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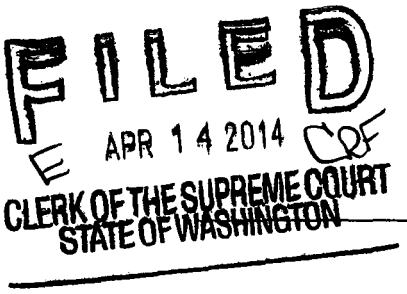
SUPREME COURT OF THE STATE OF WASHINGTON



Court of Appeals No. 43133-5-II
Supreme Court Case No. _____

FANNIE MAE aka FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent,

V.

RONALD & KATHLEEN STEINMANN, Petitioners

PETITION FOR REVIEW

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FILED IN COA ON APRIL 2, 2014

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SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT STEINMANNS'
PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Petitioners Ronald Steinmann and Kathleen Steinmann, (Petitioners), by and through their counsel of record, Brian H. Wolfe, hereby petition the Supreme Court for Review of the Opinion of the Court of Appeals and its subsequent denial of Petitioners Motion for Reconsideration and Motion to Add Additional Evidence. This Petition for Review is made pursuant to Rules of Appellate Procedure 13.1, et seq.

II. COURT OF APPEALS DECISION

Petitioners respectfully request that the Supreme Court review the opinion of Division II Court of Appeals, State of Washington filed September 10, 2013, specifically the grant of attorney's fees. Petitioners further request that the Supreme Court review the denial of Petitioners' Motion for Reconsideration and Motion to Add Additional Evidence. The Order denying said Motions was filed March 4, 2014 and specifically failed to allow additional documents unavailable at the Trial Court level.

A copy of the Decision is in the Appendix at pages A-1 thru A-9. A copy of the Order Denying Petitioners Motion for Reconsideration and Petitioners Motion for Adding Additional Evidence is in the Appendix at page A-10.

III. ISSUES PRESENTED FOR REVIEW

Petitioners respectfully submit that the Court of Appeals is in error in awarding attorney's fees in contravention of the applicable statute and in contravention of the previous rulings by the Washington State Supreme Court.

Petitioners further respectfully submit that the Court of Appeals Division II made an error in not allowing additional evidence to be presented and considered by the Court of Appeals concerning the authority of Regional Trustee Services Corporation to conduct this foreclosure sale at which Respondents Fannie Mae, aka Federal National Mortgage Association, purchased its interest. This potentially makes its decision in conflict with other Court of Appeals decisions.

Petitioners further submit that the equitable resolution of matters of this nature are an issue of substantial public interest, in light of State and National economies and abuses by the banking system.

IV. STATEMENT OF THE CASE

Petitioners are the owners of real property in Clark County, Washington. During a complicated and failed effort to obtain a loan modification, they became in default of their loan with their apparent Lender, One West Bank. A foreclosure ensued and Respondent Fannie Mae, aka Federal National Mortgage Association, was the Purchaser at the Trustee's Sale. It commenced a "Complaint for Unlawful Detainer" under Clark County

Cause No. 11-2-03547-0. (CP 1-2) While said Complaint stated it was a Complaint for Unlawful Detainer, no statute was mentioned.

Respondent then issued a Motion for Summary Judgment (CP 90-96) wherein the Respondent cited RCW 61.24.060 as the authority for use of an Unlawful Detainer procedure. It also cited RCW 59.12 as the appropriate unlawful detainer statute. No attorney's fees were requested in the Motion for Summary Judgment.

An Order granting Fannie Mae's Motion for Summary Judgment (CP 174-175) was entered with no reservation made for attorney's fees. Respondent has made no subsequent Motion for attorney's fees, other than its Brief of Respondent in the Court of Appeals. The Motion for Summary Judgment was heard without allowance for discovery.

Petitioners' appealed the ruling by the Trial Court. The Court of Appeals then issued an unpublished opinion including an award for attorney's fees under RCW 59.18.290(2) and/or the Deed of Trust itself, which had a provision for attorney's fees. (Appendix A 1-9) Petitioners filed a Motion for Reconsideration. Petitioners also filed a Motion to Add Additional Evidence under RAP 9.11 offering documents to show the Trustee's Sale was without authority.

