

FILED
Court of Appeals
Division II
State of Washington
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No. 505231

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

DANIEL G. SZMANIA, *Appellant*,

v.

WELLS FARGO BANK, N.A., AS TRUSTEE
FOR BEAR STEARNS ARM TRUST 2007-3,
Respondent.

RESPONSIVE BRIEF
of
Respondent

WELLS FARGO BANK, N.A., AS TRUSTEE
FOR BEAR STEARNS ARM TRUST 2007-3

Appeal from the Superior Court of Clark County,
the Honorable Bernard F. Veljacic, Case No. 16-2-02606-4

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INTRODUCTION

This case presents many issues of well settled law.

The Superior Court ruled correctly in allowing the underlying Unlawful Detainer to move forward, focusing on well settled in law in Washington, which prevents assertion of certain claims post-foreclosure and prevents certain claims from entering an Unlawful Detainer proceeding.

This Court did not err in issuing judgment and a writ of restitution to the respondent.

This Court should hold that:

1. Venue and subject matter of the Unlawful Detainer were properly with the Superior Court;
2. Service of the Unlawful Detainer Notices and Unlawful Detainer Complaint were appropriate;
3. The Respondent was entitled to the relief granted and the issues raised by the appellant relating to the foreclosure sale were not properly a part of the Unlawful Detainer proceeding.

STATEMENT OF THE CASE

(A) The Foreclosure and Sale.

This is a post-foreclosure eviction case for property located at 17005 NE 164th Avenue, Brush Prairie, WA 98606. CP 3 Complaint for Unlawful Detainer, Page 2, 3 and Exhibit A. The basis for the Unlawful Detainer is a trustee's sale that occurred on October 28, 2016, reverting

title to the Respondent in this case. CP 3 Complaint for Unlawful Detainer Page 2, 3 and Exhibit A. Ownership of the property was changed through the recording of a Trustee's Deed in the Clark County Recorder's Office on Number 7, 2016 as Instrument Number 5344345. CP 3 Complaint for Unlawful Detainer Page 3 and Exhibit A.

On or about June 27, 2016, prior to the foreclosure sale, Daniel G. Szmania filed a cause of action entitled Complaint for Declaratory Judgment, Permanent Injunction, Forfeiture of deed, Satisfaction of Mortgage and Other Equitable Monetary Relief and Quiet Title and Actions Under Criminal Profiteering Act and Actions under the Consumer Protection Act in the Superior Court for the State of Washington, Clark County, Case Number 16-2-01214-4. Mr. Szmania named E-Loan, Inc., Bear Stearns Arm Trust, Mortgage Pass-Through Certificates, Series 2007-3 as defendants. CP 13 Declaration of Daniel G. Szmania, Page 2, CP 14 Defendant's Motion to Dismiss, Page 2 (the "Litigation Case"). On July 20, 2016, Respondent removed the Litigation Case to Federal Court. CP Motion to Dismiss, Page 5.

(B) Eviction

On November 30, 2016, The plaintiff, through counsel caused a Notice to Quit to be served on the defendnts. CP 3 Complaint for Unlawful Detainer, Page 2, Opposition to Motion to Dismiss, Exhibit 2.

On December 22, 2016, the plaintiff through counsel caused a Summons and Complaint for Unlawful Detainer to be filed in Clark County Superior Court for the State of Washington as Case Number 16-2-

02606-4. CP 2 Summons for Unlawful Detainer, CP 3 Complaint for Unlawful Detainer.

On January 30, 2017, defendants were served with the Unlawful Detainer after the Court authorized alternative service. CP 16 Opposition to Motion to Dismiss, Exhibit 3, CP8 Order For Alternative Service, CP 9 & 10 Declaration of Service.

On February 16, 2017, Mr. Szmania filed his Motion to Dismiss the Unlawful Detainer. CP 14 Defendant's Motion to Dismiss. On April 20, 2017, Respondent filed its response to the Motion to Dismiss. CP 16 Opposition to Motion to Dismiss.

