

FILED
COURT OF APPEALS
DIVISION II
2016 APR -4 PM 1:24
STATE OF WASHINGTON
BY AP
DEPUTY

NO. 48191-0-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON,

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| <p>JOHN CHOQUER, Appellant v. GUY WAY AND ZENAIDA WAY, Respondent</p> |
| <p>RESPONDENTS' BRIEF</p> |

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS.....3

II. ISSUES PRESENTED FOR REVIEW.....3

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....8

V. CONCLUSION.....14

TABLE OF AUTHORITIES

| CASES | PAGE |
|--|------|
| <i>Cox v. Helenius</i> , 103 Wn.2d 383, 387, 693 P.2d 683 (1985)..... | 9 |
| <i>Kessler v. Nielsen</i> , 3 Wn. App. 120, 123, 472 P.2d 616 (1970)..... | 9 |
| <i>Munden v. Hazelrigg</i> , 105 Wn.2d 39, 711 P.2d 295 (1985)..... | 11 |
| <i>Peoples Nat'l Bank v. Ostrander</i> , 6 Wn. App. 28, 491 P.2d 1058 (1971)..... | 8 |
| <i>Primark, Inc. v. Burien Gardens Association</i> 63 Wn.App 900, 907, 823 P.2d 1116 (1992) | 12 |
| <i>Savings Bank of Puget Sound v. Mink</i> , 49 Wn.App. 204, 207, 741 P.2d 1043 (1987)..... | 9 |
| <i>State ex rel. Simeon v. Superior Ct.</i> , 20 Wn.2d 88, 90, 145 P.2d 1017 (1944) | 13 |
| <i>Truly v. Heuft</i> , 138 Wn.App. 913, 923, 158 P.3d 1276 (2007)..... | 12 |
| STATUTES | |
| RCW 61.24.060 | 8 |
| RCW 59.12.030 | 9 |
| RAP 3.1 | 12 |

I. IDENTITY OF RESPONDENTS.

Guy Way and Zenaida Way, husband and wife and Respondents, asks this court to affirm the Superior Court decision.

II. ISSUES PRESENTED FOR REVIEW

1. In an unlawful detainer, must the Respondent provide notice to a non-occupant when the unlawful detainer action results from an owner occupied foreclosure pursuant to RCW 61.24.060 or RCW 59.12.030(2)?
2. Does Appellant John Choquer have standing to bring this appeal if he is not the aggrieved party and Marian Choquer has not appeared?

III. STATEMENT OF THE CASE

The real property which is the subject of the Superior Court unlawful detainer action and this appeal is located in Clark County and is described with reasonable certainty as follows: 9213 NE Mason Creek Road, Battle Ground, WA 98604 (hereinafter “the premises”). RP 5:9 (September 25, 2015).

On or about July 20, 2015, a trust deed was recorded in Respondents’ favor following Respondents’ purchase of the premises at

foreclosure sale that was executed against Appellants as the previous owners of the premises. CP 1; RP 7:5 (September 25, 2015). Following the foreclosure sale and recording of the Trustee's Deed, Appellants remained in possession of the premises for a period in excess of twenty (20) days in derogation of RCW 61.24.060. CP 1; RP 8:3-16 (September 25, 2015).

On July 27, 2015, a notice described in RCW 61.24.060, requiring the Appellants "John Choquer and all other occupants" to vacate not later than twenty (20) days thereafter was mailed via first class mail and certified mail return receipt requested. CP 1; RP 8:11 (September 25, 2015).

Appellants failed to vacate the premises as required in the notice described above and remained in possession of the premises. CP 1; RP 8:13 (September 25, 2015). Thus, on September 2, 2015 Appellants were in unlawful detainer of the premises and Respondents filed a Summons and Complaint seeking a writ of restitution directing the county sheriff to deliver possession of the premises Respondents. CP 1.

Further, on August 4th, 2015, a notice described in RCW 59.12.030(2) was served upon the Appellants "John Choquer and all other occupants at 9213 NE Mason Creek Road, Battle Ground, WA 98604" as

provided in RCW 59.12.040, requiring the Appellants to vacate and surrender possession of the premises to Respondents at least twenty (20) days prior to the expiration of the month of August. This was done in the event any form of landlord-tenant argument was presented by the Appellant. CP 1; RP 2:10-12 (September 25, 2015). As with the RCW 61.24.060 notice, Appellants failed to vacate as required and were in unlawful detainer. CP 1; RP 2-13 (September 25, 2015).

On September 25, 2015, a show cause hearing was held. In that hearing, Appellant John Choquer argued notice was not properly given to his wife, Marian Choquer, as her name was not specifically addressed on the RCW 61.24.060 notice, RCW 59.12.030(2) notice, or upon the Summons and Complaint. RP 3:19 (September 25, 2015); CP 19. Following this hearing, the Superior Court ruled as follows:

First of all that the Ways are currently titled owners to the property. That the property at issue is 9213 NE Mason Creek Road in Battle Ground, Washington. The titled ownership for the Ways occurred in relation to a foreclosure and the issuance of a Trustee's Deed. That Deed was dated on July 16th, 2015 and was recorded – certainly as well – it appears that that happened on July 20th of 2015.