The Court of Appeals denied Petitioner's Motion to Add Additional Evidence. (Appendix A-10) Those documents would show that One West Bank, FSB appointed Regional Trustee Services Corporation as Successor Trustee to commence the foreclosure proceeding against Petitioners on November 9, 2009. The Assignment of Deed of Trust to One West Bank, FSB, was done on November 16, 2009. Even though both documents were recorded on the same date, January 29, 2010, it is clear that One West Bank had no authority to appoint Regional Trustee Services Corporation as Successor Trustee at the

time of appointment. Petitioner's effort was to indicate to the Court of Appeals, Division II that a Division I case, Bavand v. One West Bank, 176 WA App. 475, 309 P3d 636 (2013) had a similar fact presentation and the Division I Court of Appeals ruled that Regional Trustee Services Corporation had no authority to conduct the Foreclosure Sale. The sale in that Bavand case was voided. (Steinmann's Motion to Add Additional Evidence on Review pursuant to RAP 9.11) The result of the denial of these documents by the Court of Appeals, Division II, puts it in a conflict with the opinion of Division I.

V. ARGUMENT

A. A Conflict with Decisions of the Supreme Court of Washington

In its unpublished Opinion filed September 10, 2013 the Court of Appeals, Division II, held that Petitioners Steinmann failed to restrain the Foreclosure Sale and thus they waived the ability to invalidate the sale. Because the Steinmanns failed to pursue any pre-sale remedy provided for in RCW 61.24.130, the Court of Appeals ruled that they have waived the right to challenge the sale and post-sale remedies. The opinion focused on the "waiver" of pre-sale remedies and then, secondly, as an afterthought, made an award of attorney's fees.

The award of attorney's fees is in conflict with the decisions of the Supreme Court. Attorney's fees on appeal are recoverable "only if allowed by statute, rule, contract and the request is made pursuant to RAP 18.1(a)". Mousse, Inc. v. Steinmetz, 150 WA 2d 518, 535 79 P3d 1154 (2004). In its opinion (at page 9), the Court of Appeals stated two alternative grounds for award of attorney's fees: 1) the prevailing party provision in RCW 59.18.290(2) of the Residential Landlord-Tenant Act found in RCW 59.18, and 2) the attorney fee provision in the Deed of Trust.

RCW 61.24.060 sets forth the rights and remedies of the purchaser at the Trustee's Sale. In this case, Respondent Fannie Mae, and states that the Purchaser at the Trustee's Sale shall have the right to the summary proceedings to obtain possession of the real property provided by RCW 59.12. There is no reference in RCW 61.24.060, to the Residential Landlord-Tenant Act found in RCW 59.18, nor is there any reference to that statute or any of its provisions including RCW 59.18.290 in any portion of the Deed of Trust Act RCW 61.24. The Steinmanns have never been a "Tenant". The Residential Landlord-Tenant Act does not apply.

Thus under the statutory scheme the only unlawful detainer action that Fannie Mae could bring against the Steinmanns after the Trustees Sale was under the Forcible Entry and Detainer Act found in RCW 59.12. That is the limit of the statutory authority of RCW 61.24.060. In its opinion in Petitioners case, the Court of Appeals itself cites with approval that Fannie Mae (Respondent herein) brought its proceedings for an Unlawful Detainer under Chapter 59.12 RCW. (Appendix A page 4)

There are no attorney's fees provisions in RCW 59.12. It simply does not authorize the award of attorney's fees to a prevailing party or otherwise. One may compare RCW 59.12.170, which authorizes an award of "costs" only with RCW 59.18.290(2) which authorizes an award of "costs... and reasonable attorney's fees". In the case of In Re Forfeiture of One 1970 Chevrolet Chevelle, 166 WA 2d 834, 842, 215 P3d 166 (2009), it is stated:

> "Where the legislature uses certain statutory language in one statue and different language in another, a difference in legislative intent is evidenced."

The Court of Appeals also stated that an award of attorney's fees on appeal may be supported by the attorney fee provision in the Deed of Trust itself. There is absolutely no evidence in the record which demonstrates that Fannie Mae was ever a party to that Deed of Trust. Furthermore, its Complaint was not to enforce the Deed of Trust but rather to evict the Steinmanns from the premises, pursuant to an Unlawful Detainer Action. So first Fannie Mae is not a party to the Deed of Trust contract and secondly the Unlawful Detainer Action was not an action "on the contract".

There is no evidence that Fannie Mae had any interest in this matter until June 24, 2011, when it purchased the property at the Trustee's Sale. Simply put, it was not a party to the Deed of Trust contract and is not entitled to benefit from its terms.