On April 28, 2017, a hearing was held on the Appellant's Motion to Dismiss. CP 17, Motion Hearing.

Shortly thereafter, Appellant filed a document entitled Notice to Clerk of Removal to Federal Court. CP 18 Notice to Clerk of Removal to Federal Court.

On May 26, 2017, a follow up hearing to the Motion to Dismiss hearing was held and the Court entered the following documents:

Findings and Order to Proceed, CP 20

Order Denying Defendants' Motion to Dismiss, CP 21

Order for Default and Judgment, CP 22

Order to Issue Writ of Restitution without Bond, CP 23

On the same day, a writ of restitution was issued by counsel for the Respondent. CP 24 Writ of Restitution Issued ("May 26, 2017 documents")

(C) This Lawsuit and the Decision Below.

On June 23, 2017, the Appellant filed his appeal of the May 26, 2017 documents.

ARGUMENT

Standard of Review

An appellate court reviews questions of law de novo. *Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P.2d 986, 988 (Wash. Ct. App. 2000).

Venue and jurisdiction were appropriately before the court

As the purchaser at a foreclosure sale, the Respondent was entitled to seek possession ^{of} the property pursuant to the Unlawful Detainer statute, RCW 59.12. RCW 61.24.060 (1). The Superior Court in the appropriate County is given original jurisdiction of cases at law which

involved title or possession of real property and specifically, the statute provides jurisdiction to the superior court in actions of forcible entry and detainer. RCW. § 2.08.010. The appropriate venue of an Unlawful Detainer action is the superior court of the county in which the property is located. RCW § 59.12.050. Here, because the property was located at 17005 NE 164th Avenue, Brush Prairie, WA 98606, venue was appropriately with the Superior Court in Clark County, Washington.

Mr. Szmania seems to take issue with the Respondent's choice in filing the Unlawful Detainer in State court on the basis of the Respondent's removal of his Litigation Case to Federal Court. In general, federal jurisdiction exists when a claim either (1) arises under the Constitution and the laws of the United States, or (2) arises between citizens of different states and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. §§ 1331, 1332. If a federal court determines that it lacks subject matter jurisdiction at any time during the dispute, the court must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3); *Rosales v. United States*, 824 F.2d 799, 803 n.4 (9th Cir. 1987). It is well established law that a "defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

Federal question jurisdiction does not exist in this case. The federal question must be clear on the face of plaintiff's well-pleaded complaint and

matters raised in a defendant's answer will not create federal question jurisdiction. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830 (2002). Here, the Respondent's claim was strictly based upon state law; more specifically, RCW 59.12 *et seq.* and RCW 61.24 *et seq.* Thus, removal based on federal question jurisdiction is as improper as ~~would~~ original jurisdiction would be. The superior court of the county in which the property is situated has exclusive jurisdiction over the proceedings under Chapter 59.12.

This cause of action also does not meet the requirements of diversity jurisdiction, specifically the amount in controversy does not meet the \$75,000 threshold. The cause of action seeks issuance of a Writ of Restitution so that Respondent may obtain possession of the property. The Respondent was the successful purchaser of the property at the foreclosure sale and a trustee's deed has been issued and recorded conveying title. The debt was extinguished when the trustee's sale occurred. *See CHD, Inc. v. Boyles*, 138 Wn. App. 131, 136, 157 p.3d 415 (2007). Our case is similar to *Green Tree Servicing, LLC. v. Shoemaker*, in which the Court found that because Green Tree's only claim against Ms. Shoemaker in the unlawful detainer action was a question of possession, there is no monetary amount in controversy. *Green Tree Servicing, LLC. v. Shoemaker*, No. C05-54104JB, 2005 WL 1667758, at *3 (W.D. Wash.

