

80626-8

NO. 25076-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

OTIS HOUSING ASSOCIATION, INC., a Washington
corporation,

Appellant,

vs.

JOHN HA and MIN HA, husband and wife,

Respondents.

BRIEF OF RESPONDENTS

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Court Rules

RAP 12.2

A. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether the factual determinations of the Superior Court of Spokane County, State of Washington, are supported by substantial evidence and support the court's "Order Canceling Lis Pendens and Application for Arbitration," and entry of final judgment? [RP 15-16; CP 74-77]

2. Whether, in addition to being supported by substantial evidence, the decision and judgment of the Superior Court of Spokane County, State of Washington, is subject to affirmance by this court on other grounds within the pleadings and the proof? [RP 15-16; CP 74-75].

B. COUNTER-STATEMENT OF THE CASE

As this court is aware, the respondents, JOHN HA and MIN HA, had filed on July 11, 2006, a motion to supplement record with respect to the inclusion of the related superior court record in the related unlawful detainer action in Spokane County Superior Court Cause No. 05-02-03598-1, and said motion was thereafter denied by "order" of this court on November 14, 2006. [Spindle]. In

conformity with said "order," all factual statements relating to the proceedings in the previous unlawful detainer action [Spokane County Superior Court Cause No. 05-02-03598-1], are solely confined to those specific factual references as they appear in the existing record on appeal, to wit: (a) the report of proceedings concerning the March 10, 2006, hearing before Judge Salvator F. Cozza [RP 1-16], and (b) the designated clerks' paper [CP 15-36, 66-73, 86-91] pertaining to Spokane County Superior Court cause no. 05-02-05650-3 which has given rise to this appeal of the appellant, OTIS HOUSING ASSOCIATION, INC.

1. Factual Background of cause no. 05-2-03598-1.

Prior to the present lawsuit, the respondents, JOHN HA and MIN HA, filed an unlawful detainer action against the appellant, OTIS HOUSING ASSOCIATION, INC., in Spokane County Superior Court, State of Washington, under cause no. 05-2-03598-1. [CP 18, 75]. The gravamen of that complaint was that the defendant was in default of

the parties' lease agreement and, more specifically, was delinquent for several months of unpaid rent. [RP 3].

On August 30, 2005, the appellant, OTIS HOUSING ASSOCIATION, INC., served an "Answer and Counterclaim" in response to the Mr. and Mrs. HAS' unlawful detainer action, wherein OTIS HOUSING ASSOCIATION, INC., alleged, inter alia, that the "defendant, having an option to purchase the subject property, exercised its option and is, accordingly, entitled to the protection accorded to real estate contract purchasers by the Real Estate Contract Forfeitures Act." [CP 69-70]. Pertinent case law establishes this was completely proper, if not compulsory under the circumstances, since such claim and affirmative defense goes directly to the issue of "right of possession, and related issues," with respect to such unlawful detainer proceedings. See, Kelly v. Powell, 55 Wn.App. 143, 150-51, 776 P.2d 996 (1989); see also, Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); Lee v. Debentures Incorporated, 8

Wn.2d 353, 355-57, 112 P.2d 142 (1941); Savings Bank of Puget Sound v. Mink, 49 Wn.App. 204, 209, 741 P.2d 1043 (1987); Mead v. Park Place Properties, 37 Wn.App. 403, 406, 681 P.2d 256, review denied, 102 Wn.2d 1010 (1984); Greenhut v. Wooden, 129 Cal.App.3d 64, 180 Cal.Rptr. 786 (1982); see generally, Stella Sales, Inc. v. Johnson, 97 Wn.App. 11, 22, 985 P.2d 391 (1999); Steiner v. Fitzgerald, 3 Wn.App. 251, 474 P.2d 596 (1970); Meier v. Thorpe, 822 S.W.2d 556, 558 (Mo.App. 1992); Mitchel v. House, 71 Ark.App. 19, 26 S.W.3d 586 (2000); Golden Host Westchase, Inc., v. First Service Corp., 29 Ark.App. 107, 778 S.W.2d 633, 639 (1989).