Washington Courts have repeatedly held a non-party to the contract has no rights under the contract, and particular no right to obtain attorney's fees under the contract attorney fee provision. Watkins v. Restorative Care Center, Inc., 66 WA App. 178, 195, 831 P2d 1085 (1992). See also Touchet Valley Grain Growers, Inc. v. Opp and Seibold General Construction, Inc., 119 WA 2d 334, 356, 831 P2d 724 (1992). It is stated that a non-party to a contract cannot claim benefits under the contract.

B. Conflict with Another Decision of the Court of Appeals.

Refusal to allow Petitioners to add additional evidence on review results in a decision in this matter to be in conflict with the decision of Division I Court of Appeals found in Bavand v. One West Bank, supra. Admittedly Petitioners did not bring forward the document contained in its Motion to Add Additional Evidence until after the unpublished opinion was rendered by the Court of Appeals. However, now that those documents have been discovered it is clear that they are nearly identical to the fact pattern

found in the Bavand case. If allowed to stand, the Court of Appeals decision in this case would authorize the sale by Regional Trustees Services Corporation to Fannie Mae even though it had no authority to make that sale. By not allowing the additional evidence (which was not in the Trial Court records because discovery was not allowed) then there is a conflict between the result of the decision above and the Bavand decision in Division I.

When the Motion for Summary Judgment was in front of the Trial Court, the Bavand case had not yet been issued. At the same time the Notice of Trustee's Sale issued by Regional Trustees Services Corporation did not disclose a history of the appointment by One West Bank, nor the dates of the appointment. While on the face of the documents they state a recording date of January 29, 2010, there is nothing to indicate to the Steinmanns that they should actually be reviewing the documents themselves to determine the proprietary of the authority of Regional Trustees Services Corporation. After Bavand there is now a higher degree of scrutiny to review the process of One West Bank and Regional Trustees Services Corporation. The two (2) documents would establish that the Trustees Sale conducted by Regional Trustees Services Corporation was void. Therefore Respondent Fannie Mae would have no right to own or possess the property in question.

The Court of Appeals cites Plein v. Lackey, 149 WA 2d 214, 225, 67 P3d 1061 (2013) and Albice v. Premier Mortgage Services of Washington, Inc., 174 WA 2d 560, 569, 276 P3d 1277 (2012) as the foundation for "waiver". They insist that waiver is an equitable principle. However, they failed to take into account their own ruling in Frizzell v. Murray, 170 WA App. 570, 283 P3d 1139 (2012). In that case, the Borrower, Frizzell made an effort

to enjoin the Trustee's Sale but failed to comply with the Court's order to post a bond. Therein the Court stated:

> "....., waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of relinquishment of such right, and it may result from an express agreement of may be inferred from circumstances indicating an intent to waive. [Citations omitted] Waiver is also an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. Albice v. Premier Mortgage Services of Washington, Inc., supra." Frizzell v. Murray, supra, page 6.

The Court of Appeals then analyzed that the legislature had used the word "may" and concluded:

> "....., so under this statute, we apply waiver only where it is equitable under the circumstances and serves the WDTAs goals." Albice v. Premier Mortgage Services of Washington, Inc., 174, WA 2d at 570. Frizzell v. Murray, supra, page 7.

Rules of Appellate Procedure 9.11 is steeped in equity. The whole reason for having the allowance for limited additional evidence to allow the Court of Appeals to review facts that should possible have been in the record in the first place. There are six (6) elements for the Court to consider in acting on the Motion: 1) additional proof of facts as needed to fairly resolve issues on review; 2) the additional evidence would probably change the decision being reviewed; 3) it is equitable to excuse a party's failure to present the evidence at the Trial Court; 4) the remedy available to a party through Post-Judgment Motion and the Trial Court is inadequate or unnecessarily expensive; 5) the Appellate Court remedy of granting a new trial is inadequate or unnecessarily expensive, and: 6) it would be inequitable to decide the case solely on the evidence already taken in the Court.

The facts presented by these documents make it fall in line so closely to the Bavand case cited above, that it would inequitable and would obviously change the decision of the matter being reviewed if they were allowed in. The documents were not presented to the Trial Court because the Bain case and the Bavand case had not yet been issued. While a new trial or remand for taking evidence into the Trial Court might be appropriate, to simply deny the Motion for Additional Evidence is inappropriate.

