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

LEONID KUCHEROV AND ANNA TSYBULSKAYA,
Husband and Wife,

Appellants,

vs.

OWB REO, LLC,

Respondent.

CORRECTED BRIEF OF RESPONDENT OWB REO, LLC

Appeal from Clark County Superior Court
Case No. 16-2-01107-5
The Honorable Judge Robert Lewis

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I. INTRODUCTION

This is an unlawful detainer case. *Pro se* Defendants-Appellants Leonid Kucherov and his wife Anna Tsybulskaya (collectively, “Kucherov”¹) appeal two rulings by the trial court: (1) issuance of a Writ of Restitution allowing Plaintiff-Respondent OWB REO LLC (“OWB REO”) to evict Kucherov and take possession of the subject property following foreclosure, and (2) denial of Kucherov’s motion for the trial judge to recuse himself. Both of the trial court’s rulings should be affirmed.

Kucherov made no showing that the trial judge could not fairly preside in this matter because of prejudice. Likewise, Kucherov’s numerous and convoluted arguments challenging eviction fail. Kucherov does not dispute that he stopped making his mortgage payments in 2011—*over four years before the foreclosure sale occurred*. Instead, he argues that the foreclosure sale was invalid and that OWB REO had no right to bring an unlawful detainer action because it was not properly registered to do business in the State of Washington. He also argues that OWB REO violated Washington’s contractor registration statute (what Kucherov

¹ Kucherov was the sole borrower on the mortgage loan secured by the property at issue. Therefore, for simplicity, Defendants-Appellants are collectively referred to herein as “Kucherov.”

refers to as the Anti-Flip statute) by not registering as a contractor and that OWB REO has failed to pay Washington taxes.

The trial court properly rejected each of Kucherov's arguments and held that OWB REO is entitled to pursue unlawful detainer and that arguments regarding OWB REO's business practices and tax status are immaterial to the sole issue in an unlawful detainer action—right of possession.

Kucherov's appeal also has procedural deficiencies. In addition to relying on the arguments that he raised below, he relies on two new arguments that were never mentioned—let alone litigated—during the trial court proceedings. One of these arguments has already been considered and rejected by this Court. These newly-raised issues are not properly before the Court and they should be rejected.

II. STATEMENT OF THE CASE

Kucherov's Statement of the Case is confusing and does not comply with Rule of Appellate Procedure 10.3. Therefore, OWB REO provides the following statement of the relevant facts and procedural history.

A. Kucherov's Loan Default

Kucherov was the sole debtor on a mortgage loan owned by CIT Bank, N.A., f.k.a. OneWest Bank N.A. ("CIT Bank"). (10/28/16 Hrg. Tr.

at 11:3-12:15; 10/28/16 Hrg. Exs. 1-2.) The loan was secured by the real property located at 1931 NW 7th Avenue, Camas, WA 98607 (“the Property”). Kucherov defaulted on his loan when he stopped making his loan payments in 2011. (10/28/16 Hrg. Tr. at 12:16-13:3.) Therefore, CIT Bank exercised its rights under the loan contract and initiated non-judicial foreclosure proceedings. (10/28/16 Hrg. Tr. at 13:4-8.)

B. The Foreclosure Sale

A public foreclosure sale was held on May 20, 2016.² (10/38/16 Hrg. Ex. 3 at 2.) OWB REO, a wholly-owned subsidiary of CIT Bank, was the winning bidder at the sale. (10/28/16 Hrg. Tr. at 13:21-24; 10/38/16 Hrg. Ex. 3; CP³ at 301.) A Trustee’s Deed reciting the details of the sale and conveying ownership of the Property to OWB REO was recorded in the Clark County Recorder’s Office on May 31, 2016. (10/38/16 Hrg. Ex. 3.)

