

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' SUPPLEMENTAL BRIEF

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

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Inc., and Ocwen Loan Servicing, LLC

COURT OF APPEALS
DIVISION ONE

SEP 11 2014

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I. STATEMENT OF THE CASE

A. The Townleys Fail to Restrain the Trustee's Sale

After non-judicial foreclosure proceedings were initiated based upon the Townleys' default on their home loan, the Townleys filed an affirmative complaint in the Western District of Washington on November 16, 2010 ("Federal Case"). A true and correct copy of the Federal Case docket, 2:10-cv-01720-JCC, is attached hereto as Exhibit A.

The trustee's sale of the subject property took place on December 3, 2010. CP 1. Although the Townleys had filed their Federal Case at the time of the trustee's sale, they did not take any action to restrain the sale. *See* Exhibit A. After the sale, the Townleys amended their affirmative complaint twice. *See* Exhibit A, Dkt. Nos. 13, 68. The operative complaint ("Second Amended Complaint") was thus filed on March 25, 2011, against Bank of New York Mellon f/k/a Bank of New York as Trustee for Certificateholders CWL, NC. 2005-10 ("BONY"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Does 1-100 (Litton Loan Servicing, LP ("Litton") was previously named, but was not included as a defendant in the Second Amended Complaint). *See* Exhibit A, Dkt. No. 68. The Townleys pled, with the assistance of an attorney, violation of the

Washington Consumer Protection Act (“CPA”), and requested declaratory and injunctive relief. *Id.*

Based upon the motion of BONY and MERS, the district court dismissed the Townleys’ Second Amended Complaint. *See* Exhibit A, Dkt. Nos. 86-87. The court ordered that as a result of the Townleys failure to restrain the sale, all claims unrelated to the CPA were waived, and that because the Townleys failed to allege a public interest impact, the CPA claim was also dismissed. *Id.* The Townleys eventually appealed the dismissal to the Ninth Circuit on September 30, 2011. *See* Exhibit A, Dkt. No. 93.

B. The Unlawful Detainer and the Townleys Counter and Cross Complaint are Filed During the Pendency of the Ninth Circuit Appeal

The Bank of New York Mellon F/K/A The Bank of New York as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2005-10 (“BONY”) initiated an action for unlawful detainer against the Townleys on February 24, 2012. CP 1. The Townleys eventually filed “counter and cross complaints” in which they named BONY as a counter defendant and Ocwen Loan Servicing, LLC (“Ocwen”); Goldman Sachs Group, Inc.; MERS; HSBC Mortgage Services, Inc.; and Does 1-20 as “Cross Complained Defendants”

(“Counter and Cross Complaint”). CP 16. The Townleys alleged three causes of action: CPA; fraud; and mortgage fraud. *Id.* The causes of action all relate to the underlying mortgage and trustee’s sale of the property—not to any post sale action. Thus, the subject matter of which the Townleys complained both in their Federal Case and their Counter and Cross Complaint are identical.

After a lengthy procedural history, the Townleys were ultimately denied relief in the unlawful detainer, and a writ of restitution was issued. CP 69-70. Thereafter, the Townleys filed this appeal. CP 87, 109.

This appeal was stayed pending the outcome of the Ninth Circuit appeal. The Ninth Circuit issued its judgment: the district court was affirmed in part, vacated in part, and remanded for further proceedings. *See Exhibit A, Dkt. No. 116.* The Ninth Circuit affirmed dismissal of the declaratory and injunctive requests for relief based upon the Townleys’ waiver for failing to bring an action to enjoin the sale. *Id.* However, the Ninth Circuit vacated the dismissal of the CPA claim in order to afford the district court an opportunity to reconsider the Townleys’ CPA claim based upon *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). *Id.* Therefore, the Townleys currently have pending in their Federal Case a CPA claim upon which they requested damages against BONY and MERS. *Id.*

C. The Stay is Removed in this Appeal and this Court Requests Supplemental Briefing

Respondents now provide this Court with authority on the doctrines of res judicata and collateral estoppel and its application to the Townleys splitting causes of action between federal and state courts. Furthermore, Respondents now provide this court with additional authority on the application of waiver and the narrow jurisdiction of unlawful detainer actions pursuant to RCW 59.12 *et seq.*

II. SUMMARY OF ARGUMENT

The Townleys' Counter and Cross Complaint is precluded based upon res judicata, which prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. It is also precluded based upon collateral estoppel, which prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. Affirming the dismissal would conserve judicial resources, encourage respect for judicial determinations, and discourage the Townleys from attempting to re-litigate their claims time and again.