And this is where equity fits. If the Court of Appeals, Division II, can allow Mrs. Frizzell to have not waived her rights because she failed to put in a bond, why isn't it equally equitable to allow the Steinmanns to bring in evidence that the Trial Court did not have available to it, to resolve the issues on review? The sale to Fannie Mae was without authority. That Trustee's Sale is VOID. There is nothing the Court of Appeals can do to clear the title by allowing the transaction to stand. The Court of Appeals and its unpublished opinion will deny justice to Petitioner Steinmann if the VOID sale continues to be recognized as a valid sale to Fannie Mae.

Had the Court of Appeals, Division II, upheld the Motion to Add Additional Evidence, and then reviewed those documents in context of Bavand, there is little question that they would probably change their decision in this case.

C. Substantial Public Interest.

The matter before the Court involves issues of substantial public interest that should be determined by the Supreme Court. The fallout of the financial crisis experienced in the United States, and Washington State is significant. Many of the larger banks became immune from the impact they were having on their borrowers and careless in how they administered their loans and did their paperwork. We found from the case of Bain v.

Metropolitan Mortgage Group, Inc. 175 WA 2d 83, 185 P3d 34 (2012), that Mortgage Electronic Registration Services, Inc., (MERS) does not actually hold the loan documents. The propriety of MERS being a holder of the documents was raised in response to Respondent Fannie Mae's Motion for Summary Judgment. MERS allegedly was the nominee to assign the Deed of Trust to One West Bank in this case at bar. We now know that the sale was void because Regional Trustees Services Corporation, the Successor Trustee conducting the Foreclosure Sale did not have the requisite authority to conduct the Trustee's Sale. As stated above, it was appointed Successor Trustee by One West Bank before One West Bank had been assigned its beneficiaries interest in the Deed of Trust. One West Bank was assigned the Deed of Trust by MERS, which by practice never held the original Note or Deed of Trust. There is some question that One West Bank ever held the original note or Deed of Trust. Petitioners were not allowed the time to accomplish discovery or any other thorough investigation. That is not to fault the Trial Court. Respondent Fannie Mae was moving the eviction along fairly rapidly and the Bain case and the Bavand case had not yet been decided to give the Trial Court any ammunition to postpone the entry of the Order Granting Summary Judgment and avoid the eviction of Petitioners.

Since the sale is most likely void, title to the property is not conferred in Fannie Mae nor can Fannie Mae confer a good title to any third party to whom it may later sell the property. This would thwart the effort to obtain the stated objectives of the Washington Deed of Trust Act: "(3) to promote the stability of land titles." With a void sale the land's title is unstable. Even if a court would find that Steinmann should have known of this failure before the Trustees Sale, the fact remains that Fannie Mae's title is void because the

sale was conducted without authority. The Court of Appeals Opinion does not rectify that. It does not provide "clear title" to any future purchaser from Fannie Mae.

There is substantial public interest in getting control over the abuses of foreclosure proceedings and the handling of their loan processes by major banks and the government entities known as Fannie Mae and Freddie Mac. As the Court of Appeals Division II stated in its Frizzell case, supra, equitable principles should apply when facts are raised to show that it would be inequitable to apply the rule of waiver. So even though the Steinmanns did not attempt a pre-sale restraint of the sale, if ultimately they can bring forward facts that show the sale is invalid, the equitable principles of justice demand that they be given relief and the Trustee's Sale voided.

VI. CONCLUSION

The essence of the Washington Deed of Trust Act is to meet its (3) three principles. The second of those principles is to provide adequate opportunities for interested parties to prevent wrongful foreclosures. We have already discussed the stability of land titles and the fact that a void sale makes the land title of the property in question unstable. We have also pointed out that there is "wrongful foreclosure" when an agency that has been shown to have little authority in the Bain case grants an Assignment of Interest to the Lender who had already appointed a Successor Trustee to start the foreclosure. That was never rectified, thus the foreclosure itself is wrongful and it shouldn't matter when all this comes before the Court. Those of us that work in the legal industry would like it all to happen clearly and distinctly in the Trial Court. Sometime it does not. While this matter is still open and being processed through the Court of Appeals and the Supreme, justice and equity demand that these wrongful foreclosure be dealt with.

Added to that is the inexplicable award of attorney's fees when the statute doesn't apply and the contract Deed of Trust doesn't apply. Those are clearly in contravention of stated case law from the Supreme Court and the statutes themselves.

The Supreme Court should grant this Petition for Review so that the matter can be fully adjudicated.