C. OWB REO’s Unlawful Detainer Action and First Writ of Restitution

OWB REO filed this unlawful detainer action on June 14, 2016. (CP at 2-43.) A show cause hearing for issuance of a Writ of Restitution

² Kucherov made numerous attempts to avoid and delay the foreclosure proceedings and the eviction by, among other things, filing multiple lawsuits challenging the foreclosure and multiple bankruptcy petitions. These proceedings are detailed at CP 293-299 and OWB REO’s Response to Defendants’ Emergency Motion for Stay, filed in this Court on November 4, 2016.

³ All citations to “CP” refer to the Clerk’s Papers.

was set for July 1, 2016. (CP at 44.) A few days before the hearing, OWB REO was notified that Kucherov had attempted to remove this case to federal court, including an electronic notice from the federal court that Kucherov had filed a “PROPOSED Notice of Removal” and had not paid the required filing fee. (CP at 117-118.)

The day before the show cause hearing, OWB REO’s counsel spoke to both the Clark County Superior Court and the federal court to determine whether the hearing in state court could proceed in light of Kucherov’s attempted removal. (CP at 118.) Both courts advised that proper removal had not occurred and nothing prevented the show cause hearing from going forward. (*Id.*) Thus, OWB REO appeared at the hearing and the state court issued a Writ of Restitution, explaining that its records did not show that a proper removal had occurred, or that it lacked jurisdiction to proceed. (CP at 60-63; 118-119.)

To clarify the status of the state court’s jurisdiction, OWB REO moved to dismiss or, alternatively, remand the improperly removed federal action. (CP 119.) The federal court summarily ordered remand without waiting for a response from Kucherov, stating that there was no basis for federal jurisdiction. (CP 119; 122.)

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D. Kucherov's First Appeal

Kucherov filed an Emergency Motion for Reconsideration and Rehearing on Issuance of the July 1, 2016, Writ. (CP at 66-99.) He argued that the state court lacked jurisdiction to issue the Writ because of the removal and that OWB REO was not properly registered to do business in Washington. (*Id.*) On August 2, 2016, the trial court denied Kucherov's Motion for Reconsideration. (CP at 160-161.) Kucherov then filed an emergency motion to stay or cancel the Writ with this Court, making the same arguments he had made to the trial court. *OWB REO LLC v. Kucherov*, Wash. Ct. App. Case No. 49441-8-II ("First Appeal") (8/4/16 Motion for Stay.)

In an effort to avoid protracted litigation, OWB REO requested that this Court vacate the July 1, 2016 Writ and remand the case so that a new Writ could be issued where the removal proceedings were fully resolved and the trial court's jurisdiction could not be questioned. (First Appeal, 8/18/16 Response to Motion.) OWB REO further explained that although it did not believe that the business registration requirement that Kucherov relied on applied, it had registered as a foreign entity with the State of Washington, effective August 11, 2016. (*Id.*; *see also* 10/38/16 Hrg. Ex. 4.) This Court accepted OWB REO's proposal of remand on

September 1, 2016, and the case was returned to the trial court for issuance of a new writ. (CP 198-199.)

E. OWB REO's Second Writ of Restitution

Following remand, OWB REO moved for issuance of a new writ, and a show cause hearing was scheduled for September 30, 2016. (CP 189-204.) In response, Kucherov moved to stay issuance of the writ arguing, among other things, that OWB REO had made false statements in its business registration and owed outstanding taxes in the State of Washington. (CP 209-269.) He also filed a Motion to Disqualify the Honorable Judge Robert Lewis because the Washington Court of Appeals “reversed the rulings made by Judge Lewis and [Kucherov] will be prejudiced by any further rulings of this Honorable Judge.” (CP 274.)

At the September 30, 2016 hearing, Judge Lewis denied Kucherov’s Motion to Disqualify, stating: “I have no actual bias against you and there is no reason to think I can’t judge this case fairly.” (9/30/16 Hrg. Tr. at 7:14-16.) He also set an evidentiary hearing on Kucherov’s Motion for Stay for October 28, 2016. (*Id.* at 3:24-4:1, 8:1-22.)