Thereafter, on October 14, 2005, a show cause hearing was held before Maryann C. Moreno, Judge of the Spokane County Superior Court. [CP 66, 71-73]. Initially, during the course of this hearing, the court noted that the original "answer and counterclaim" of OTIS HOUSING ASSOCIATION, INC. [CP 69-70], was not in the court file although counsel for said defendant represented to

the court that he had, in fact, served and filed said pleading on or about August 30, 2005. [CP 67].

At the very least, counsel for OTIS HOUSING ASSOCIATION, INC., had intended to file the same with the superior court. [CP 67]. However, following this October 14 hearing before Judge Moreno, it was determined this answer and counterclaim had apparently not been filed by defense counsel. [CP 67]. As a result, an amended answer to the unlawful detainer complaint was served and filed on or about October 20, 2005. [CP 18, 35-36, 67].

Nevertheless, during the course of this October 14 hearing, OTIS HOUSING ASSOCIATION, INC., did in fact argue and present to Judge Moreno its "counterclaim and affirmative defense" that it had previously given notice to Mr. and Mrs. HA of its decision to exercise of the option to purchase as allegedly contemplated under the second addendum to the lease. [RP 2-4, 12-14; CP 20-34]. This was notwithstanding the fact that a

third addendum had been entered into by the parties which provided that no option to purchase had been exercised under this new addendum and any option to purchase, which even the defendant acknowledged, must have been closed no later than "December 31, 2004." Id.

Following this oral argument of counsel, Judge Moreno ruled that there had been an option to purchase agreement between the parties, and that agreement in the form of addenda had been amended three [3] times. [CP 29-34, 72-74]. With respect to the third and final addendum [CP 29-34], the court noted that the defendant, OTIS HOUSING AUTHORITY, was required to meet, but in fact had not met in this instance, "the very specific terms of the lease" and [the] designated closing date of "December 31, 2004," as required under this third addendum [CP 29-34], and so the option had not been properly exercised by OTIS HOUSING ASSOCIATION, INC., so as to bar the relief being requested by JOHN and MIN HA. [RP 4; CP 72-74]. As a result, Judge Moreno held at the

conclusion of the hearing on October 14, 2006, that the court had not choice "but to authorize the entry of a Writ of Restitution" under the facts presented in this case. [RP 4-5; CP 72-73].

OTIS HOUSING ASSOCIATION, INC., filed a motion for reconsideration. [RP 5] However, said motion was later abandoned when, after apparently being dissatisfied with Judge Moreno's ruling concerning its failure to properly exercise the option to purchase, OTIS HOUSING ASSOCIATION, INC., decided on November 22, 2005, to file a new lawsuit, and request under Title 7 RCW for arbitration, under Spokane County Superior Court cause no. 05-2-05650-3. [RP 4; CP 1-4].

2. Factual Background of cause no. 05-2-05650-3. As indicated above, the plaintiff, OTIS HOUSING ASSOCIATION, INC., filed this new and separate lawsuit against JOHN HA and MIN HA under cause no. 05-2-05650-3, which was entitled "Application for an Order Directing the Defendants to Proceed to Arbitration," wherein it was claimed for the first time by OTIS HOUSING ASSOCIATION,

INC., that the Spokane County Superior Court was without authority to decide any dispute which existed between the parties, including the claimed exercise of the option to purchase by OTIS HOUSING ASSOCIATION, INC., and that such dispute could only be resolved by way of arbitration. [CP 1-4].

At the same time, the plaintiff filed a notice of lis pendens with the Spokane County Auditor against the subject real estate owned by Mr. and Mrs. HA. [RP 5, 7].

