

80626-8

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 250768 - III

OTIS HOUSING ASSOCIATION, INC.,
A Washington corporation

PLAINTIFF / APPELLANT

v.

JOHN HA AND MIN HA,
husband and wife,

DEFENDANTS / RESPONDENTS

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
A. REPLY TO COUNTERSTATEMENT OF ISSUES	1
B. REPLY TO COUNTERSTATEMENT OF THE CASE	1
C. REPLY TO "ARGUMENT IN RESPONSE"	3
D. REPLY TO THE "FACTUAL APPEAL" ARGUMENT	3
E. REPLY TO THE "OTHER GROUNDS" ARGUMENT	3
E. REPLY TO RESPONDENT'S FINAL ARGUMENT	6

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

First Union Management v. Slack, 36 Wn. App. 849, 679 P. 2d 936 (1984)	4
Kelly v. Powell, 55 Wn. App. 143, 776 P. 2d 996 (1989)	3, 4
Lucas v. Velikanje, 2 Wn. App. 888, 471 P. 2d 103 (1970)	5
Mead v. Park Place Properties, 37 Wn. App 403, 681 P. 2d 256 (1984)	5
Munden v. Hazelrigg, 105 Wn 2d 39, 711 P. 2d 295	3

REPLY TO RESPONDENTS' COUNTER-STATEMENT OF ISSUES PRESENTED.

Respondents undertake to restate the issues. The first issue that Respondents propose is whether the factual determinations of the Superior Court are supported by substantial evidence and support the Court's "Order Canceling Lis Pendens and Application for Arbitration." Were it not for the arbitration clause in the REAL ESTATE OPTION TO PURCHASE (CP 26) there could have been a trial on factual issues relating to the option and its exercise. Evidence would have been presented and authorities cited on both sides of the dispute. But the arbitration clause says that if a dispute should arise under the agreement the dispute shall be submitted to arbitration. Since there was an agreement to arbitrate, the only factual matters that could have been brought before the Superior Court were (1) the existence of the REAL ESTATE OPTION TO PURCHASE including the agreement to arbitrate, (2) the existence of a dispute, and (3) whether or not a party to the dispute and given the other party proper notice to start the arbitration process. No findings were made on any of those three "factual matters," but then, no one has ever questioned any of them.

The second issue that Respondents propose is whether the decision of the Superior Court should be affirmed "on other grounds within the pleadings and the proof." The "other grounds" to which Respondents refer can only be the asserted application in this case of *res judicata* and collateral estoppel to the proceedings in the unlawful detainer action brought by the Respondents. That will be addressed later.

REPLY TO RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Respondents present a counter statement of the case. Here Respondents detail the

proceedings in the unlawful detainer case of Ha v. Otis. (Respondent's Brief 2-7)

Respondents note, correctly, that Appellant, the defendant in that case, had served a pleading entitled "Answer and Counterclaim." (CP 69-70) a pleading that was never filed. That pleading included, as a first affirmative defense, the proposition that payments had been made under the Real Estate Option, asserting, on that basis, that the defendant had an equity in the property. As a second affirmative defense then defendant Otis asserted that the option had been exercised and that the defendant was entitled to the protection of the Real Estate Contract Forfeitures Act, a defense, which, if the court had deemed it meritorious, would not have entitled defendant Otis to possession, as Respondents assert at page 3 in their brief, but would have required plaintiffs Ha to pursue a different, less expedited, procedure. Then defendant Otis never asserted that it had closed on the purchase of the property, that it owned the property, or that it was entitled to possession, nor did it seek specific performance or damages for breach of contract. (ANSWER and COUNTERCLAIM, CP 69-70; AMENDED ANSWER CP 35-36) There was in fact no counterclaim. The only affirmative relief that defendant Otis sought in the case of Ha v. Otis was an award of attorney fees and costs.

Respondents assert that defendant Otis argued its counterclaim and affirmative defense before judge Moreno. What argument was presented is not before this court as Respondents elected to file only the court's ruling. (CP 71-73) Thus the only support in the record for that assertion in Respondents' brief is the argument of Respondents' counsel before Judge Cozza. (RP 2-4 and 12-14) Respondents then proceed to attribute to Judge Moreno a ruling that "the option had not been properly exercised by OTIS

HOUSING ASSOCIATION, INC.” The authority cited for this proposition is, again, Mr. Shumaker’s argument before Judge Cozza. (RP 4) Judge Moreno did note that then defendant Otis “had until December 1st, 2004, to close ... (and) that has not happened.” She then noted that “the terms of the lease have not been complied with ... (and that) I have no choice but to authorize the entry of a writ of restitution.” (CP 72-73) She made no ruling as to the option or its exercise.

REPLY TO RESPONDENTS’ “ARGUMENT IN RESPONSE”

THE “FACTUAL APPEAL” ARGUMENT

This is not “a factual appeal.” This is an appeal based on the application of the statutes and case law pertaining to arbitration to the undisputed facts in this case, including the arbitration agreement (CP 26), the dispute, and the notice of intent to arbitrate (CP 8). Respondents have not seen fit to address any argument to that central issue in this case.

