust to Bank of New York Mellon, as Trustee.

C. The Townleys Failed to Cure the Default and Foreclosure Proceedings Were Commenced.

On July 24, 2009, The Bank of New York Mellon, as Trustee, recorded an Appointment of Successor Trustee naming Northwest Trustee Services, Inc. ("Northwest Trsutee") as Successor Trustee and vesting Northwest Trustee with the powers to sell the Property. On September 14, 2010, Northwest Trustee issued an amended Notice of Trustee's Sale setting the sale date to October 29, 2010. The foreclosure sale was postponed to December 3, 2010.

D. The Property Was Sold at a Foreclosure Sale on December 3, 2010 as the Townleys Took No Action Pursuant to the Deed of Trust Act to Restrain the Sale.

The Property was sold to Bank of New York Mellon, as Trustee, on December 3, 2010. As evidence of its purchase, Northwest Trustee executed a Trustee's Deed to Bank of New York Mellon. The Trustee's Deed was recorded with the King County Recorder's Office on December 10, 2010 under recording number 20101210001799. Bank of New York Mellon filed a Complaint in the Trial Court to obtain possession of the Property. On February 24, 2012, Bank of New York Mellon filed a Complaint against the Townleys and other unknown defendants seeking possession of the Property.

E. The Townleys Filed a Counter and Cross Complaint Which Was Dismissed Because the Claims Are Outside of the Scope of the Unlawful Detainer Action.

In addition to an Answer to the Complaint filed by Bank of New York Mellon, the Townleys filed a Counter and Cross Complaint against Ocwen Loan Servicing, LLC and Mortgage Electronic Registration Systems, Inc. The Townleys asserted claims for Consumer Protection Act violations, common law fraud, and "mortgage fraud." On March 7, 2012, the Townleys attempted to change the unlawful detainer proceeding from

limited to general jurisdiction (apparently realizing that their Counter and Cross Complaint was improperly filed in the unlawful detainer action). On May 8, 2012, Respondents filed an Opposition to the Motion, which asserted that the issue of the right of possession of the property precludes the present unlawful detainer action from being converted into an ordinary civil suit for damages. CP 49. On May 11, 2012, the Court denied the Townleys' Motion to change proceeding from limited general jurisdiction. CP 61. On May 15, 2012, Respondents filed a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) and that the Trial Court lacks subject matter jurisdiction to resolve issues outside the scope of the unlawful detainer statute under RCW 59.12. On May 17, 2012, the Court granted Respondents' Motion to Dismiss the Townleys' Counter and Cross Complaint.

F. The Court Granted Bank of New York Mellon's Writ of Restitution for Possession of the Property.

On May 1, 2012, Bank of New York Mellon filed its Motion for Writ of Restitution for possession of the Property. CP 29. The Townleys filed a response to the Motion for Writ of Restitution. CP 66. The Townleys asserted in their Response that the summons in the unlawful detainer does not comply with chapter 59.18 (the Residential Landlord-Tenant Act). In the Reply of Bank of New York Mellon, it asserted that

the Townleys' argument is fatally flawed because the Act does not apply to the Townleys since they are not "tenants" within the meaning of the Act. The Court issued the Writ for Possession in favor of Bank of New York Mellon on May 17, 2012. CP 70.

G. The Townleys Filed a Petition for Declaratory Judgment and Injunctive Relief, Which Were Denied Based on Lack of Subject Matter Jurisdiction.

On March 8, 2012, the Townleys filed a Petition for Declaratory Judgment and Injunctive Relief. Respondents' filed a Response to the Petition on May 9, 2012. CP 47. The Response argued that the Court lacked subject matter jurisdiction on the declaratory and injunctive relief claims in the unlawful detainer action and that the claims are they are precluded by statute. On May 11, 2012, the Court denied the Townleys' Petition for Declaratory and Injunctive Relief, on the basis that the Superior Court does not have subject matter jurisdiction to decide the Townleys' claims within the context of an unlawful detainer action. CP 62. On May 21, 2012, the Townleys then filed a motion for reconsideration of the denial of the Petition and an emergency motion to stay the execution of the writ of restitution based on the pending motion for reconsideration. CP 73, 74. The Court denied both motions. CP 105,

106. The Townleys then filed a Notice of Appeal on August 10, 2012. CP 109.

H. Respondents Move for Legal Fees and Costs Because The Townleys Have Maintained Three Lawsuits Based on the Same Set of Facts that Have Caused Unnecessary Delay to Bank of New York Mellon's Property Interest.

