

No. 49078-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN MORTGAGE CORPORATION

Plaintiff/Respondent,

vs.

PAMELA S. OWEN,

Defendant/Appellant

**ANSWERING BRIEF OF RESPONDENT FEDERAL HOME
LOAN MORTGAGE CORPORATION**

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I. INTRODUCTION

Pamela S. Owen (“Owen” or “Appellant”) seeks review of the trial court’s entry of an Order Reissuing Writ of Restitution that secured the right of possession of the subject real property for Federal Home Loan Mortgage Corporation (“Freddie Mac” or “Respondent”), following an unlawful detainer show cause hearing held on May 20, 2016.

Freddie Mac purchased the subject property following a nonjudicial foreclosure trustee’s sale held on January 16, 2015, which Owen did not restrain. Thereafter, Freddie Mac brought the underlying unlawful detainer action to obtain possession and obtained a default judgment and writ of restitution securing possession for Freddie Mac. Owen appealed to this Court, Cause No. 47566-9-II, challenging service. This Court upheld the default judgment. Freddie Mac eventually moved the trial court to re-issue the writ of restitution based on the judgment. Owen countered the re-issuance, producing a 1099-A Internal Revenue Service tax form (“1099”) generated as a result of Freddie Mac’s acquisition of the Property. The form made no representations as to note holder status in the foreclosure process and did not implicate subject matter jurisdiction. The trial court ordered the writ re-issued. Freddie Mac asks this court to affirm the trial court’s decision.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. CR 60(b) and Collateral Estoppel Bar Appellant's Collateral Attack Based on the 1099 Tax Form.
- B. The Trial Court Properly Re-issued the Writ of Restitution Because the 1099 Tax Form Did Not Implicate Subject Matter Jurisdiction.

III. STATEMENT OF THE CASE

The underlying action relates to a piece of real property located in Clark County, Washington, which is commonly known as 3912 NE 57th Avenue, Vancouver, WA 98661 (the "Property").

A. Procedural History and Statement of Facts

Appellant Owen was the owner of the Property that was subject to a deed of trust. Appellant's Brief at 1. A notice of trustee's sale was recorded June 18, 2014¹. CP 22, 25. On January 16, 2015, the Property was sold at a non-judicial foreclosure sale to Freddie Mac, the highest bidder; the record does not show the sale was restrained. The trustee issued and recorded a Trustee's Deed to Freddie Mac. See Appellant's Brief at 3; Supplemental CP 80-81. Owen refused to vacate the Property and on March 6, 2015, Freddie Mac served Owen with a Summons and Complaint for Unlawful Detainer. CP 1-6. The trial court entered a default

¹ The pleadings in the record on appeal cite to the Notice of Trustee's Sale, which was apparently not attached to the pleadings wherein it was cited. Respondent requests the Court, pursuant to ER 201, take judicial notice of the recorded Notice of Trustee's Sale referred to. ER 201(b)(2).

judgment April 3, 2015. Appellant’s Brief at 4; Supplemental CP 82-86. This Court upheld the judgment in Cause No. 47566-9-II (October 16 2016).

Owen says she received a 1099 tax form on January 28, 2016. Appellant’s Brief at 4. Owen raised the 1099 in her federal case and that court rejected the challenge on February 9, 2016. CP 60-67. On April 22, 2016, based on the original judgment, Freddie Mac moved the trial court to re-issue the writ. CP 7-10. On May 12, 2016, Owen raised the issue of the 1099 in the trial court. CP 11-20. This was over a year from the judgment. On May 20, 2016, after hearing, the trial court ordered the clerk to re-issue the writ. CP 69-72.

The 1099 makes no representation regarding note possession. It labels Freddie Mac a “Lender” – who acquired real property at a foreclosure sale. CP 31-32. According to the *Freddie Mac Single-Family Seller/Service Guide* (2016) the “servicer must provide IRS form 1099-A... this reporting must be done whenever Freddie Mac or a third party acquires an interest in a property in full or partial satisfaction of Freddie Mac’s secured debt.” CP 35-36.

IV. ARGUMENT

A. Standard of Review

Whether a trial court had subject matter jurisdiction over a

controversy is a question of law reviewed de novo. *Young v. Clark*, 149 Wash.2d 130, 132, 65 P.3d 1192 (2003).