If the Townleys' claims for either fraud or CPA survive application of res judicata and collateral estoppel, the claims remain barred. The claims remain barred in the context of an unlawful detainer based upon

RCW 61.24.127 and the narrow scope of an unlawful detainer, which is limited to questions related solely to possession.

The Townleys did not restrain the sale. As a result, the Townleys may bring a separate cause of action for *damages only*, and they are limited to asserting four causes of action: (1) common law fraud or misrepresentation; (2) a material violation of RCW 61.24 *et seq.* by the trustee; (3) a violation of the Consumer Protection Act; and (4) a violation of RCW 61.24.026. Therefore, the Townleys may assert their fraud and CPA claims, but they may only recover monetary damages—their claims may not affect the validity or finality of the sale, i.e. possession.

In an unlawful detainer, the court's jurisdiction is limited, and it may only hear claims and defenses related to the question of possession. The Townleys' CPA and fraud claims for monetary damages are not applicable to the question of possession. In other words, even if the Townleys were successful on their CPA and/or fraud claims, the relief they would be entitled to is not possession of the subject property; therefore, their CPA and fraud claims are not permissible in an unlawful detainer action and their dismissal should be affirmed.

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III. ARGUMENT

A. **THE TOWNLEYS' COUNTER AND CROSS COMPLAINT IS PRECLUDED BASED UPON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.**

1. The requisite elements of res judicata are satisfied.

The Townleys' Counter and Cross Complaint is barred by the doctrine of res judicata: "If a matter has been litigated or there has been an opportunity to litigate on the matter in a former action, the party-plaintiff should not be permitted to relitigate that issue." *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1, 3 (1986) (citing cases). Application of res judicata requires a "concurrence of identity in four respects: (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." *Schoeman*, 106 Wn.2d at 858, 860. Here, each necessary element is satisfied.

First, the subject matter of the Federal Case and the Counter and Cross Complaint is identical. The facts all pertain to the Townleys' underlying loan and the non-judicial process and foreclosure thereof.

Second, for the purpose of res judicata, the causes of action in both matters are the same in nature. In order to identify a cause of action, the following criteria should be considered: "(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by

prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.” *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165, 168 (1983). The prior case determined the same rights the Townleys are requesting be adjudicated in this matter. The evidence presented in both matters is nearly identical. Both suits relate to the rights afforded the Townleys under the various statutes, including the Deed of Trust Act (“DTA”). Moreover, both suits arise out of the same nucleus of actions; thus, the causes of action are the same.

With respect to the third and fourth factors, two of the parties named are identical, and the third party named is only nominally different. MERS and BONY are named in both suits. Initially, the Townleys named Litton in their Federal Case. *See* Exhibit A, Dkt. No. 13. Although Litton is not named in the Second Amended Complaint, the Ninth Circuit viewed Litton as a Defendant-Appellee, and as such, Litton participated in the federal appellate process. A true and correct copy of the Ninth Circuit docket is attached hereto as Exhibit B. While Litton is not named in the Counter and Cross Complaint, Ocwen is named. Ocwen acquired Litton in late-2011; after the Second Amended Complaint was filed but prior to the Counter and Cross Complaint being filed in the unlawful detainer. The

parties must qualitatively be the same, but “[i]dentity of parties is not a mere matter of form, but of substance....[P]arties nominally different may be, in legal effect, the same.” *Rains*, 100 Wn.2d at 664. Thus, a suit against Ocwen is in legal effect, a suit against Litton.

Here, the concurrence of the four identities bars the Townleys’ Counter and Cross Complaint. Because each of the above elements are satisfied, all matters that were or could have been asserted by the Townleys merged with the judgment and cannot form the basis for their Counter and Cross Complaint. Application of the four identities in this matter is similar to the *Rains* matter.