The Townleys have been a party to three suits based upon the same set of facts regarding the Subject Property. The Townleys' claims regarding the foreclosure of the Subject Property have been repeatedly rejected. When the Townleys defaulted on their loan in January 2009, foreclosure proceedings were commenced. The Townleys filed a Chapter 13 bankruptcy petition in Western District of Washington on November 18, 2009. Bk. No. 09-22120. In that proceeding, the Townleys challenged Bank of New York Mellon's standing to enforce the Note. On July 19, 2010, the Chapter 13 trustee objected to confirmation of the Townleys' plan and filed a motion to dismiss. The Court granted the Motion to dismiss and entered judgment against the Townleys. The Townleys then filed a Motion for reconsideration, which was denied. The Townleys appealed the Court's dismissal order and denial of the motion for reconsideration. BAP Case No. WW-10-1397-JuWaPa. On November 7, 2011, the Washington Bankruptcy Appellate Panel dismissed the

Townleys' appeal as moot. The appellate panel also held that even if they were to decide to reverse the bankruptcy court's order, the appellate court cannot provide the Townleys with any effective relief because the Property had been sold in December 2010 and the Townleys have no right to redeem the Property under Washington law.

Nevertheless, the Townleys filed another suit in Western District of Washington, challenging the foreclosure sale and Bank of New York Mellon's standing to enforce the Note. Case No. 2:10-cv-01720-JCC. The Townleys were given two opportunities to amend the Complaint, but the Townleys still failed to plead facts that would entitle them to relief. Thus, on June 29, 2011, Judge Coughenour dismissed the Townleys' lawsuit based on the reasoning that the Townleys have waived their rights to challenge the post-sale claims and the exceptions did not apply to the Townleys. Dkt. 68, ¶ 17. The Townleys filed a motion for reconsideration of the Court's judgment and order granting the motion to dismiss. Dkt. 90. On September 23, 2011, the District Court reiterated its previous decision and denied the motion. Dkt. 92. The Townleys filed a notice of appeal of the District Court's ruling in the United States Court of Appeals for the Ninth Circuit, Case No. 11-35819.

Despite the Bankruptcy Court and District Court's dismissal of their claims, the Townleys re-litigated the same claims in the instant

unlawful detainer action. The Townleys' complaint in the Western District also sought for declaratory and injunctive relief for the Superior Court to review alleged fraudulent documents regarding "mortgage fraud". Thus, the Superior Court did not err when it dismissed the Townleys' claims. Because of the Townleys' repeated acts to relitigate the same issues, filing unmeritorious motions and papers based on the same or substantially similar facts arising out of the foreclosure, Respondents move the Court for fees and costs under RAP 14.2 and RAP 18.3. The Townleys are not entitled to any fees and costs because they are pro se litigants and they have been unjustly enriched by having occupied the Subject Property for over three years without paying rent, taxes and insurance. The Court should award fees and costs to Respondents and dismiss the appeal.

III. SUMMARY OF ARGUMENT

This is a case where the Townleys obtained a $297,000 mortgage loan and defaulted on the loan beginning January 2009. The Townleys do not dispute that they were over $16,000 in arrears when the Property was sold at a foreclosure sale to Bank of New York Mellon on December 3, 2010. Instead, the Townleys contend that the foreclosure was improper due to alleged violations of the Washington Deed of Trust Act. However, the Townleys have improperly raised the claims in the unlawful detainer action where the Superior Court lacks jurisdiction to hear claims outside

the context of possession. Thus, the Townleys' attempts to challenge the foreclosure sale were all correctly dismissed.

On appeal, the Townleys do not dispute that the Trial Court lacked subject matter jurisdiction to rule on the claims outside of the context of possession. Instead, the Townleys assert arguments regarding the foreclosure proceedings, the same arguments that have been filed and dismissed by the Court in the United States District Court Western District of Washington, Case No. C10-1720. CP 32, Exhibit "1" to Grigsby's Declaration. Notwithstanding, the arguments still fail to raise any assignments of error in the Trial Court's proceedings.