B. CR 60(b) Bars Appellant's "Newly Discovered Evidence"

Because Appellant failed to timely move for relief from the judgment that authorized re-issuance of the writ of restitution, CR 60(b) bars her collateral attack on appeal. The trial court entered a default judgment April 3, 2015 and denied Owen's subsequent motion to vacate, which raised service of process issues. Owen says she received the 1099 on January 28, 2016. Based on the original judgment, Freddie Mac moved the trial court to re-issue the writ. On May 12, 2016, Appellant again moved to vacate the judgment, this time based on the 1099 – more than a year from the judgment. The trial court denied this second motion to vacate and re-issued the writ.

Motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion. *Hope v. Larry's Markets* (2001) 108 Wash.App. 185, 29 P.3d 1268. Pursuant to CR 60(b)(3):

on motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for... newly discovered evidence... The motion shall be made within a reasonable time and... not more than 1 year after the judgment...

Here, Appellant received the 1099 in January 2016, but did not bring a motion to vacate based on the 1099 in the trial court until May 2016, over a year after the judgment authorizing issuance of the writ. CR 60(b) thus time-barred her motion to vacate based on the 1099. The trial court's denial of her motion to vacate and re-issuance of the writ was well within the trial court's sound discretion.

Alternatively, a court will not grant relief from judgment based on newly discovered evidence if the newly discovered evidence is not material. *Vance v. Offices of Thurston County Com'rs* (2003) 117 Wash.App. 660, 71 P.3d 680, *reconsideration denied, review denied* 151 Wash.2d 1013, 88 P.3d 965. The 1099 form is not material, as shown below, sections C and D.

C. Collateral Estoppel Barred More Litigation Based on the 1099

The Federal Court's February 9, 2016 ruling for Freddie Mac disposed of Appellant's 1099 claim. CP 60-67. The four elements of collateral estoppel applied to bar Appellant from raising the issue in the trial court: (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 collateral estoppel 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? See *McDaniels v. Carlson*, 108 Wash.2d 299, 303, 738 P.2d 254 (1987).

The federal ruling treated the 1099 issue as a motion for reconsideration and denied it. CP 61. The federal ruling was final and dismissed the claims with prejudice and the relevant parties are the same. The doctrine will not work an injustice because its application serves judicial economy and the principals of justice, because the Appellant has more than had her day in court and actually lost on the 1099 issue already. Collateral estoppel thus barred Appellant from raising the issue again.

D. Unlawful Detainer Provides No Forum to Litigate Title; Alternatively, Appellant Has Waived All Title Challenges and Cannot Overturn the Trustee's Sale

Appellant attempts to attack subject matter jurisdiction with an attack on Freddie Mac's title, inverting longstanding Washington law that bars title litigation in unlawful detainer. 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, 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 Wash.App. 56, 66–68, 925 P.2d 217 (1996). Unlawful detainer “do[es] not provide a forum for litigating claims

to title.” *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998). Unlawful detainer is a narrow proceeding limited to the question of possession and related issues such as restitution of the premises and rent. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45 (1985). Appellant’s “title” attack thus did not suddenly divest the trial court of subject matter jurisdiction, rather, unlawful detainer’s limited scope barred her belated and irrelevant claim, properly deciding the limited issue of possession for Freddie Mac.

Further, under RCW 61.24.060, the purchaser at the trustee’s sale shall be entitled to possession of the property on the twentieth day following the sale and has the right to the summary proceedings to obtain possession of the real property provided in RCW 59.12, the unlawful detainer statute. A trustee’s deed is prima facie evidence of a proper sale and the only evidence necessary to prove the right to possession. RCW 61.24.040(7); *Glidden v. Municipal Authority of City of Tacoma*, 111 Wn.2d 341 (1988). Appellant admits that the trustee’s deed herein issued after sale to Freddie Mac. Appellant’s Brief at 3. The 1099 fails to rebut or even present a challenge to the validity of the recorded trustee’s deed.