July 15, 2005). Even if this court does find that the monetary threshold is met, the court still lacks subject matter jurisdiction under diversity of citizenship. “When federal-court jurisdiction is predicated on the parties’ diversity of citizenship...removal is permissible ‘only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action [was] brought.’” *Lincoln Property Co. v. Roche*, 546 U.S. 81, 83-84, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005). Additionally, “the presence of a local defendant at the time removal is sought bars removal.” *Spencer v. U.S. Dist. Court for N. Dist. of Cal.*, 393 F.3d 867, 870 (9th Cir. 2004) (citing 28 U.S.C. §1441(b)).

Federal courts are courts of limited subject matter jurisdiction and removal statutes are to be strictly construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam) (citing *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988); *Takeda v. Northwestern Nat’l Live Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985)). The appellant states absolutely no authority for his argument that the removal of one case deprives the State Court of jurisdiction in other cases.

Service of the Unlawful Detainer Notices and Unlawful Detainer Complaint were appropriate.

Because this case was brought under RCW 59.12, the respondent should act in accordance with the Unlawful Detainer statute in service.

Under RCW 59.12.080, the summons must be served and returned in the same manner as summons in other actions is served and returned. RCW § 59.12.080. If personal service cannot be obtained, certain means of alternative service are allowed under the Unlawful Detainer statute. Specifically, upon order of the court, (a) The summons and complaint must be posted in a conspicuous place on the premises unlawfully held not less than nine days from the return date stated in the summons; and (b) Copies of the summons and complaint must be deposited in the mail, postage prepaid, by both regular mail and certified mail directed to the defendant or defendants' last known address not less than nine days from the return date stated in the summons. RCW § 59.12.085.

The respondent acted in compliance with the statute by obtaining the necessary order and serving in accordance with the statute, effectively conveying jurisdiction of the court in the Unlawful Detainer Action. CP 8 Order for Alternative Service, CP 9 Declaration of Service, CP 10 Declaration of Service. Both the declaration of posting and the declaration of mailing were properly before the lower court for its consideration.

The Respondent was entitled to the relief granted and issues raised by the appellant relating to the foreclosure sale were not properly a part of the Unlawful Detainer proceeding

The trial court properly entered an order issuing writ of restitution under the unlawful detainer statute in favor of the Respondent because Szmania failed to raise a valid defense to the unlawful detainer action.

In *Peoples Nat. Bank of Wash. v. Ostrander*, the court noted that in enacting the non-judicial foreclosure statute, “the legislature did not contemplate that after a trustee’s sale further lengthy proceedings would be required to obtain possession. It gave the purchaser...”the right to obtain possession of the real property by summary proceedings in an unlawful detainer action.” *Peoples Nat. Bank of Wash.*, 6 Wn. App. 28, 31, 491 P.2d 1058 (Wash. Ct. App. 1971). Presale judicial remedies provided under the Deed of Trust Act are adequate and an unlawful detainer action is not an appropriate proceeding to raise challenges to the foreclosure. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113-114, 725 P.2d 385 (Wash. Ct. App. 1988).

An unlawful detainer action is a summary proceeding limited solely to the question of possession and collateral issues may not be asserted. *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 30-31, (1971), *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 208, 741 P.2d 1043 (Wash. Ct. App. 1987), *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (Wash. Ct. App. 1996) (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Josephinium Associates*

v. *Kahli*, 111 Wn.App. 617, 624 45 P.3d 627 (Wash. Ct. App. 2002)); *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003) The purpose of the unlawful detainer action is “to preserve the peace by providing an expedited method for resolving the right to possession of property.” *Heaverlo*, 80 Wn. App. at 728 (1996).

Thus, in order to protect the summary proceeding, “other claims, including counterclaims, are generally not allowed.” *Id.* The unlawful detainer proceeding “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 (Wash. Ct. App. 1998).

Furthermore, 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, 764 P.2d 647 (1988).