Specifically, the Court should dismiss the appeal for the following reasons: (1) There is no dispute that Bank of New York Mellon purchased the Subject Property at a trustee's sale; (2) the Townleys failed to perfect the procedures to timely file an appeal as to the Orders dismissing the Counter and Cross Complaint, the Order granting Writ of Restitution and Order denying Townleys' Motion for Revision of Commissioner's Order of Writ of Restitution based on the Townleys' request for jury trial; and (3) The claims for declaratory and injunctive relief are precluded from RCW 61.24 and are outside the scope of the superior court's subject matter jurisdiction in an unlawful detainer action. Accordingly, the Townleys' appeal should be dismissed.

IV. ARGUMENT

A. STANDARD OF REVIEW

An order dismissing a complaint for failure to state a claim under Civil Rule 12(b)(6) is reviewed de novo. *In re Cedano*, 470 B.R. 522, 528 (B.A.P. 9th Cir. 2012) citing to *Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc.*, 610 F.3d 1063, 1066 (9th Cir. 2010).

Subject matter jurisdiction over a controversy is a question of law, which is reviewed de novo. *Angelo Prop. Co., LP v. Hafiz,* 167 Wash. App. 789, 808 (2012). Parties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter jurisdiction or it does not. *In re Marriage of Furrow,* 115 Wash.App. 661, 667 (2003). Lack of subject matter jurisdiction renders a Trial Court powerless to decide the merits of the case. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County,* 135 Wash.2d 542, 556, 958 P.2d 962 (1998). A judgment entered by a court lacking subject matter jurisdiction is void; and a party may challenge such judgment at any time. *Cole v. Harveyland LLC,* 163 Wash.App. 199, 205, 258 P.3d 70 (2011).

A decision to deny a motion for reconsideration is reviewed for an abuse of discretion. *Arrow Elecs., Inc. v. Justus* (*In re Kaypro*), 218 F.3d 1070, 1073, (9th Cir. 2000). A two-part test is applied to determine objectively whether the Court abused its discretion. *United States v.*

Hinkson, 585 F.3d 1247, 1260 (9th Cir. 2009). The "first step is to determine de novo whether the Trial Court identified the correct legal rule to apply to the relief requested." *Id.* Second, "whether the Trial Court's resolution of the motion resulted from a factual finding that was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* If any of these three apply, only then is the court of appeals able to have a "definite and firm conviction" that the district court reached a conclusion that was a "mistake" or was not among its "permissible" options, and thus that it abused its discretion by making a clearly erroneous finding of fact. *Id.*

B. THE TOWNLEYS' APPEAL AS TO THE ORDER GRANTING WRIT OF RESTITUTION AND MOTION TO DISMISS SHOULD BE DISMISSED BECAUSE IT IS UNTIMELY.

The Townleys seek to appeal various orders, including: (1) Order dismissing the Counter and Cross Complaint entered on May 17, 2012 (CP 69); (2) Order denying Petition for Declaratory Judgment entered on May 11, 2012 (CP 21); (3) Order denying the Townleys' motion for reconsideration of order denying petition for declaratory judgment entered on July 13, 2012 (CP 106); (4) Order granting Writ of Restitution entered on May 17, 2012 (CP 70); and (5) Order denying the Townleys' Motion

for Revision of Commissioner's Order of Writ of Restitution based on the Townleys' request for jury trial entered on July 13, 2012 (CP 105).

A party is allowed 30 days to file a notice of appeal after the entry of the decision of the Trial Court that the party filing the notice wants reviewed. RAP 5.2(a). This 30-day time limit can be extended due to some specific and narrowly defined circumstances. RAP 5.2(a). It can also be prolonged by the filing of "certain *timely* posttrial motions", including a motion for reconsideration and a motion for amendment of judgment under CR 59. *Moore v. Wentz,* 11 Wash.App. 796, 799, 525 P.2d 290 (1974); RAP 5.2(a), (e). A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A Trial Court may not extend the time period for filing a motion for reconsideration. CR 6(b); *Moore v. Wentz,* 11 Wash.App. 796, 799, 525 P.2d 290 (1974).