THE “OTHER GROUNDS” ARGUMENT

The “other grounds” to which Respondents refer can only be Respondents’ contention that the issues related to the Purchase Option were decided in the Unlawful Detainer case thus precluding the Appellant, on the basis of *res judicata* and collateral estoppel, from pursuing any relief based on the Purchase Option. While many cases are cited, two in particular call for comment: Munden v. Hazelrigg, 105 Wn. 2d 39, 711 P. 2d 295 (1085), and Kelly v. Powell, 55 Wn. App. 143, 776 P. 2d 996 (1989).

In Munden, supra at 45, our Supreme Court recognized that “It has long been settled that counterclaims may not be asserted in an unlawful detainer action.” The court

then noted the recognized exception to that general rule “when the counterclaim, affirmative defense, or setoff is ‘based on facts which excuse a tenant’s breach.’” (citing authority) The court went on to hold, under the facts of that case (prior to trial, the tenants had vacated the premises and specifically relinquished any right to possession), “Where the right to possession ceases to be an issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims and affirmative defenses.”

A third exception under which a counterclaim may be brought in an Unlawful Detainer case is addressed in Kelly v. Powell, supra at 150, “The exception properly applies when resolution of the counter claim ‘is necessary to determine the right to possession.’” Quoting from First Union Management v. Slack, 36 Wn. App. 849, 854, 670 P. 2d 936 (1984). Kelly had brought suit for unlawful detainer. Powell

counterclaimed for specific performance of their option. “If they had properly exercised the option, they would have been entitled to continued possession. Thus the trial court had to reach the merits of the counterclaim to decide the issue of possession.”

In the present case Appellant did not assert that its failure to pay the rent that was due under the lease was in any way excused. Neither did Appellant pray for specific performance. (CP 69-70, 35-36) Nor did Appellant argue, or have any basis for arguing, that if it had properly exercised the option (i.e. given notice of exercise, there was never a contention that it had closed on the purchase) it would have been entitled to possession. Finally, Appellant did not claim that it was entitled to retain possession, only that Respondent should proceed under the Real Estate Contract Forfeiture Act rather than by Unlawful Detainer. (CP 36) Thus a claim by the Appellant that it is entitled to arbitrate its

dispute with the Respondents arising out of the Purchase Option does not fall under any of the exceptions to the limited jurisdiction of the court in an Unlawful Detainer action.

The court in the Unlawful Detainer action (Ha v. Otis) did not purport to rule on Appellant's option. The closest that it came was to observe, which was never in dispute, that the option gave the tenant, Appellant Otis, until December 31, 2004 to close on its purchase and it hadn't happened. (CP 72)

The essence of the defense of *res judicata* is that the issue to which the doctrine would be applied has already been decided. The same principle is involved when the defense is collateral estoppel. For the defense of collateral estoppel to apply there must be an affirmative answer to four questions: "(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 the plea 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 applied?" Mead v. Park Place Properties, 367 Wn. App. 403, 405, 681 P. 2d 256 (1984) quoting from Lucas v. Velikanje, 2 Wn App. 888, 894, 471 P. 2d 103 (1970). The answer to the third question is yes. The answer to the other three is no. As to question number 1, Respondents argue, with no support in the record, that the issue was decided in the prior case of Ha v. Otis. Respondents do not address question number 4, and they would certainly find doing so difficult since Appellant has paid close to seven hundred thousand dollars to apply on the option price (CP 46) and has spent almost a quarter of a million dollars on improvements to the property. (CP 47) But the answer to question number 2 is the capstone. No judgment was ever entered in the case of Ha v. Otis. A writ of restitution was ordered. That was all. (CP 72-73, 98-99)

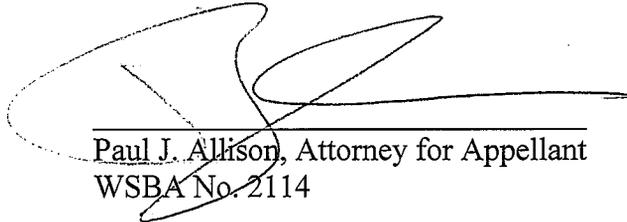
REPLY TO RESPONDENTS' FINAL ARGUMENT

Respondents' final argument (Respondents' Brief page 20) is that Appellant is equitably estopped from pursuing arbitration of its rights under the option because it failed "to timely raise the same (that arbitration is the exclusive remedy) as a challenge to Judge Moreno's jurisdiction to entertain the unlawful detainer action in the first instance."

Respondents apparently overlook the fact that the arbitration clause is in the REAL ESTATE OPTION TO PURCHASE, not the BUILDING LEASE.

Dated this 5th day of January, 2007.

Respectfully submitted



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