Szmania overlooks RCW 59.12.032, which specifically permits the use of the unlawful detainer statute to obtain possession following a trustee’s sale, *i.e.* the present circumstances.

Here, Respondent obtained its interest in the Property via a Trustee’s Deed upon foreclosure sale. CP 3 Complaint, Exhibit A. The recorded trustee’s deed was presented to the trial court. CP 3 Complaint, Exhibit A The trustee’s deed recites that the sale was conducted in compliance with the

Act and has not been rebutted by Szmania. *Id.* Accordingly, because Respondents's right to possession ultimately rests on the recorded trustee's deed, which is prima facie evidence of a proper sale, and thereby establishes its right to possession of the Property, RCW 59.12.032 permits use of the unlawful detainer statute to obtain possession.

Moreover, because the unlawful detainer statute applies and because collateral claims, including a claim to title is not permitted in an unlawful detainer action, the trial court correctly determined that the appropriate time for Szmania to have raised a defense to the foreclosure was prior to the trustee's sale, not after. The trial court properly granted the order of writ of restitution in favor of Respondent.

Even if Szmania's claims were permissible in the unlawful detainer action, his claims have been waived.

The Deed of Trust Act provides that objections to the trustee's sale must be raised prior to the sale or they may be deemed waived. RCW 61.24.040(1)(f)(IX). The Washington Supreme Court recently reaffirmed waiver, which restricts certain post-sale claims and prohibits challenges to the validity and finality of a completed sale. *Frizzell v. Murray*, 179 Wn. 2d 301, 313 P.3d 1171 (2013) (citing *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 223 (2008), and *Plein v. Lackey*, 149 Wn.2d 214, 67

P.3d 1061 (2003)). *Frizzell* cites to RCW 61.24.040(1)(f)(IX), which provides:

[a]nyone 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 sale 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.

Waiver of a post-sale contest occurs when “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.” *Frizzell*, 179 Wn.2d at 306-07 (internal citations omitted); *see also Fed. Nat. Mortgage Ass'n v. Ndiaye*, No. 32994-1-III, 2015 WL 3755067, at *3 (Wash. Ct. App. June 16, 2015).¹

In *Frizzell*, the plaintiff actually obtained a preliminary injunction enjoining the sale, but the injunction was conditioned upon payment into the court registry. *Frizzell, supra*, at 1173. When the plaintiff failed to make her payment into the court registry, the trustee proceeded with the foreclosure

¹ Cases wherein courts have declined to apply the waiver doctrine are inapposite to the case at bar. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 112, 297 P.3d 677 (2013). There, the property subject to the non-judicial foreclosure was agricultural, yet the parties had agreed to a “deed of trust on the land and an agreement that the property was not agricultural for purposes of non-judicial foreclosure.” The court reasoned that because the DTA specifically requires that the property being non-judicially foreclosed not be used primarily for agricultural purposes, and parties cannot contractually waive the prerequisites to a non-judicial foreclosure, the DTA did not apply and therefore the waiver doctrine as applied to the DTA did not apply. *Id.* Here, nothing in the record demonstrates that the Property’s character rendered the DTA inapplicable nor is there anything to suggest the parties attempted to contract around some DTA requirement.

and a trustee's sale was held. *Id.* The Supreme Court held that even when an order to enjoin sale is sought, ignoring "the conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless." *Id.* at 1175. The Court found that "Frizzell could have paid the sum into the court to enjoin the sale, made a motion for reconsideration, or appealed the order, all of which she failed to do." *Id.* at 1175.

Here, the record demonstrates that Szmania does not dispute any of the three elements of the waiver doctrine. Szmania does not dispute that he failed to restrain or enjoin the sale. Szmania actually did file a lawsuit, but, like *Frizzell*, never obtained a restraining order or injunction. CP 14 Defendants' Motion to Dismiss, Page 5. Szmania had actual or constructive knowledge of the pending sale and his right to seek an injunction.²

Finally, Szmania admittedly had actual knowledge of his claims because he filed a lawsuit prior to the sale asserting those claims. CP 14 Defendants' Motion to Dismiss, Page 5. The elements of waiver have therefore been met and, as a result, Szmania cannot now contest the validity of the trustee's sale and Respondent's right to possession.