Thereafter, Kucherov moved to continue the evidentiary hearing until he could complete discovery on OWB REO’s tax status, among other things, (CP 307-309), and he issued over 100 discovery requests to OWB REO. (CP 316-353.) He also filed additional briefing on his Motion for

Stay, continuing to argue that OWB REO had committed tax fraud and had no right to acquire the Property because it was not properly registered in Washington. (CP 439-449).

At the October 28 hearing, the trial court denied Kucherov's request for a continuance, explaining that unlawful detainer is a limited proceeding and the discovery Kucherov sought was irrelevant to the issue of right of possession before the court. (10/28/16 Hrg. Tr. at 7:17-8:4.) The trial court then directed the parties to present their evidence on whether a writ should issue. (*Id.* at 9:9-10.) OWB REO presented evidence of Kucherov's default, the completed foreclosure sale, and its registration with the State of Washington. (*See id.* at 10:10-15:25, 17:6-7, 18:23-19:2, 19:21-23, 20:10-21:7; 10/28/16 Hrg. Exs. 1-4.) The only evidence that Kucherov presented was his wife's testimony that OWB REO "did not have the right to buy [their] house" because it owed delinquent taxes. (10/28/16 Hrg. Tr. at 26:22-24.)

At the close of the evidence, the trial court held that OWB REO could own the Property regardless of its registration status and that it had the authority to pursue its unlawful detainer action because it had registered and was in good standing with the State of Washington. (*Id.* at 35:19-20, 37:14-38:18.) Therefore, a new Writ of Restitution issued. (CP at 795-798.)

F. Kucherov's Second Appeal

Kucherov filed a Notice of Appeal a few days later on November 1, 2016. Two days prior, he filed an emergency motion in this Court to stay or cancel the Writ. (11/1/16 Motion for Stay in Trial Court.) In this motion, he argued for the first time that the foreclosure trustee failed to conduct a public sale. Kucherov's motion was procedurally deficient because he did not post a bond, as required by statute. Thus, this Court denied Kucherov's emergency motion and awarded OWB REO its attorney fees for time spent responding to the motion. (11/7/16 Ct. of App. Order.) Kucherov moved for reconsideration, which was summarily denied. (11/16/16 Ct. of App. Order.) The sheriff executed the Writ and performed the eviction on November 28, 2016. (CP 835-837.)

After OWB REO proved the amount of attorney fees it had incurred and this Court entered an award of fees, Kucherov again sought reconsideration of the Court's decision. (12/29/16 Mot. for Reconsideration.) In his second motion for reconsideration, Kucherov raised a second new issue argument—that the foreclosure sale was invalid because CIT Bank admitted to the Consumer Financial Protection Bureau (“CFPB”) that his loan was fully paid in 2007. (*Id.*)

Responding to this motion, OWB REO submitted evidence that Kucherov had misrepresented the facts, and that the statement to the CFPB

to which he referred related to his wife's separate loan that was secured by a wholly different property. (1/30/17 Opp. to Mot. for Reconsideration; 1/30/17 Hunsaker Decl. In Supp. of Opp. to Mot. for Reconsideration.) Thereafter, a panel of this Court denied Kucherov's Motion for Reconsideration of the award of attorney fees. (3/16/17 Ct. of App. Order.)

III. ARGUMENT

A. **Unlawful detainer proceedings are limited to determining right of possession.**

Unlawful detainer proceedings are limited, summary proceedings governed by statute, and the trial court's jurisdiction in these proceedings is likewise limited. As Division Two of this Court has explained: "It is well settled in Washington that, in an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues." *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 808-09 (Div. 2 2012) (internal citation and quotation marks omitted).