In *Rains*, Rains filed a complaint in federal district court alleging violation of his rights by named members of the Public Disclosure Commission. *Rains*, 100 Wn. 2d at 662. The federal district court entered judgment for the defendants. *Id.* Subsequent to his federal court action, Rains filed a state court action based upon the same statute, and he added the State of Washington as a defendant. *Id.* The trial court granted the defendants’ motion for summary judgment based upon the doctrines of res judicata and collateral estoppel. *Id.* at 663. The Supreme Court of Washington affirmed and held that the state court action was barred by both res judicata and collateral estoppel: “He [Rains] had an unencumbered, full and fair opportunity to litigate his claim in a neutral

forum—federal district court.” *Id.* at 665-66. Therefore, Rains was prohibited from relitigating the same issues and claims in state court. *Id.*

2. The Townleys’ Counter and Cross Complaint is also barred based upon collateral estoppel.

Application of collateral estoppel requires affirmative answers to the following questions:

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

Rains, 100 Wn.2d at 665. Here, the claims and issues presented to both courts are identical, and the Ninth Circuit issued its opinion on said issues. Moreover, the parties, for all intents and purposes are the same. Last, the Townleys will not face an injustice if their state court claims are barred as they have previously had the opportunity to litigate their claims in the forum of their choice: federal district court. Moreover, their CPA claim remains pending in the Federal Case.

B. THE TOWNLEYS' FAILURE TO RESTRAIN THE TRUSTEE'S SALE RESULTED IN WAIVER OF SEVERAL CLAIMS; THOSE CLAIMS THAT SURVIVED WAIVER ARE NOT WITHIN THE COURT'S LIMITED JURISDICTION IN AN UNLAWFUL DETAINER ACTION.

1. As a result of the Townleys' failure to enjoin the sale, all claims aside from those specifically enumerated in RCW 61.24.127 are waived.

The Townleys failed to take any action to restrain the trustee's sale. As a result, their requests for declaratory and injunctive relief are waived. RCW 61.24.127.

Waiver does not apply to the Townleys' claims for fraud and violation of the CPA because they are specific exceptions under the statute. RCW 61.24.127(1)(a)-(b). However, the Townleys' fraud and CPA claims are restricted in that the relief they may seek is limited solely to monetary damages: the Townleys may not seek relief that would affect in any way the finality or validity of the trustee's sale. RCW 61.24.127(2)(b)-(c). The Townleys have requested said monetary damages in their Federal Case.

2. The Townleys' claims that survive waiver cannot affect possession; therefore, the claims are not properly brought in the unlawful detainer action.

An action for unlawful detainer is a summary proceeding. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295, 298 (1985). Counterclaims are generally not allowed for the purpose of providing an expedited

method to resolving the right to possession of the property. *Id.* Thus, an unlawful detainer is a narrow proceeding limited to the question of possession. *Id.* A counterclaim will only be permitted when resolution of the counterclaim is “necessary to determine the right of possession.” *Kelly v. Powell*, 55 Wn. App. 143, 150, 776 P.2d 996, 999 (1989), on reh'g (Nov. 30, 1989) (citing *First Union Management Inc. v. Slack*, 36 Wn. App. 849, 854, 679 P.2d 936 (1984)).

Here, the Townleys are prohibited from obtaining any relief aside from monetary damages based upon their surviving claims. See RCW 61.24.127(2)(b)-(c). Because the Townleys claims cannot affect possession, they are outside the jurisdiction of the court and must be maintained in a separate action.

3. Division I Court of Appeals applied the principles set forth above in the *McNaughton* and *Muresan* matters.
 - a. *The McNaughton Court allowed the borrower's defense because it was directly related to possession but subject to waiver.*

In *McNaughton*, Richard Brock (“Brock”) purchased a piece of property and financed the purchase with a loan through Chase Manhattan Personal Financial Services, Inc. (“Chase”), which was secured by a deed of trust. *McNaughton v. Brock*, 127 Wn. App. 1008, 1 (2005). Several years later, Chase initiated foreclosure proceedings and sent Brock a

notice of trustee's sale, which included his right to file a lawsuit based upon an objection to the sale. *Id.* Although Brock believed he had a defense to the sale and took some action, he did not file a lawsuit to restrain the sale. *Id.* at 1-2. Thereafter, the third party purchaser at the trustee's sale, Gina McNaughton ("McNaughton"), initiated an unlawful detainer action against Brock.