As owners that have taken possession subsequent to the Trustee's Deed there was a Notice that was served to the occupants. That was provided on a couple of different levels.

One was a Twenty-Day Notice that was provided by first class mail and certified mail as well in conjunction with RCW 61.24.060(3) identifying the service provisions for that statute. I do find that that provision applies – RCW 61.24.060.

That the Ways as mentioned were purchasers of the Trustee's sale. That in paragraph one entitled them to possession of the property on the 20th day following the sale, specifically as against the borrower and grantor that was identified with the Deed of Trust.

In addition to that the statute provided the Plaintiffs with the opportunity for the summary proceedings allowed under RCW 59.12 that then led to the filing of this particular lawsuit.

The Defendant does not dispute the service of the two Twenty-Day Notices in essence that were issued here. The dates of those I'll note appear to be July 27th of 2015 and August 4th of 2015.

The other issue as far as occupancy of property is concerned, the Plaintiffs have established that Mr. Choquer continues to occupy the property. That was not disputed in any way by Mr. Choquer. But again that he has failed to vacate the property following the Notice. That also is not disputed by Mr. Choquer.

What has been disputed by Mr. Choquer is the issue of whether or not Notice was defective because Notice did not include by name his wife. I'll note that both of the Twenty-Day Notices do identify Mr. Choquer by name and identify then all other occupants, where the one Notice identifies and all persons occupying the particular address.

As to those two Notices I don't find that the facts – that apparently she wasn't identified by name – that is Mr. Choquer's wife – as causing those Notices to be defective. They did include

That provided both actual Notice to Mr. Choquer and to any other occupants that were involved as well. The fact that she was not identified in those Notices I don't believe makes them defective on their face. There was a proper Notice that was provided at that time.

The issue with the Summons and Complaint that was also then filed in this court under 59.12, I find to be appropriate again based on the provisions of RCW 61.24.060. There is an issue as far as service of the lawsuit would need to be established. That was not objected to by Mr. Choquer.

I'll note that there is a Certificate of Service that has been filed identifying service was completed and that – that service was completed on September 3rd with personal service on Mr. Choquer as well of that. Again I'll note that for the lawsuit purposes all – any – excuse me – all other persons occupying are also identified as a named Defendant.

So with those findings I'm going to find in favor of the Plaintiffs. I believe there is an adequate basis to grant that relief requested as far as the Writ or Restitution is concerned and will so order at this time.

RP 14:14-16:25 (September 25, 2015).

The Court then entered a Judgment and Order for Writ of Restitution. CP 51.

On October 6, a hearing was held in which Appellant was requesting a stay from enforcement of the previously entered Judgment and Writ of Restitution. As part of the hearing, the Court inquired into the

location of Marian Choquer as follows:

Judge: All right. And is it also your position that you were occupying the property – you've indicated that. Is your wife also occupying the property at this point?

JC: **No. She has a different residence at this point.**

Judge: All right. When was the last time she did occupy the property?

JC: **May 8th of this year.**

Judge: **Of 2015?**

JC: **That's correct.**

RP 14:1-9 (October 6, 2015) (emphasis added).

IV. ARGUMENT

A. Actual notice to Marian Choquer was not required.

RCW 61.24.060 provides in part:

The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust ... and shall have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

RCW 61.24.060

RCW 61.24 provides the method for nonjudicial foreclosure of a deed of trust. The chapter was designed by the Legislature to avoid costly, time-consuming judicial foreclosure proceedings, *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971), and also to "provide an adequate opportunity [or notice] for interested parties to prevent wrongful foreclosure." *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 207, 741 P.2d 1043 (1987) (citing *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

Under RCW 59.12, the unlawful detainer statute, notice to quit the premises, where required, is a jurisdictional prerequisite. *Kessler v. Nielsen*, 3 Wn. App. 120, 123, 472 P.2d 616 (1970). RCW 59.12.030(b) states:

RCW 59.12.030 states:

A tenant of real property for a term less than life is guilty of unlawful detainer either:

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him or her. When real property is leased for a specified term or period by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of the specified term or period;

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period;

(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;

(4) When he or she continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in manner in RCW 59.12.040 provided) upon him or her, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture;

(5) When he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the

service (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit;

(6) A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040 . Such person may also be subject to the criminal provisions of chapter 9A.52 RCW; or

(7) When he or she commits or permits any gang-related activity at the premises as prohibited by RCW 59.189.130.