Dated this 23 day of April, 2014.

Respectfully Submitted,

BRIAN H. WOLFE, P.C.

By: _____
Brian H. Wolfe, #04306
Attorney for Appellants/Petitioners

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FANNIE MAE aka FEDERAL NATIONAL MORTGAGE ASSOCIATION, its successors and/or assigns, Respondent, v. RONALD STEINMANN, KATHLEEN STEINMANN, and JOHN AND JANE DOE, UNKNOWN OCCUPANTS OF THE PREMISES, Appellants.	No: 43133-5-II UNPUBLISHED OPINION

JOHANSON, A.C.J. — Kathleen and Ronald Steinmann appeal the superior court's summary judgment order in Fannie Mae's unlawful detainer action. Fannie Mae purchased the Steinmanns'[1] property at a trustee's foreclosure sale after the Steinmanns defaulted on their refinance obligations. The Steinmanns argue that the trustee's sale was void for several reasons and that Fannie Mae is not entitled to possession or title. We hold that because the Steinmanns failed to restrain the foreclosure sale, they waived the ability to invalidate the sale, and accordingly we affirm.

FACTS

In 2008, Kathleen and Ronald Steinmann refinanced their home and secured the refinance with a deed of trust in favor of IndyMac Bank, F.S.B. In 2010, the Steinmanns defaulted on their obligations. Regional Trustee Services Corporation (Trustee) sent them default letters and then a Notice of Trustee's Sale.

In January 2011, the Trustee discontinued the scheduled Trustee's sale, but it specified that the discontinuance was not a waiver of breach or default and that it did not impair the Trustee's rights or remedies. Instead, it was only the Trustee's election to not go forward with the previously scheduled sale. The Trustee later sent another Notice of Default and Notice of Trustee's Sale. The February 2011 Notice of Trustee's Sale specifically stated:

> 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 same pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.

Clerk's Papers (CP) at 83.

In May 2011, the Steinmanns disputed that IndyMac Mortgage Services was the proper debt beneficiary and asked that the Trustee verify the chain of title and the real party in interest or holder of their deed of trust. IndyMac and the Trustee responded. The Trustee stated that it was proceeding with the scheduled foreclosure.

In June 2011, the Trustee held the Trustee's sale and conveyed the property by Trustee's deed to the highest bidder, Fannie Mae. Later that month, Fannie Mae sent the Steinmanns a 20-

[1] We refer to Kathleen and Ronald in their individual capacity by their first name only for clarity, intending no disrespect. And we refer to both of them collectively as the Steinmanns.

Day Notice to Quit, explaining that it had purchased the property at a Trustee's sale and was entitled to possession. The Steinmanns did not comply.

In September 2011, Fannie Mae filed a complaint for unlawful detainer against the Steinmanns. The Steinmanns alleged that Fannie Mae wrongfully brought the unlawful detainer action because the Trustee's sale was defective and Fannie Mae had no right to the property.

In January 2012, Fannie Mae moved for summary judgment, arguing that there were no genuine issues of material fact and that it was entitled to possession as a matter of law because (1) the only issue in an unlawful detainer action is possession and (2) the Steinmanns waived their opportunity to challenge the foreclosure sale by failing to enjoin it before it occurred. The Steinmanns responded that they did not realize the significance of the pending Trustee's sale and that they did not restrain it, partially because the California law firm that they hired took their retainer but did not help them. Also, the Steinmanns argued that there were genuine issues of material fact regarding the validity of the foreclosure sale and other issues. In Kathleen's summary judgment declaration, the Steinmanns admitted having received a Notice of Default in January 2011 and a Notice of Trustee's Sale in February 2011 but they claimed that no one ever told them that they needed to obtain a restraining order to prevent the Trustee's sale from occurring. The superior court granted Fannie Mae's motion for summary judgment and ordered that a writ of restitution be issued, giving Fannie Mae possession of the property. The Steinmanns appeal.

ANALYSIS

The Steinmanns argue that the superior court erred by failing to find that genuine issues of material fact exist and that the Trustee's sale was void. Fannie Mae argues that the superior

court properly entered summary judgment because (1) the court's jurisdiction in an unlawful detainer action is limited to determining the right to possession, and (2) the Steinmanns are barred from challenging the Trustee's sale's validity or finality because they failed to enjoin it at the time. We affirm because the Steinmanns waived their right to challenge the foreclosure.