Here, the Townleys filed a notice of appeal on August 10, 2012. CP 109. With the exception to the appeal as to the Court's order denying petition for declaratory judgment entered on May 11, 2012, the appeal as to the other orders are untimely. Specifically:

(1) The Townleys appeal as to the Order dismissing the Counter and Cross Complaint is untimely. An Order dismissing the Counter and Cross Complaint was entered on May 17, 2012. Pursuant to RAP 5.2(a),

the notice of appeal should have been filed no later than June 15, 2012. CP 69, 109. The Townleys did not file the Notice of Appeal as to this Order until August 10, 2012, 28 days past the allowable time limit. As such, the notice of appeal filed by the Townleys as to the order dismissing the Counter and Cross Complaint fails to perfect an appeal. The disposition of this case is governed by RAP 18.8(b), which states:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

The Townleys have not provided sufficient excuse for their failure to file a timely notice of appeal or has demonstrated sound reasons to abandon the preference of finality. Thus, the Court should dismiss the appeal and/or uphold the Trial Court's Ordeer dismissing the Counter and Cross Complaint.

(2) The Townleys' appeal as to the Order granting Writ of Restitution is untimely. The Order granting Writ of Restitution was entered on May 17, 2012. CP 70. In order to expand the 30-day limit to file an appeal, the Townleys would need to file a motion for revision of the commissioner's order of writ of restitution within 10 days of the Order, or no later than March 18, 2012. RCW 2.24.050 states in relevant

part that, "unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the court." The Townleys filed a Motion for Revision on May 30, 2012, twelve (12) days after entry of the Court's Order. CP 81. Because the Townleys' Motion for Revision was not timely, it did not extend the 30-time limit for filing the notice of appeal. *See Schaefco, Inc. v. Columbia River George Comm'n*, 121 Wash. 2d 366, 368 (1993) (dismissing the appeal as untimely since the late filing of a motion for reconsideration does not extend the 30-day limit for filing the notice of appeal). Thus, the Townleys' appeal filed on August 10, 2012 is 53 days past the allowable time limit.

C. THE TRIAL COURT CORRECTLY ISSUED AN ORDER FOR WRIT OF RESTITUTION BECAUSE BANK OF NEW YORK MELLON, AS PURCHASER OF THE PROPERTY AT THE TRUSTEE'S SALE, IS ENTITLED TO POSSESSION OF THE PROPERTY.

The Trial Court did not err when it issued an Order for Writ of Restitution and an Order denying the Townleys' Motion for Revision of Commissioner's Order for Writ of Restitution. As discussed above, the

appeal is untimely as to these orders. Even if considered, the evidence clearly supports Bank of New York Mellon's right to possess the property.

Washington courts have generally not allowed parties to raise other claims, including counterclaims, when the Trial Court determines in an unlawful detainer action who is entitled to possess the property at issue. *Munden v Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Kessler v. Nielsen,* 3 Wn. App. 120, 123-24, 472 P.2d 616 (1970).

In *Angelo*, the Washington Court of Appeals clarified that when the superior court hears an unlawful detainer action under RCW 59.12,[1] it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute:

> An unlawful detainer action under *RCW 59.12.030* is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the Trial Court to resolve is the "right to possession" as between a landlord and a tenant. *Port of Longview v. Int'l Raw Materials, Ltd.,* 96 Wn. App. 431, 436, 979 P.2d 917 (1999); *see also Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). It is well settled in Washington that,
>
> > [i]n an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues.

[1] RCW § 61.24.060 provides that a purchaser at a trustee's sale shall "have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW."

> *Granat v. Keasler,* 99 Wn.2d 564, 571, 663 P.2d 830, *cert. denied*, 464 U.S. 1018 (1983). Thus, ***an unlawful detainer action is a "narrow one, limited to the question of possession and related issues such as restitution of the premises and rent.***" *Munden, 105 Wn.2d at 45.*
>
> ***If, however, an issue is not incident to the right to possession, the trial court must hear the issue in a general civil action.*** *Kessler v. Nielsen,* 3 Wn. App. 120, 123-24, 472 P.2d 616 (1970). In other words, although a superior court is normally a court of general jurisdiction and it may resolve most civil claims, ***when the superior court hears an unlawful detainer action under RCW 59.12.030, it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute.*** *See Sprincin King St. Partners v. Sound Conditioning Club, Inc.,* 84 Wn. App. 56, 66-68, 925 P.2d 217 (1996); *First Union Mgmt., Inc. v. Slack,* 36 Wn. App. 849, 853-55, 679 P.2d 936 (1984).