The relevant issue in these proceedings is "the question of possession and related issues such as restitution of the premises and rent." *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d 72, 81

(2017). The only exception to this narrow scope is where a defendant has a “counterclaim, equitable defense, or setoff . . . based on facts which excuse a tenant’s breach.” *Id.* at 82. Challenges to foreclosure that can be raised before the sale occurs are not properly raised in an unlawful detainer proceeding. *Id.* at 82-84; *Fed. Nat’l Mortg. Ass’n v. Ndiaye*, 188 Wn. App. 376, 382-84 (Div. 3 2015). Likewise, allegations challenging an unlawful detainer plaintiff’s title or asserting title defects are not properly raised as a defense to unlawful detainer. *Selene RMOF II REO Acquisitions II, LLC*, 189 Wn.2d at 83-84.

B. The trial court properly denied Kucherov’s Motion to Continue the evidentiary hearing until after discovery.

The trial court has discretion in deciding whether to grant a motion to stay proceedings, and its decision is reviewed for an abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348 (Div. 1 2000). “A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons.” *Id.* More specifically, “[w]hether a court abuses its discretion in controlling discovery depends on the interests affected and the reasons for and against the decision.” *Id.*

Relevant here, Kucherov filed two motions to delay issuance of the writ of restitution. First, he filed a Motion to Stay on September 20, 2016, challenging OWB REO’s authority to bring an unlawful detainer action,

which prompted the trial court to set an evidentiary hearing on these issues for October 28, 2016 and issued a pre-hearing submission schedule.

(9/30/16 Hrg. Tr. at 3:20-4:2, 8:21-22, 9:8-13.)

Second, ignoring the pre-hearing schedule, Kucherov sought to continue the evidentiary hearing until after discovery. (CP at 307-309.) Thereafter, he issued over 100 discovery requests to OWB REO on wide-ranging issues, including the number of houses that OWB REO had purchased and resold and the amount of taxes OWB REO owed as a result of these transactions. (CP 316-353.)

At the beginning of the October 28 evidentiary hearing, the trial court questioned Kucherov about the purpose of his discovery requests, and Kucherov explained that he wanted discovery about OWB REO's tax status. (10/28/16 Hrg. Tr. at 4:24-6:10.) The trial court declined to continue the evidentiary hearing, explaining the narrow focus of unlawful detainer and that the discovery Kucherov sought was not material to this issue. (*Id.* at 7:17-8:4.) This was not an abuse of discretion.

Kucherov's arguments regarding OWB REO's tax status, like his arguments related to OWB REO's business registration status, do not excuse his failure to make his loan payments or establish that he retained the right of possession of the Property. *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d at 81-82. Likewise, these issues

do not undermine OWB REO's ability to purchase and possess property, and Kucherov failed to identify any authority establishing otherwise.

Under these circumstances, the trial court was well within its discretion to deny Kucherov's motion for a continuance.

C. The trial court properly issued the second Writ of Restitution allowing OWB REO to gain possession of the Property.

A foreclosure sale purchaser is entitled to evict a former owner where the foreclosure sale complies with the statutory requirements. RCW 61.24.060; *Selene RMOF II REO Acquisitions II, LLC*, 189 Wn.2d at 77. Kucherov did not present any evidence showing that the foreclosure sale was improper. Moreover, his arguments in this case challenging the foreclosure sale and eviction are either beyond the scope of an unlawful detainer proceeding or procedurally improper.

1. Kucherov's long-standing loan default is undisputed.

CIT Bank presented evidence that Kucherov stopped making his loan payments in 2011 and that his loan was secured by the Property. (10/28/16 Hrg. Tr. at 11:21-12:2, 12:16-20.) At the time of his default, Kucherov's unpaid loan balance was \$648,000.00. (*Id.* at 12:21-13:2.) Over four years after Kucherov's default, the bank foreclosed on its security interest in May 2016. (*Id.* at 13:4-8.) Kucherov has no argument that he did not get proper notice of the foreclosure sale because he filed a

lawsuit challenging the foreclosure sale before it occurred, although he did not try to restrain the sale. *Kucherov v. MTC Financial Inc. et al.*, Case No. 3:16-cv-05276-BHS.