I. STANDARD OF REVIEW

On an appeal from summary judgment, we engage in the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Our standard of review is de novo and summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). We review all questions of law de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

II. DISCUSSION

Fannie Mae brought its unlawful detainer action under RCW 61.24.060, which authorizes a purchaser at a trustee's sale to obtain possession of the purchased property using the summary proceedings for unlawful detainer in chapter 59.12 RCW. Chapter 59.12 RCW provides for a limited summary proceeding "to preserve the peace by providing an expedited method for resolving the right to possession of property." *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996). To protect the summary nature of such proceedings, the action is a narrow one and is limited to the question of possession and ancillary issues such as damages and

rent due. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998); *Heaverlo*, 80 Wn. App. at 728.

Here, the Steinmanns sought to defend against the unlawful detainer action by questioning the foreclosure sale's validity for several reasons. But the "Deeds of Trust Act", chapter 61.24 RCW (Act), provides the only means by which a grantor or borrower may avoid a trustee sale once foreclosure has begun. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). The Act allows a grantor or borrower to seek to enjoin or restrain a sale "on any proper legal or equitable ground." RCW 61.24.130; *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003). It is undisputed that the Steinmanns failed to pursue this presale remedy provided for in RCW 61.24.130 and that they are now seeking post-sale remedies through unlawful detainer. So, we must determine if the Steinmanns waived their right to now challenge the sale.

The failure to take advantage of presale remedies under the Act may result in waiver of the right to object to the sale. *Plein*, 149 Wn.2d at 227. "Waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012). Waiver of any post-sale contest 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." *Plein*, 149 Wn.2d at 227. Waiver in this context serves all three of the Act's objectives: (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3)

the process should promote the stability of land titles. *Plein*, 149 Wn.2d at 227-28; *Albice*, 174 Wn.2d at 567 (citing *Cox*, 103 Wn.2d at 387).

Applying the three steps here, first, the Steinmanns received notice of their right to enjoin the sale. The Notice of Trustee's Sale specifically stated:

> 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 same pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.

CP at 83. Second, the Steinmanns had knowledge of their asserted defenses before the sale. One of their asserted defenses is that the Trustee breached its duties because it had a conflict of interest as it thought that it worked for the bank. Kathleen's declaration explained that in May 2011, when she asked the Trustee if the sale could be postponed because they were still trying to get approved for loan modification, a Trustee employee told her, "We work for the bank, IndyMac, and we have to do what they say." CP at 117. The sale occurred in June 2011 so the Steinmanns had knowledge of this alleged conflict of interest prior to the sale. Another asserted defense is that IndyMac violated the covenant of good faith and fair dealing by failing to correct information in the Steinmanns' modification and by what the Steinmanns call a "dual tracking" process of loan modification while also processing the foreclosure. Br. of Appellant at 17. These facts were also known to the Steinmanns prior to the sale.[2] The Steinmanns also argue that the Trustee should have confirmed the real party in interest or holder of their deed of trust

[2] The Steinmanns also argue that they did not have enough time between when they received their last notice that the Trustee would not postpone the sale again and the day the sale was scheduled. But the Steinmanns could have brought action to restrain the sale after the first notice of sale, rather than waiting until they received the last notice of sale.

prior to the sale. But again, the Steinmanns knew about the Trustee's alleged failure to do so prior to the sale.

Third, the Steinmanns failed to obtain a preliminary injunction or other order restraining the sale. Instead, the Steinmanns challenged the sale for the first time in their answer to Fannie Mae's unlawful detainer action. And "[t]o allow one to delay asserting a defense until this late stage of the proceedings would be to defeat the spirit and intent of the [Act]." *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971). In light of the undisputed record, we hold that the Steinmanns waived their claims against Fannie Mae.[3]

Nonetheless, the Steinmanns argue that waiver does not apply to them and that they can seek relief from a void sale under *Cox*. In *Cox*, the Coxes obtained a loan to build a swimming pool and secured the loan by granting a security interest in their home by deed of trust. *Cox*, 103 Wn.2d at 385. When the pool system failed, the Coxes refused to pay on the loan because the cost to repair the system and the damage it caused exceeded the amount due under the loan. *Cox*, 103 Wn.2d at 385-86. The Coxes brought a civil suit for damages after being notified that they were in default on the note. *Cox*, 103 Wn.2d at 386. In the meantime, the Trustee initiated foreclosure proceedings and sold the Coxes' home at a foreclosure sale for a fraction of its value. *Cox*, 103 Wn.2d at 386-87.