Angelo Property Co. v. Hafiz, 2012 Wash.App. LEXIS 881 (Ct. App., Div. 2, Filed April 17, 2012) (emphasis added). The Washington Supreme Court has recognized an exception for counterclaims "based on facts which excuse a tenant's breach," citing as permissible examples, breach of implied warranty of habitability and breach of covenant of quiet enjoyment. *Munden*, 105 Wn.2d at 45. This exception does not apply to the present case. Pursuant to RCW 61.24.060, Bank of New York Mellon was entitled to possession of the Subject Property on December 23, 2010, the twentieth day following the trustee's sale.

Here, the Townleys' Opening Brief does not assert what error was done by the Trial Court other than general conclusions that it should not

have been denied. The evidence shows that Bank of New York is entitled to possession and the Townleys failed to raise any issues within the context of possession. Northwest Trustee Services, Inc. (hereinafter "Northwest Trustee") served as the Trustee in the non-judicial foreclosure of the property commonly known as 23639 SE 267th Place, Maple Valley, WA 98038 ("Subject Property" or the "Property"). In its capacity as Trustee, on or about September 14, 2010, Northwest Trustee recorded an Amended Notice of Trustee's Sale, setting a sale date of October 29, 2010. This Notice was recorded with the King County Recorder's Office under recording number 20100914001311. CP 32, Exh. A. Bank of New York Mellon purchased the Subject Property at the trustee's sale on December 3, 2010. As evidence of its purchase, Northwest Trustee executed a Trustee's Deed to Bank of New York Mellon. CP 32, Exh. B. The Trustee's Deed was recorded with the King County Recorder's Office on December 10,2010 under recording number 20101210001799.

Subsequently, a notice to vacate was served. CP 32, Affidavit of Grigsby. Bank of New York filed its complaint in this action on February 24, 2012. In response to the complaint, on March 8, 2012, Townley filed a document titled "Defendants' Objection in Response to Plaintiffs' Unlawful Detainer Action Against Defendants." On March 13, 2012 Defendants Townley filed a document titled "Defendants' Answer and Affirmative

Defenses to Plaintiff Summons and Complaint." On or about April 30, 2012, Bank of New York Mellon filed a Motion for Writ of Restitution. CP 32. The matter came on for hearing on May 17, 2012, and the Court granted the motion for Writ of Restitution. CP 70. Thus, there is no dispute that Bank of New York Mellon purchased the Subject Property at the trustee's sale. Accordingly, the Court should uphold the Trial Court's Order for Writ of Restitution.

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D. THE TRIAL COURT CORRECTLY DENIED THE TOWNLEYS' PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF BECAUSE THE ISSUES ARE OUTSIDE THE SCOPE OF AN UNLAWFUL DETAINER ACTION.

On May 10, 2012, the Honorable Leroy McCullough correctly denied the Townleys' Petition for declaratory judgment and injunctive relief as the Court lacked subject matter jurisdiction to hear the Townleys' claims. CP 53. The Court correctly ruled on this issue.

In the Petition for declaratory and injunctive relief, the Townleys seek an order from the Court to review alleged fraudulent documents and records of alleged "mortgage fraud." CP 11. Respondents, Bank of New York Mellon, Ocwen and MERS filed their response to the Petition for Declaratory Judgment. CP 47. At the hearing on the motion, the Honorable Leroy McCullough correctly denied the Townleys' Petition for declaratory judgment and injunctive relief as the Court lacked subject matter jurisdiction to hear the Townleys' claims. CP 53. The Townleys' claims are outside the scope of the Trial Court's statutorily limited jurisdiction in an unlawful detainer action; therefore, the Court correctly ruled that it lacked authority to resolve such claims.

Moreover, the Townleys' claims are barred by statute. Even if the claims were considered in the unlawful detainer jurisdiction (which the Trial Court did not), the Townleys' claims for declaratory and injunctive relief would be precluded from statute. It is undisputed that the Townleys failed to enjoin the trustee's sale, and as a result, the Townleys' post-sale remedies are limited. "A party waives the right to postsale remedies where the 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." *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008) *citing to Plein v. Lackey*, 149 Wash.2d 214, 221 (Wash. 2003). If the borrower has knowledge of a defense to the trustee's sale but fails to enjoin the sale, the borrower waives any claims related to the underlying obligation and the sale itself. *Plein v. Lackey*, 149 Wash.2d 214, 227-228 (2003).