The trial court gave Kucherov the opportunity to present his arguments in writing prior to the evidentiary hearing, (9/30/16 Hrg. Tr. at 9:8-25), as well as to cross examine the bank's witness and present whatever evidence he had showing that the eviction was improper. (10/28/16 Hrg. Tr. at 22:8-23:13; 23:3-8). Kucherov did not dispute his default either in his written filings or evidence presented at the hearing. (*See id.* at 24:11-30:2; CP at 209-269, 270-290, 307-315, 439-529, 559-654.) Thus, it is undisputed that he defaulted on his loan, entitling CIT Bank to initiate foreclosure.

2. It is undisputed that OWB REO acquired the Property at the foreclosure sale.

The Trustee's Deed recorded in the Clark County land records following the May 2016 foreclosure auction establishes that OWB REO acquired the Property at the foreclosure sale. (10/28/16 Hrg. Ex. 3.) The recitations in the Trustee's Deed are "prima facie evidence" that the sale was conducted properly. RCW 61.24.040(7). As the Washington Supreme Court has explained:

[O]nce a property is sold, the [Deed of Trust Act] favors purchasers over property owners and other borrowers by

giving preference to . . . stability of land titles. It does so by creating, at a minimum, a rebuttable presumption that the sale was conducted in compliance with the procedural requirements of the act.

Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 570-71 (2012).

Kucherov did not present any evidence to rebut this presumption. Instead, he argued that OWB REO was not an authorized buyer and the unlawful detainer action was void because OWB REO had no authority to bring a legal action in Washington. Both of these arguments, discussed below, fail as a matter of law and do not undermine OWB REO's claim of title to the Property following the foreclosure sale. Nor do they otherwise provide a viable defense to OWB REO's unlawful detainer claim. Thus, under Washington statute, OWB REO was entitled to take possession of the Property 20 days after the foreclosure sale. RCW 61.24.060.

3. OWB REO had the authority to purchase the Property.

Kucherov argues that it was improper for OWB REO to purchase the Property, thus rendering the sale void, because OWB REO had violated Washington's contractor registration statute. Specifically, Kucherov contends that OWB REO was required to register as a

contractor because it resells properties that it acquires after spending more than \$500.00 on improving those properties.

Even assuming that the contractor statute applies to OWB REO, which OWB REO does not concede, it is wholly irrelevant to OWB REO's ability to buy property and to the validity of the foreclosure sale. The contractor registration statute makes it unlawful to perform the functions of a contractor without registering. *See* RCW 18.27.020(2), 18.27.200. Registration is not required as a condition of *acquiring* property. Yet the only evidence of record in this case was that OWB REO had acquired the subject Property. (10/28/16 Hrg. Tr. at 35:13-18.) OWB REO had not made any improvements to the Property, or even determined whether any improvements were necessary, because Kucherov refused to relinquish possession. (*Id.* at 15:12-20.)

Moreover, the consequences for violating the contractor registration statute are pursued and imposed by law enforcement officials and other government actors. *See* RCW 18.27.020(4)-(5), 18.27.210-.215. There is no private right of action entitling Kucherov to enforce the registration statute to undermine OWB REO's acquisition of property or other business activities.

Finally, even if the contractor registration statute were relevant, Kucherov failed to present any competent evidence that OWB REO had

violated this statute. (*See* 10/28/16 Hrg. Tr. at 26:22-29:8.) All he presented was conjecture and allegation about OWB REO's business practices and intentions without establishing that he possessed any personal knowledge about these issues. ER 602.

For all of these reasons, Washington's contractor registration statute does not provide Kucherov with any defense to OWB REO's unlawful detainer action, and the trial court did not err in rejecting Kucherov's argument based on this statute.