Thereafter, on January 9, 2006, the defendants, JOHN HA and MIN HA, filed a motion for order to cancel lis pendens and to deny plaintiff's application for arbitration, along with their supporting memorandum referencing the plaintiff's failed counterclaim and affirmative defense in the prior unlawful detainer litigation. [CP 14, 15-36, 37-44]. Similarly, in the declaration of Eric R. Shumaker which was filed with the superior court on March 6, 2006, the earlier proceedings and ruling of Judge Moreno were further spelled out to the court in this new

action. [CP 66-73]. In terms of the legal basis for the relief requested, Mr. and Mrs. HA argued in its briefing that the present action of OTIS HOUSING ASSOCIATION, INC., was barred under "the principles of collateral estoppel, and . . . res judicata" and as to the "issue of arbitration" this too should have been raised in the earlier unlawful detainer action. [CP 18].

On March 10, 2006, the motion of the defendants, JOHN HA and MIN HA, was heard by Salvator F. Cozza, Judge of the Spokane County Superior Court. [RP 1-14]. As clearly reflected from the report of proceedings concerning this hearing, the prior record and file in cause no. 05-2-03598-1 were brought to the forefront of this hearing and argument of counsel. Id. At the conclusion of this hearing, the superior court ruled that it was not necessarily certain whether this is "a matter of res judicata," but in any event, and once again as Judge Moreno had earlier ruled in cause no. 05-2-03598-1 [CP 72-73], "there ha[d] been a material failure to exercise the

option in question, that the right to seek arbitration of the matter within that contractual framework ha[d] lapsed." [RP 16].

Accordingly, Judge Cozza held, as Judge Moreno had previously ruled [CP 71-73], that "there had been a material failure to exercise the option in question. [RP 16]. The court went on to note that "the right to seek arbitration of the matter within that contractual frame work ha[d] lapsed." [RP 16].

An "Order Canceling Lis Pendens and Denying Application for Arbitration" was entered by the superior court on this same date as the court's oral decision. [CP 74-77]. With regard to said "order," the following "findings" of fact were entered:

1. Otis Housing Association, Inc. materially failed to timely exercise and/or close the Option to Purchase.
2. The time for exercising and/or closing the Option to Purchase has expired. Otis Housing association, Inc. is not entitled to purchase the property.
3. Otis Housing Association, Inc. previously sought relief form the Spokane County Superior Court regarding the Option to Purchase in the case of Ha v. Otis Housing Association, Inc., Spokane County Superior Court Cause #05-2-03598-1.

4. The right to seek arbitration under the Option to Purchase no longer exists and has lapsed.

5. The defendant JOHN HA and MIN HA are deemed to be the prevailing party in this action, and are therefore entitled to an award of costs and attorney fees pursuant to the provisions of the Option to Purchase.

6. Further Findings and Conclusions are contained in the Court's oral decision [RP 16], which is hereby incorporated by reference as though fully set forth herein.

[CP 74-75]. Based upon these "findings," the superior Court ordered the Lis Pendens lifted in this case and denied the appellant's request for arbitration. [CR 75-76].

Thereafter, following the court's denial of plaintiff's motion for reconsideration [CP 78, 79-87, 88-91, 92-106, 107-08], OTIS HOUSING ASSOCIATION, INC., filed a notice of appeal on April 6, 2006, challenging the foregoing "order" entered by Judge Cozza. [CP 109-16; Spindle].

C. STANDARD OF REVIEW

Review of an assignment of error will be denied if the assignment of error is unsupported by adequate argument or citation to pertinent authority. Cowiche Canyon Consergency v. Bosley,

118 Wn.2d 801, 809, 828 P.2d 549 (1992); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). In addition, factual determinations of trial court are subject to only limited review in terms of substantial evidence. Thorndike v. Hesperian Orchards, Inc. 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence exists where there is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premises set forth in the findings of fact of the trial court. Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1986). If such findings of fact are supported by substantial evidence, the remaining inquiry on appeal is whether those findings of fact support the trial court's conclusions of law and judgment. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984). If such is the

case, then dismissal of the appeal is warranted. Id. Finally, it is longstanding rule of appellate practice in Washington that a decision of the trial court may be affirmed on any basis within the pleadings and the proof. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); State v. Morelose, 133 Wn.App. 591, 599, 137 P.3d 114 (2006); Sunnyside v. Lopez, 50 Wn.App. 786, 794, 751 P.2d 313 (1988).