RCW 61.24.127 permits a borrower to bring post-sale claims for common law fraud, misrepresentation and CPA violations, but expressly states that such claims "may not seek any remedy at law or in equity other than monetary damages," and "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." RCW 61.24.127 is set forth below in pertinent part:

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of *RCW 61.24.026.*

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with *RCW 4.56.190*, become a judgment lien on real property then owned by the judgment debtor; and

(emphasis added).

Pursuant to the RCW 61.24.127, the declaratory and injunctive remedies are equitable remedies specifically prohibited by subsection (2)(b) and (c). Moreover, the affidavits of Lynn E. Szymoniak and Cheye Larson in support of the Townleys' Petition for declaratory and injunctive relief are insufficient. Ms. Szymoniak's affidavit fails to set forth facts that she is an expert in the areas of mortgage transactions, mortgage-backed securities, or the mortgage industry in general. Ms. Szymoniak's affidavit indicates she testified approximately seven insurance fraud cases. CP 11, Szymoniak affidavit, ¶¶ 3 and 4. Ms. Szymoniak claims to have testified in a single foreclosure-related case, but does not affirmatively state that she qualified as an expert in the areas of mortgage transactions, mortgage-back securities or the mortgage industry in general. Similarly, Ms. Szymoniak's opinion that the Assignment of Deed of Trust and the Appointment of Successor Trustee in this case are "fraudulent" documents is merely a legal conclusion supported only by innuendo and speculation based on Ms. Szymoniak's review of other documents executed over some unspecified period of time. Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.,* 49 Wn. App. 130 (1987) aff'd, 110 Wn.2d 912 (1988).

Similarly, the declaration of Cheye Larson is not relevant to any issue in this case. Mr. Larson claims to have discovered some irregularities in connection with MIN numbers associated with certain documents on MERS web site; however, there is no relationship between these alleged irregularities and trustee's sale giving rise to the present action. Nor were there any allegation that these alleged irregularities resulted in any harm to the Townleys. Accordingly, both declarations submitted by the Townleys are irrelevant and the claims for declaratory and injunctive relief are specifically barred by statute. The Court should dismiss the appeal.

E. THE TOWNLEYS' COUNTER AND CROSS COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As discussed above, the Townleys' appeal of the Order dismissing the Counter and Cross Complaint is untimely and should be dismissed. Moreover, the Trial Court did not err when it granted Respondents' motion to dismiss the Counter and Cross Complaint under CR 12(b)(6). The Townleys' Counter and Cross Complaints alleged a counterclaim and third-party claims for violations of the Washington Consumer Protection Act ("CPA"), common law fraud and "mortgage fraud."

In an unlawful detainer action, the court's jurisdiction is limited to determine the right of possession of the property. *Mead v. Park Place Properties*, 37 Wash.App. 403, 406 (1984). Although RCW 61.24.127 permits a borrower to bring post-sale claims for common law fraud, misrepresentation, and CPA violations, the statute expressly provides that such claims are limited to "monetary damages" and "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." *See* RCW 61.24.127(2)(b) and (2)(c). Thus, these claims are not incident to the right of possession and were dismissed in the unlawful detainer action.

1. The Townleys Fail to State a Claim Under the Washington Consumer Protection Act Because the Townleys Have Not Alleged the Necessary Elements.

Even if considered, the Townleys failed to allege a claim for violation of the CPA. To establish a violation of the CPA, the Townleys must allege five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). To establish a deceptive intent to deceive, a party is required to

show that the alleged conduct had the capacity to deceive a substantial portion of the public. *Hangman,* 105 Wash.2d at 785. A party alleging injury under the CPA must establish all five elements. *Id.* "Failure to satisfy even one of the elements is fatal to a CPA claim." *Sorrel v. Eagle Healthcare*, 110 Wn.App. 290, 298, 38 P.3d 1024, 1028 (2002).

In the Opening Brief, the Townleys rely heavily on the opinions of *Cox, Bain* and *Albice* for the proposition that the foreclosure is deemed wrongful where MERS is listed as the beneficiary and that they did not waive their right to contest the foreclosure. Not only have the Townleys' drawn a flawed conclusion from these cases, the cases cited do not support the Townleys' position that the Trial Court has jurisdiction to decide damages claim in an unlawful detainer action.

a. Bain v. Mortgage Electronic Registration, Inc., et al. does not support the Townleys' position that the Court has subject matter jurisdiction to hear claims for monetary damages.