4. OWB REO had the authority to maintain its unlawful detainer action.

On January 1, 2016, the Washington Legislature enacted a foreign-entity registration requirement. Of relevant part, the new statute provides:

A foreign entity doing business in this state may not maintain an action or proceeding in this state unless it is registered to do business in this state and has paid to this state all fees and penalties for the years, or parts thereof, during which it did business in this state without having registered.

RCW 23.95.505(2). Kucherov claims OWB REO was barred from prosecuting its unlawful detainer case because it did not properly register to do business in Washington and owes outstanding fees and taxes. Both contentions fail because (1) this statute does not apply to OWB REO and, (2) even if it does, OWB REO properly registered and received a

certificate of good standing from the Washington Secretary of State before the trial court issued the Writ of Restitution.

a. OWB REO is not required to register under the new foreign-entity registration statute.

A foreign entity has to register to maintain a legal action only if it is “doing business” in Washington. RCW 23.95.505(2). The statute excludes numerous activities from the definition of “doing business,” including: (1) “[s]elling through independent contractors,” (2) “[c]reating or acquiring indebtedness, mortgages, or security interests in property,” (3) “[s]ecuring or collecting debts or enforcing mortgages or security interests in property securing the debts,” and (4) “[o]wning, without more, property.” RCW 23.95.520(1)(e), (g), (h), (j).

OWB REO is a wholly-owned subsidiary of CIT Bank. (CP at 301.) Its sole function is to hold title to properties that secure loans owned by CIT Bank after the borrower defaults and the security interest is foreclosed. (Id.) Under these circumstances, OWB REO’s activities are inextricably connected to CIT Bank’s lending and loan enforcement activities, which do not constitute “doing business.” RCW 23.95.520(1)(g), (h); *Deutsche Bank Nat’l Trust Co. v. Shields*, 2017 WL 4351473, at *3 (Wash. Ct. App. Div. 1 Oct. 2, 2017) (unpublished).

Moreover, even if OWB REO's activities could be separately considered from CIT Bank's activities, OWB REO is still excluded from the registration requirement because owning property does not constitute "doing business." RCW 23.95.520(1)(j). OWB REO is an owner once it takes title to foreclosed properties. To the extent properties may be sold after OWB REO acquires them, it does not conduct those sales directly. Instead, OWB REO contracts with independent brokers who handle the marketing and sales activities. (CP at 301.) This type of activity also is excluded from the definition of "doing business." RCW 23.95.520(1)(e).

For these reasons, the registration requirement provided in RCW 23.95.505 is irrelevant to OWB REO's authority to bring an unlawful detainer action to evict Kucherov.

b. Alternatively, OWB REO properly registered as a foreign entity and proved it was in good standing before the Writ of Restitution issued.

Assuming that the foreign-entity registration requirement does apply to OWB REO, the statute provides that if registration is required for a foreign entity to be able to maintain legal actions, any pending action can be stayed until the registration is completed. RCW 23.95.505(4). Thus, necessarily, the statute does not require that actions filed before registration is complete be dismissed as void. *Id.* ("[T]he court may . . .

stay the proceeding until the foreign entity, or its successor, obtains the certificate of registration.”).

After Kucherov objected to OWB REO’s lack of registration, OWB REO registered with the Washington Secretary of State. (10/28/16 Hrg. Ex. 4.) The registration was effective on August 11, 2016, and on October 3, 2016, OWB REO received a certificate stating that it was in “good standing” and that “all fees, interest and penalties owed to this state and collected through the Secretary of State have been paid.” (*Id.*) OWB REO’s registration certificate and proof of good standing was presented to the trial court. (10/28/16 Hrg. Tr. at 19:21-20:20.) Thus, the trial court did not err in finding that OWB REO was entitled to maintain its unlawful detainer action.