Alternatively, a claim to title based on a Mortgage Electronic Registration Systems (“MERS”) argument -- as is Appellant’s (see Appellant’s Brief at 8) -- is fatally belated and waived because there is no

evidence here that the trustee sale was enjoined.² See e.g. *Federal National Mortgage Association v. Ndiaye*, 188 Wn.App. 376 (2015); *Merry v. Northwest Trustee Services*, 188 Wn.App 174, 194-95, 352 P.3d 830 (2015). Owen had at least constructive notice of a purported “MERS claim” based on the deed of trust she signed, and the recorded Notice of Trustee’s Sale’s advisement of the right to restrain the sale. See Appellant’s Brief at 2; Respondent’s Request for Judicial Notice Exhibit 1, p. 3. However, even if not waived, a claim may not affect in any way the validity or finality of the foreclosure sale, and may not operate in any way to encumber or cloud the title to the property. RCW 61.24.127(2) (c), (e). Thus, Owen may not attack title in any sense and subject matter jurisdiction remained with the trial court.

E. Alternatively, Subject Matter Jurisdiction Was Properly Retained Because The 1099 Suggests, at Most, an Owner-Servicer Relationship Approved by *Brown v. Washington State Department of Commerce*

The 1099 tax form is wholly irrelevant. It makes no representation regarding note possession during foreclosure. It does not even solicit such information. Instead, it identifies a “Lender” who acquired real property

² The “MERS” argument also fails because Owen admits the subject note was assigned to Bank of America, N.A., CP 10, 12, which then properly appointed the successor trustee who effectuated foreclosure. Owen’s cite to an October 29, 2014 bankruptcy court declaration (Appellant’s Brief at 3) is not in the record and should be disregarded.

at a foreclosure sale -- for tax purposes, not for analysis of the nonjudicial foreclosure process. According to the *Freddie Mac Single-Family Seller/Servicer Guide* the “servicer must provide IRS form 1099-A... this reporting must be done whenever Freddie Mac or a third party acquires an interest in a property in full or partial satisfaction of Freddie mac’s secured debt.” CP 35-36.

At most, Owen attempts to fault a note owner’s relationship with its servicer – a relationship explicitly approved by *Brown v. Washington State Department of Commerce* 184 Wn.2d 509, 359 P.3d 771 (2015). The owner-servicer relationship is commonplace in the contemporary residential mortgage business. There is nothing actionable about Freddie Mac owning a note and Bank of America (“BANA”), as servicer of the debt, enforcing the note via nonjudicial foreclosure. *Brown* explains that Freddie Mac does not lend to homebuyers. Instead, Freddie Mac purchases mortgage notes from the initial lenders. When Freddie Mac purchases a mortgage note from a lender, the lender often agrees to “service” the loan in return for compensation. Before the servicer institutes foreclosure proceedings, Freddie Mac provides the servicer with actual or constructive possession of the original note. The servicer holds the note and is entitled to enforce it. Washington's Uniform Commercial Code (UCC) authorizes

this division of note ownership from note enforcement. *See Brown*, 184 Wn.2d 509, 521-523.

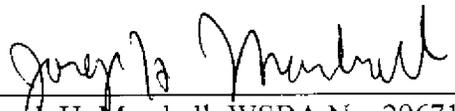
The 1099's labelling of Freddie Mac as "lender" is thus consistent with its ownership status and BANA's servicer status and right to enforce the note in nonjudicial foreclosure. The servicer would also have issued required notices in the foreclosure process, so Appellant's claim that Freddie Mac did not is of no import. There is thus no foreclosure or title implication to have deprived the trial court of subject matter jurisdiction.

V. CONCLUSION

Subject matter jurisdiction remained with the trial court; the trial court properly granted the order of default and re-issued the Writ of Restitution. Accordingly, Freddie Mac requests that this Court affirm the lower court's orders.

Submitted this 11th day of October, 2016.

RCO Legal, P.S.

By: 
Joseph H. Marshall, WSBA No. 29671

Declaration of Service

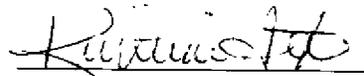
The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.
2. On October 11, 2016, I caused a copy of the **Answering Brief of Respondent Federal Home Loan Mortgage Corporation** to be served to the following in the manner noted below:

Pamela Owen 3912 NE 57 th Ave. Vancouver, WA 98661 <i>Pro Se</i> Appellant	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 11th day of October, 2016.



Kristine Stephan, Paralegal

RCO LEGAL PS

October 11, 2016 - 3:46 PM

Transmittal Letter

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