D. ARGUMENT IN RESPONSE

1. The factual determinations of the Superior Court of Spokane County, State of Washington, [RP 16; CP 74-75] are supported by substantial evidence and, in turn, support its "Order Canceling Lis Pendens and Application for Arbitration," and entry of final judgment against the appellant herein.

As is abundantly clear from the record in this matter, the present case is essentially a factual appeal. In this regard, on page 1 of the "Brief of Appellant, the appellant, OTIS HOUSING ASSOCIATION, INC., has specifically assigned error to the superior court's findings as set forth in

its assignment of error no. 4. Nevertheless, on pages 7 through 15 of the "Brief of Appellant," OTIS HOUSING ASSOCIATION, INC., argues, without any specific argument or reference to any of these challenged "findings" of fact of the superior court [RP 16; CP 74-75] that it was entitled to have all issues arbitrated in this matter of "right of possession" of the subject property. Suffice it to say, it is a well-settled rule of appellate practice that review of an assignment of error will be denied if the assignment of error is unsupported by meaningful analysis, adequate argument or citation to pertinent authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). Insofar as the appellant has failed to provide any meaningful analysis or argument as to why these particular "findings" are in error, said findings of fact are considered verities on this appeal. Id.

That being the case, the only remaining

inquiry is whether those findings of fact support the superior court's decision and "order" [75-76] lifting of the lis pendens and the denial of the appellant's request to arbitrate. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984). Suffice it to say, the above-cited "findings" of Judge Cozza amply support the decision of the court in this regard and, accordingly, dismissal of the appeal is clearly warranted. Id.

However, even assuming, arguendo, that the appellant had provided any type of meaning analysis or challenge to the "findings" of the superior court in its argument, it is nevertheless well-established that factual determinations of trial court are subject to only limited review in terms of substantial evidence. Thorndike v. Hesperian Orchards, Inc. 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence exists where there is evidence of a sufficient quantum to

persuade a fair-minded person of the truth of the declared premises set forth in the findings of fact of the trial court. Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1986). Again, if such findings of fact are supported by substantial evidence, the remaining inquiry on appeal is whether those findings of fact support the trial court's conclusions of law and judgment. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984). If such is the case, then dismissal of the appeal is warranted. Id.

Suffice it to say, the terms of the third addendum alone [CP 29-34], when taken into account with the undisputed and acknowledged facts that the appellant was delinquent in terms of rents owed for the entire year of 2005 and that the subject option and completed purchase had not been

accomplished by the time prescribed, clearly provides substantial evidence supporting the "findings" of Judge Cozza in this instance. Likewise, as stated previously, these same findings amply support the decision of the court concerning its decision to lift the subject lis pendens and to deny the appellant's request to arbitrate. Accordingly, dismissal of the appeal is once more clearly warranted in this instance. Eggert, at 854; Silverdale Hotel Assocs., at 766; see also, RAP 12.2.

2. In this particular instance, the decision and judgment of the superior court is further subject to affirmance by this appellate court on other grounds within the pleadings and the proof.

Aside from simply affirming the decision of Judge Cozza on the basis of substantial evidence, there are other grounds upon which said holding can be affirmed in this case. As stated above, it is longstanding rule that a decision of the trial court may be affirmed on any basis within the pleadings and the proof. State v. Rohrich, 149

Wn.2d 647, 654, 71 P.3d 638 (2003); State v. Morelose, 133 Wn.App. 591, 599, 137 P.3d 114 (2006); Sunnyside v. Lopez, 50 Wn.App. 786, 794, 751 P.2d 313 (1988).