During the trial, Brock admitted that he received the notice of trustee's sale; that the sale was conducted properly; and that he did not file a lawsuit to restrain the sale. *Id.* at 3. Thereafter, the court issued an oral ruling in favor of McNaughton finding that Brock had notice of the sale and his remedies, "but nonetheless failed to avail himself of the remedies..." *Id.*

Post-trial, Brock filed a motion to dismiss, arguing that the court lacked jurisdiction over the matter because title to the property was in dispute. *Id.* The court denied Brock's motion to dismiss and he appealed. *Id.* at 3-4.

This Court affirmed the trial court's orders in the unlawful detainer action. *Id.* at 6. It began by reiterating that an unlawful detainer action is a narrow proceeding, limited to possession, but it noted that while generally other claims are not allowed, an exception is made when the resolution of a counterclaim or defense is necessary to determine the right of

possession. *Id.* at 4. This Court held that because Brock’s defense regarding title to the property affects the right of possession, it could be considered in the unlawful detainer. *Id.* at 5. The Court then held that Brock waived his affirmative defense, because he admittedly failed to take advantage of the pre-sale remedies in RCW 61.24 *et seq.*

The *McNaughton* case is not on point with the present matter because the Townleys’ cross and counter claims cannot effect the right of possession nor is the resolution of their Counter and Cross Complaint necessary to determine possession. Per RCW 61.24.127, the Townleys are limited to monetary damages—as such, their claims go beyond the jurisdiction of the unlawful detainer proceeding and cannot be considered.

b. The Muresan Court held that the borrower’s claims were not proper in the unlawful detainer because they were not directly related to possession.

David Muresan (“Muresan”) defaulted on a loan, secured by a deed of trust recorded against his property. *Bank of New York Mellon v. Muresan*, 180 Wn. App. 1046, 1 (2014). He was denied for a loan modification under the Home Affordable Modification Program (“HAMP”). *Id.* The note and deed of trust were conveyed to Bank of New York Mellon (“BONY”), and it initiated a non-judicial foreclosure. *Id.* In an effort to postpone the sale, Muresan filed a lawsuit against a loan

servicer regarding his allegedly improperly denied loan modification applications. *Id.* Thereafter, the trustee's sale occurred, and the property reverted to BONY. *Id.* Almost three weeks later, Muresan's lawsuit against the servicer was dismissed with prejudice. *Id.* BONY then initiated the unlawful detainer action against Muresan, and the court issued a writ of restitution. *Id.* Muresan appealed not on the basis of an improperly issued writ of restitution, but instead, he challenged the underlying sale and pre-sale process. *Id.*


This Court reviewed the arguments and defenses Muresan set forth, which related to his HAMP denial and federal case. *Id.* at 2. This Court then held that an unlawful detainer is a narrow proceeding limited to the question of possession; and that “[t]hese arguments and unsupported factual assertions ‘do not directly relate to the question of possession’ and thus are not properly before us.” *Id.* (citing *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 209, 741 P.2d 1043, 1046 (1987)). This Court went on to state that its holding supports the legislative intent behind the DTA: “By the terms of the [deed of trust] act it is clear the legislature did not contemplate that after the trustee's sale further lengthy proceedings would be required to obtain possession.” *Id.* (citing *Peoples Nat'l Bank of WA v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971)). Thus, it affirmed issuance of the writ of restitution. *Id.* at 3.

Similar to Muresan's claims regarding his loan modification and prior suit, the Townleys' claims regarding the Consumer Protection Act and fraud do not directly relate to possession. Their relief, if obtained, is limited to monetary damages; therefore, the resolution of the Townleys' claims is not necessary to determine possession. Their claims and any alleged damages are properly before the federal court based upon the Ninth Circuit's remand.

IV. 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: September 10, 2014 **HOUSER & ALLISON**
A Professional Corporation

By: 
Robert W. Norman, Jr. (SBN 37094)
Attorneys for Respondents

**CERTIFICATE OF SERVICE
(BY EMAIL AND OVERNIGHT MAIL)**

STATE OF WASHINGTON, COUNTY OF KING:

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 1601 Fifth Ave, Suite 850, Seattle, Washington 98101.

On September 11, 2014, I served true copies of the attached

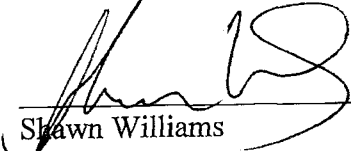
RESPONDENTS' SUPPLEMENTAL BRIEF

VIA EMAIL: Per agreement.

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: September 11, 2014


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