The *Bain* opinion held that "the mere fact MERS is listed on the deed of trust as beneficiary is *not* itself an actionable injury." *Bain v. Mortgage Electronic Registration, Inc.* 175 Wash. 2d 83, 119 (emphasis added). *Bain* also held that:

> Given the procedural posture of these cases, it is unclear whether the plaintiffs can show any injury, and a categorical statement one way or another seems inappropriate. Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or and many other things, and MERS may or may not have a causal role.

Bain, supra, at 119.

Subsequent to the *Bain* decision, Washington courts applied *Bain* and found that "while *Bain* does undercut some of the articulated reasoning behind at least one of these CPA claim dismissals, reconsideration is not warranted" *Michelson v. Chase Home Finance LLC,* 2012 WL 5377905 (W.D. Wash. Oct. 31, 2012) (denying motion for reconsideration because plaintiffs still fail to plead injury and causation based on characterizing MERS as a beneficiary); *See also Lynott v. Mortgage Elec. Registration Sys., Inc.,* 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012) (granting motion to dismiss because plaintiff has alleged no injury arising from MERS's actions); *Kullman v. Northwest Trustee Services, Inc.*, 2012 WL 5922166 (W.D. Wash. Nov. 26, 2012) (granting motion to dismiss for fraud and violation of the WCPA claim because plaintiffs have failed to allege any prejudice arising from MERS' role in the foreclosure); *Jimenez v. Federal National Mortgage Ass'n*, Case No. 11-2-38345-KNT (Wash. Sup. Ct. King County (Aug. 30, 2012) (Order Granting Motion to Dismiss) (The note holder retains authority to carry

out foreclosure where it does not rely on a MERS assignment of the Deed of Trust).

Similarly, the Townleys have not specifically directed the Court's attention to any allegations in the complaint that the Townleys have pled all the required elements to support a CPA claim. First, there is nothing unfair or deceptive when Bank of New York Mellon, as Trustee was identified on the recorded foreclosure documents as the beneficiary under the Deed of Trust. *See Peterson v. Citibank, N.A.*, as Trustee, 170 Wash. App. 1035 (2012) (finding that plaintiffs failed to alleged injuries flowing from improper characterization of MERS as a beneficiary on the deed of trust). Second, the Townleys do not dispute that they executed the Deed of Trust, which clearly states that MERS is acting as an *agent* for the Lender. Importantly, the Townleys have not suffered any injury by the simple fact that MERS was named as the beneficiary in a nominee capacity in the Deed of Trust. Third, the Townleys have not alleged a public interest impact. Fourth, any alleged irregularities or non-compliance with statutory requirements cannot be deemed to constitute unfair and deceptive acts under the CPA.

Finally, as a matter of law, the Townleys cannot show they have suffered damages and that MERS caused any damages. The Townleys do not dispute that they defaulted on the terms of the Note. As a result of the

default, Bank of New York Mellon, as the noteholder, could properly institute the unlawful detainer action. The Court should uphold the Trial Court's order dismissing the counter and cross complaint.

b. Albice v. Premier Mortgage Services of Washington, Inc. is irrelevant to the issues on appeal.

In *Albice*, the borrower defaulted on the loan and received a notice of trustee's sale. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wash.2d 560, 564 (2012). After receiving the notice of trustee's sale, the borrower entered into a forbearance agreement to cure the default. *Id.* The borrower made each payment late under the forbearance agreement and each payment was accepted except for the last payment. *Id.* The last payment was sent on February 2, 2007, but the payment was rejected on February 10, 2007, and the payment was refunded on February 16, 2007. *Id.* The foreclosure sale took place on February 16, 2007.

The Court in *Albice* distinguished this case from *Plein, supra,* and declined to apply the waiver doctrine. The Court reasoned that "under the circumstance of this case," the borrower had no reason to assert the valid ground to restrain the trustee's sale because they believed that their default had been cured. *Id.* at 571. Furthermore, the Court reasoned that "[w]hile making these payments, [the borrower] had no reason to seek an order restraining a sale that may not even proceed," and even though the final

payment, curing the default, was made late, the lender had created a reasonable belief that the final payment would be accepted late. *Id.*

Unlike the borrower in *Albice*, the Townleys did not enter into any forbearance agreement or make any payments to reinstate the loan. The Townleys were in arrears of over $16,000 as of July 2009. Similar to other cases cited by the Townleys, this case does not support the proposition that the Trial Court has subject matter jurisdiction to hear the CPA claim in an unlawful detainer action. As such, the Court should uphold the Trial Court's order dismissing the counter and cross complaint.

c. Cox v. Helenius is inapplicable to the Townleys' case.