As outlined above, in section B.1 of respondent's "Counter-Statement of the Case," the appellant, OTIS HOUSING ASSOCIATION, INC., had a full and fair opportunity, and did in fact argue its affirmative defense and counterclaim, in the unlawful detainer action [Spokane County Superior Court cause no. 05-2-035981] before Judge Maryann C. Moreno, that it is had exercised the option to purchase and was therefore entitled to continue in possession of the subject real estate. Moreover, had the appellant not presented this defense to the superior court during the course of this unlawful detainer proceeding, it would have been barred from raising it in the future. Suffice it to say, said affirmative defense and counterclaim are compulsory insofar as they relate directly to the question of right of possession and related issues. Kelly v. Powell, 55 Wn.App. 143, 150-51,

776 P.2d 996 (1989); see also, Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); Lee v. Debentures Incorporated, 8 Wn.2d 353, 355-57, 112 P.2d 142 (1941); Savings Bank of Puget Sound v. Mink, 49 Wn.App. 204, 209, 741 P.2d 1043 (1987); Mead v. Park Place Properties, 37 Wn.App. 403, 406, 681 P.2d 256, review denied, 102 Wn.2d 1010 (1984); Greenhut v. Wooden, 129 Cal.App.3d 64, 180 Cal.Rptr. 786 (1982); see generally, Stella Sales, Inc. v. Johnson, 97 Wn.App. 11, 22, 985 P.2d 391 (1999); Steiner v. Fitzgerald, 3 Wn.App. 251, 474 P.2d 596 (1970); Meier v. Thorpe, 822 S.W.2d 556, 558 (Mo.App. 1992); Mitchel v. House, 71 Ark.App. 19, 26 S.W.3d 586 (2000); Golden Host Westchase, Inc., v. First Service Corp., 29 Ark.App. 107, 778 S.W.2d 633, 639 (1989).

In any event, and as in set forth above, the appellant did in fact argue its option to purchase claim in the earlier unlawful detainer proceeding before Judge Moreno. Consequently, under the doctrines of collateral estoppel and res judicata,

OTIS HOUSING ASSOCIATION, INC., was barred from asserting the same claims in this second action giving rise to this appeal, as well as all other issues, including arbitration, which could have been raised in the initial action between these parties. See, Cramer v. Seattle Sch. Dist. No.1, 52 Wn.App. 531, 534, 762 P.2d 356 (1988), cert. denied, 493 U.S. 873 (1989); Marino Property Co. v. Port Comm'rs of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982); see also, Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

Suffice it to say, even if the claim of arbitration is not governed by the foregoing doctrines of issue preclusion, it is still quite clear that such claim was either waived by the appellant, or appellant is otherwise equitably estopped from raising the same, in light of the failure of OTIS HOUSING ASSOCIATION, INC., to timely raise the same as a challenge to Judge Moreno's jurisdiction to entertain the unlawful detainer action in the first instance. Harting v. Barton, 101 Wn.App. 954, 6 P.3d 91 (2000), review

denied, 142 Wn.2d 1019 (2001). Suffice it to say, appellant did not bother to raise this issue until well after Judge MORENO had entered her decision in this matter, and clearly connotes a voluntary decision to forego any right to invoke the same in either of these two [2] proceedings Before the superior court. Id.

Thus, for these additional legal grounds and reasons, the subsequent decision of Judge Cozza in this matter should be affirmed on this appeal.

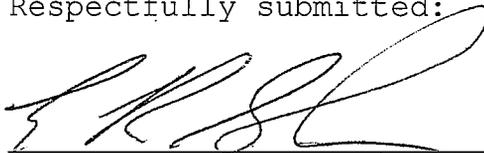
RAP 12.2.

E. CONCLUSION

Based upon the foregoing points and authorities, the respondents, JOHN HA and MIN HA, respectfully request that the judgment of the Superior Court of Spokane County, State of Washington, be affirmed and, accordingly, that this appeal be dismissed with prejudice.

DATED this 12th day of December, 2006.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'E. R. Shumaker', written over a horizontal line.

Eric R. Shumaker, WSBA #22231
Attorney for Respondents,
JOHN HA and MIN HA

I certify under penalty of perjury under the laws of the State of Washington that I mailed and/or delivered a true and correct copy of the foregoing Brief of Respondents, to the following persons, by first class mail, postage prepaid, on December 12, 2006:

Paul J. Allison
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Dated: December 12, 2006.



Eric R. Shumaker WSBA#22231