5. Kucherov’s confusing arguments regarding OWB REO’s tax status lack legal merit and are irrelevant.

Kucherov makes numerous assertions and allegations that OWB REO failed to pay taxes and fraudulently registered as a “non-revenue entity.” None of Kucherov’s assertions on this point have any merit or relevance to the issue of unlawful detainer. Kucherov’s apparent goal in focusing on these issues is to distract from his loan default and lack of any defense to the bank’s enforcement of its security interest. Yet the fact remains that Kucherov lost the right to possess the Property by defaulting

on his loan obligations, and unsupported allegations about OWB REO's tax status do not change that. Even if they could, Kucherov has presented no authority establishing that he has standing to enforce Washington tax law or to challenge OWB REO's tax status, and OWB REO has found none.

The evidence before the trial court was that OWB REO was registered to do business in Washington and was in good standing. (10/28/16 Hrg. Tr. at 37:14-20; 10/28/16 Hrg. Ex. 4.) Kucherov presented no evidence that OWB REO owed delinquent taxes other than his own unsubstantiated assertion, and OWB REO testified that it had no knowledge that it owed any outstanding taxes in Washington or that there were any pending tax fraud investigations, as Kucherov alleged. (10/28/16 Hrg. Tr. at 21:1-7.) Therefore, as with Kucherov's other arguments, his claims about unpaid taxes were properly rejected by the trial court.

D. Kucherov's allegations regarding the lack of a public sale and CIT Bank's statements made to the CFPB are procedurally improper and should not be considered.

1. Kucherov's argument that no public sale was held should be rejected because it was not raised to the trial court.

"A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any

error.” *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81 (Div. 1 2014). It is a well-settled rule of procedure that an appellate court will not “review an issue, theory, argument, or claim” that was not first presented to the trial court. *Id.* (quoting *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207 (Div. 1 2001)).

As detailed above, Kucherov argues for the first time to this Court that the foreclosure sale was invalid because the trustee did not conduct a public auction. This argument was not raised in any of Kucherov’s numerous filings submitted to the trial court. (*See* CP at 209-269, 270-290, 307-315, 439-529, 559-654). As a result, OWB REO had no notice that it needed to present evidence on this issue, which it could have done, and the trial court did not address this issue. Kucherov could have presented this issue below, since he claims that he knows no public sale occurred because he appeared at the time and place of the scheduled sale.⁴ Rather than prejudice OWB REO by requiring it to litigate an issue on appeal that it had no opportunity to address in the trial court, the Court should decline to consider this new argument as procedurally improper. *Ainsworth*, 180 Wn. App. at 81.

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⁴ Kucherov’s recent allegations that he appeared at the time and place scheduled for the foreclosure sale are inconsistent with prior statements made during preliminary proceedings in the trial court that he did not appear for the sale.

2. Kucherov's argument regarding the bank's statements to the CFPB is procedurally improper and has already been rejected.

Finally, Kucherov argues the foreclosure sale was invalid because the bank admitted to the CFPB that the loan it foreclosed was fully paid in 2007. This argument also was not presented to the trial court. Rather, Kucherov raised it for the first time in his December 29, 2016 Motion for Reconsideration filed in this Court. OWB REO responded to this motion on January 30, 2017, presenting evidence that Kucherov's allegations were factually wrong. The communications at issue between CIT Bank and the CFPB were related to his wife Anna Tsybulskaya's wholly separate loan, which was secured by a different property. (OWB REO LLC's Opp. to Mot. for Reconsideration of 12/20/17 Ruling on Attorney Fees at 2-3; Hunsaker Decl. In Supp. Opp. to Mot. for Reconsideration, Exs. C-D.) This Court necessarily rejected Kucherov's argument on this issue when it denied his motion for reconsideration. (3/16/17 Ct. of Appeals Order.)

Any appeal of the panel's decision on Kucherov's motion had to be filed "not later than 30 days after the ruling." RAP 17.7. That was not done. Nor is this appeal the proper mechanism for seeking review of the panel's motion decision. *See* RAP 12.4(a). Thus, the Court should

decline to re-consider this issue that was not properly raised below and that has already been addressed, and rejected, by this Court.