[3] In 2009, the legislature added RCW 61.24.127 as an amendment to the Act. It provides that a borrower's failure to bring an action to enjoin the foreclosure sale may not be deemed a waiver of a claim for damages. RCW 61.24.127. This amendment clarifies that "[t]he claim may not seek any remedy at law or in equity other than monetary damages." RCW 61.24.127(2)(b). Here, the Steinmanns seek to void the Trustee's sale and did not bring a civil action for monetary damages.

Our Supreme Court explained that an action to enjoin the sale was the only means to preclude the foreclosure sale after the foreclosure proceedings began and that an action contesting the default does not enjoin the sale. *Cox*, 103 Wn.2d at 388. But, the court held that because the Coxes had brought an action on the obligation and under RCW 61.24.030(4), the Trustee wrongfully initiated foreclosure proceedings while there was an action pending on the obligation. This invalidated the sale. *Cox*, 103 Wn.2d at 388.[4] *Cox* is an example of a case where post-sale challenges were permitted. But the Steinmanns are not in a similar situation. The Steinmanns did not bring an action on the default prior to the foreclosure sale and they do not base their challenges on anything that happened at or after the sale. Instead, their arguments rely on actions that occurred before the sale, making *Cox* not persuasive to excuse their failure to bring the presale statutory remedies.[5]

In conclusion, because they failed to restrain the foreclosure sale, the Steinmanns waived any objection to the foreclosure proceedings, and their unlawful detainer action did not provide a forum for litigating claims to title. *See Bridges*, 92 Wn. App. at 526. The Steinmanns offered no defense relevant to an unlawful detainer action, and the court therefore properly granted summary judgment to Fannie Mae. We affirm.

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[4] Additionally, the court held that the extreme disparity between the price at the sale and the home's value and the Trustee's conduct were reasons to set aside the sale that the Coxes could not have known about before the sale. *Cox*, 103 Wn.2d at 388.

[5] The Steinmanns also cite *Meyers Way Development Ltd. Partnership v. University Savings Bank*, 80 Wn. App. 655, 910 P.2d 1308, *review denied*, 130 Wn.2d 1015 (1996), but the *Meyers Way* case was not an unlawful detainer case and the plaintiffs there did bring an action to restrain the sale. *Meyers Way*, 80 Wn. App. at 663.

ATTORNEY FEES

Fannie Mae requests attorney fees on appeal under RAP 18.1, RCW 59.18.290(2), and the deed of trust. Under RAP 18.1(a), we may grant a party reasonable attorney fees or expenses if applicable law permits it. RCW 59.18.290(2) allows an attorney fees award to a landlord who prevails in an unlawful detainer action. Also the deed of trust includes a provision for attorney fees, including appellate fees. Thus because Fannie Mae prevails, it is entitled to its fees and costs upon compliance with RAP 18.1.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Quinn-Brintnall, J.

Forbes, J.P.T.

Forbes, J.P.T.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FANNIE MAE aka FEDERAL NATIONAL MORTGAGE ASSOCIATION, its successors and/or assigns,
Respondent,

v.

RONALD STEINMANN, KATHLEEN STEINMANN, and JOHN AND JANE DOE, UNKNOWN OCCUPANTS OF THE PREMISES,
Appellants.

No. 43133-5-II

ORDER DENYING MOTION FOR ADDITIONAL EVIDENCE AND DENYING MOTION FOR RECONSIDERATION

APPELLANTS filed a motion for additional evidence and a motion for reconsideration, in the above-entitled matter. Following consideration, the court denies the motions.

Accordingly, it is

SO ORDERED.

DATED this 4th day of March, 2014.

PANEL: Jj. Johanson, Quinn-Brintnall, Forbes

FOR THE COURT:

Johanson, A.C.J.
ACTING CHIEF JUDGE

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CERTIFICATE OF MAILING

I hereby certify that I have mailed **(by regular mail)** Petition for Review on the following attorney on the date noted below, by mailing to said persons a true copy thereof, certified by me as such, contained in a sealed envelope, addressed to said persons last known addresses as indicated, and deposited in the Post Office at Vancouver, Washington, on said day.

Tracy Frazier
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and

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DATED this 2nd day of April, 2014.

BRIAN H. WOLFE, P.C.

By: Roberta Woelke
Roberta Woelke, assistant to
Brian H. Wolfe