For its part, RCW 59.12 is designed to provide expeditious, summary proceedings for the removal of persons in the possession of the property of another, *Munden v. Hazelrigg*, 105 Wn.2d 39, 711 P.2d 295 (1985), who are either in breach of a condition to that occupancy, have committed waste, have unlawfully entered, or have held over after expiration of a tenancy for a definite term. RCW 59.12.030. *Id.* In *Savings Bank of Puget Sound*, the court stated:

“We believe that the Legislature intended to preserve the summary nature of foreclosure actions permitted under RCW 61.24 in referring purchasers to the unlawful detainer statutes for the removal of "reluctant" former owners. RCW 61.24 provides for detailed notices and provides opportunities to cure for the defaulting property owner. **An additional notice prior to commencement of an unlawful detainer action would be superfluous.** Application of RCW 59.12.030(1) to these proceedings will provide a remedy that is consistent with the spirit and intent of the Legislature in enacting RCW 61.24 and **will do so without prejudice to the rights of the defaulting party.** We so hold.

Savings Bank of Puget Sound, 49 Wn. App. at 208 (emphasis added).

The purchaser at a trustee's sale may commence an unlawful detainer action to obtain possession under chapter 59.12 RCW without first providing notice. *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App 204, 208, 741 P.2d 1043 (1987). The only entities required by statute to be made defendants to an unlawful detainer action are a tenant of the premises, and any subtenant, **in actual possession at the time the complaint is filed**. *Truly v. Heuft*, 138 Wn. App. 913, 923, 158 P.3d 1276 (2007) (emphasis added).

Presently, it is clearly from Appellant's testimony on October 6, 2015 that Marian Choquer was ***not in possession or an occupant*** of the premises as she was residing at a different residence. Therefore, no notice was required to Marian Choquer pursuant to RCW 59.12.030(1) and applicable caselaw. Secondly, since Marian Choquer was not in actual possession at the time the complaint was filed, there was no need to include her as a party. Further, "all other occupants" were consistently used in all Notices, the Summons, and the Complaint which necessarily incorporates any other occupants of the premises.

B. Appellant John Choquer lacks standing to pursue this appeal and the Superior Court Judgment and Order for Writ of Restitution should be affirmed.

Only an aggrieved party may seek review by the appellate court.

RAP 3.1. An aggrieved party is one who has a "present, substantial interest, as distinguished from a mere expectancy, or ... contingent interest" in the subject matter. *Primark, Inc. v. Burien Gardens Association*, 63 Wn. App 900, 907, 823 P.2d 1116 (1992). And as the Washington Supreme Court has stated, "[t]he mere fact that one may ... be disappointed over a certain result ... does not entitle him to appeal. He must be "aggrieved" in a legal sense. *State ex rel. Simeon v. Superior Ct.*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944).

According to Appellant's own argument, Marian Choquer is the aggrieved party as she allegedly did not receive proper notice. However, Marian Choquer has never once appeared in this appeal. Her husband, John Choquer, may not represent her or risk the unauthorized practice of law. Further, if he is not representing her, he certainly does not have standing to argue in her place as he is not an aggrieved party. RAP 3.1.

After determining the entirety of John Choquer's argument surrounds that of the validity of Notice to the wife, it goes without question that at the very least, the Superior Court Judgment and Order for

Writ of Restitution should be affirmed against John Choquer. Quite simply, he admits to being properly served with a proper notice pursuant to RCW 61.24.060, remained in possession of the premises in violation of RCW 61.24.060, was properly named in the summons and complaint, and was properly served with the summons and complaint. He never once attempts to defend the unlawful detainer in any form as it relates to his occupancy of the premises.

Due to John Choquer's lack of standing and lack of any defense relating to his occupancy, the Superior Court decision should be affirmed.

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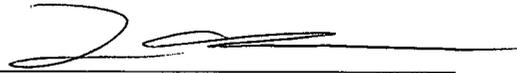
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V. CONCLUSION

Appellant John Choquer admits he was properly served and named in all relevant notices. He further admits he was properly served and named in the summons and complaint. Since Marian Choquer was no longer an occupant of the premises, Respondent was not required to name her personally, although the use of “all other occupants” necessarily incorporates anyone else residing in the premises. Finally, John Choquer lacks standing to bring this appeal as he is not an aggrieved party in a legal sense. Therefore, Respondent respectfully requests this court affirm the Superior Court’s Judgment and Order for Writ of Restitution.

DATED this 1 day of April, 2016.

RESPECTFULLY SUBMITTED:



Quinn H. Posner, WSBA #31463
Attorney for Respondents Guy and Zenaida
Way

CERTIFICATE OF SERVICE

On the date below, I served the following document(s) on the attorney(s) or person(s) identified below:

Documents

1. Respondents' Brief

| <u>Person and Address</u> | <u>Method of Service</u> |
|---|---|
| John Choquer 9213 NE Mason Creek Road Battle Ground, WA 98604 | <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> First-Class Mail |

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

Date: 04/01/2016


Place: Camas, WA

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