Statutory Exceptions to Waiver do not affect possession.

² "[I]n most cases, the statutory notices of foreclosure and trustee's sale should be sufficient to inform a party of the right to enjoin the sale." *Koegel*, 51 Wn.App. at 114.

There are certain exceptions to the waiver doctrine in the Deed of Trust Act, none of which are applicable to this case.³ The non-waived claims are limited in that they may not seek any remedy other than damages, and they cannot affect the validity or finality of the Trustee's sale. RCW 61.24.127(2)(b) and RCW 61.24.127(2)(c). In other words, under no circumstances could Szmania's action affect the validity or the finality of the trustee's sale. RCW 61.24.127(2)(c). Possession of the Property is not an available remedy to Szmania. Accordingly, the trial court properly ordered the writ of restitution in favor of Respondent.

CONCLUSION and REQUEST FOR RELIEF

The order issuing writ of restitution was properly entered by the trial court and should not be reversed because the unlawful detainer action is a summary proceeding limited solely to the question of possession and any claims Szmania has regarding his claims must be brought in a separate civil action where his remedy will be limited to monetary damages.

For these reasons, the Court of Appeals should not reverse the Superior Court and should affirm the Trial Court's Judgment

³ The waiver doctrine is limited by RCW 61.24.127, which states that "[t]he failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting: (a) Common law fraud or misrepresentation; (b) A violation of Title 19 RCW; (c) Failure of the trustee to materially comply with the provisions of this chapter; or (d) A violation of RCW 61.24.026." RCW 61.24.127(2)(b).

Dated: February 20, 2018

Respectfully submitted,

By: 

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Declaration of Service

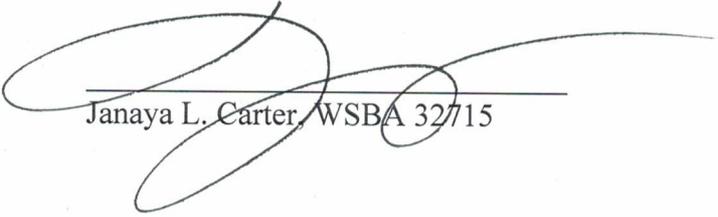
The undersigned makes the following declaration:

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 February 20, 2018, I caused a copy of the **Respondent Briefing of Wells Fargo Pursuant to R.A.P. 13.7(d)** to be served to the following in the manner noted below:

| | |
|--|---|
| Daniel G. Szmania 7911 S. 115 th Pl. Seattle, WA 98178 <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 |
|--|---|

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

Signed this 20 day of February, 2018


Janaya L. Carter, WSBA 32715

RCO LEGAL PS

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Transmittal Information

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Superior Court Case Number: 16-2-02606-4

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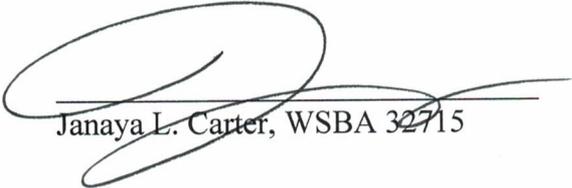
The undersigned makes the following declaration:

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 February 20, 2018, I caused a copy of the **Respondent Briefing of Wells Fargo Pursuant to R.A.P. 13.7(d)** to be served to the following in the manner noted below:

| | |
|---|---|
| Daniel G. Szmania HM1USNR Retired PO Box 757 Brush Prairie, WA 98606-0757 <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 |
|---|---|

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

Signed this 20th day of February, 2018


Janaya L. Carter, WSBA 32715

RCO LEGAL PS

February 20, 2018 - 5:04 PM

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