Similarly, the *Cox* case is inapplicable to the Townleys' case. The Townleys have previously made the same exact argument in a general civil action based on the same claims. *Cox v. Helenius*, 103 Wash. 2d 383, (1985). In Case Number C10-1720 filed in the United States District Court Western District of Washington, the Complaint included the same claims as the present Counter and Cross Complaint herein. The Court in that case dismissed the action based on the Townleys' failure to restrain the sale prior to the trustee's sale and for failure to allege a public interest impact to support the CPA claim.

The District Court distinguished the *Cox* case from the Townleys' case as follows:

> "In that case, the trustee for a deed of trust commenced non-judicial foreclosure against the plaintiffs. In response, the plaintiffs filed a complaint for damages against the trustee of the loan. Prior to the sale, the plaintiffs amended the complaint to include a request for an injunction restraining the upcoming trustee's sale. *Id.* The Supreme Court of Washington noted that although the plaintiffs had not applied for an order restraining the sale, they had requested that relief in their amended complaint. The court concluded that "the suit brought by the grantor prevented the trustee's initiation of foreclosure, making the sale void." *Id.* at 684. (Dkt. 92).

Moreover, the District Court found that the Townleys "do not allege that they ever attempted to restrain the sale in any way." *Id.* Neither do the Townleys offer any evidence in the record which demonstrates by way of reference to the record and legal authority that the District Court's Order on this point was incorrect. The Court should dismiss the Townleys' appeal.

2. <u>The Townleys Failed to State a Claim for Fraud Because the Fraud Claim Lacks Specificity</u>.

The Townleys' Counter and Cross Complaints purport to set forth claims for common law fraud and "mortgage fraud." CR 9(b) mandates that "[i]n all averments of fraud or mistake, the circumstances constituting

fraud or mistake shall be stated with particularity." If properly plead, fraud or intentional misrepresentation is establish by showing clear and convincing evidence of nine elements: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). "Fraud in the inducement . . . is fraud which induces the transaction by misrepresentation. . . ." *Pedersen v. Bibioff*, 64 Wash.App. 710, 722, 828 P.2d 1113, 1121 (1992).

In the present case, the Townleys fail to set forth any facts establishing the elements of fraud. Instead Townleys speak in generalized terms about "fraudulent business records and practices." There are no specific allegations that the Respondents made any intentional misrepresentations to the Townleys in the course of the non-judicial foreclosure process. Consequently, the Townleys fail to state a claim for fraud and it was dismissed by the Trial Court. The Court should uphold the Trial Court's order dismissing the cross and counter complaint.

V. CONCLUSION

For the reasons set forth in the record and above, Respondents Bank of New York Mellon, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York; Mortgage Electronic Registration Systems, Inc. and Ocwen Loan Servicing LLC request the Court to affirm the Trial Court's decision in full and/or to dismiss the instant appeal with no relief to the Townleys and award fees to Respondents.

DATED: January 24, 2013

HOUSER & ALLISON
A Professional Corporation

By: _____
Robert W. Norman, Jr. (SBN 37094)
Attorneys for Respondents, Bank of New York Mellon, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York, Mortgage Electronic Registration Systems, Inc., and Ocwen Loan Servicing, LLC

CERTIFICATE OF SERVICE
(BY OVERNIGHT MAIL)

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I, the undersigned say: I am a person over the age of eighteen years and not a party to this action. My business address is 9970 Research Drive, Irvine, California 92618.

On January 24, 2013, I served true copies of the attached

RESPONDENTS' BRIEF

[X] **VIA OVERNIGHT MAIL/COURIER:** By placing a true copy thereof enclosed in a sealed envelope, addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would in the ordinary course of business, be delivered to an authorized courier or delivery authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day for delivery on the following business day.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: January 24, 2013

_____
Courtney Hershey

Scott C. Townley
Stephanie A. Tashiro-Townley
25437 167 Pl. SE,
Covington, WA 98042

V. CONCLUSION

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