E. Judge Lewis did not err in refusing to recuse himself.

In order to disqualify a judge as a matter of right, a party must file an affidavit “before the judge has made any discretionary ruling in the case.” RCW 4.12.050. Where, as occurred in this case, a party seeks to disqualify a judge after the time for filing an affidavit has passed, the “party must demonstrate prejudice on the part of a judge.” *State v. Cameron*, 47 Wn. App. 878, 884 (Div. 1 1987); *see also In re Marriage of Farr*, 87 Wn. App. 177, 188 (Div. 1 1997) (party who failed to move for recusal before the judge made in rulings was required to “demonstrate prejudice on the judge’s part”). “Bias or prejudice on the part of a judge is never presumed and must be affirmatively shown by the party asserting it.” *Rich v. Starczewski*, 29 Wn. App. 244, 246 (Div. 1 1981). “Casual and unspecific allegations of judicial bias provide no basis for appellate review, even when asserted by a pro se litigant.” *Id.* “Recusal lies within the sound discretion of the trial court.” *Farr*, 87 Wn. App. at 188.

Judge Lewis did not abuse his discretion in denying Kucherov’s motion to disqualify the judge. Kucherov argued that Judge Lewis was required to recuse himself because this Court vacated the first Writ of Restitution that Judge Lewis issued on July 1, 2016. (CP 270-290.)

However, that Writ was vacated at OWB REO's request so as to avoid protracted litigation over jurisdictional questions arising from Kucherov's frivolous and wholly baseless attempt to remove this case to federal court. (CP 551-552.) This Court's order vacating the Writ and remanding the case to the trial court does not reflect that Judge Lewis had any prejudice against Kucherov.

Kucherov's mere disagreement with Judge Lewis' rulings is insufficient to support his claim that Judge Lewis was prejudiced against him. *Farr*, 87 Wn. App. at 188 ("Although [the appellant] may disagree with the court's rulings, the record fails to reflect any evidence of bias."). Accordingly, it was not error for Judge Lewis to decline to recuse himself from this case. (9/30/16 Hrg. Tr. at 7:13-16.)

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IV. CONCLUSION

For the reasons discussed herein, the trial court properly issued a Writ of Restitution following the October 28, 2016 evidentiary hearing and properly denied Kucherov's motion for the judge to recuse himself. There is no evidence in the record supporting Kucherov's claim of a continued right of possession. Nor do Kucherov's meritless arguments regarding OWB REO's business and tax status undermine its legal entitlement to possession as a foreclosure sale purchaser. The trial court's decisions should be affirmed.

Dated: November 6, 2017.

Respectfully Submitted,

s/ Danielle J. Hunsaker

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OWB REO, LLC

CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to the within action. I am employed in Multnomah County, State of Oregon, and my business address is 121 SW Morrison St., Suite 700, Portland, Oregon 97204.

On November 6, 2017, I served the following document(s):

CORRECTED BRIEF OF RESPONDENT OWB REO, LLC

on the party or parties listed on the following page(s) in the following manner(s):

BY HAND DELIVERY: For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by messenger to the parties below.

BY FEDERAL EXPRESS: For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by Federal Express to the street address(es) indicated on the attached service list.

BY FIRST-CLASS MAIL: For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be deposited in the United States mail at Portland, Oregon, with first-class postage thereon fully prepaid and addressed to the street address(es) indicated on the attached service list.

BY FACSIMILE: For each party, I caused a copy of the document(s) to be sent by facsimile to the facsimile number(s) indicated on the attached service list. If this action is pending in Oregon state court, then printed confirmation of receipt of the facsimile generated by the transmitting machine is attached hereto.

BY E-MAIL: For each party, I caused a copy of the document(s) to be sent by electronic mail to the e-mail address(es) indicated on the attached service list.

BY E-FILING: For each party, I caused a copy of the document(s) to be sent by electronic mail via the Court's e-filing system to the e-mail address(es) on file with the court.

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

s/ Danielle J. Hunsaker

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