

No. 71635-2-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

U.S. BANK, NA, and its successors-in-interest and assigns,
Plaintiff-Respondent

vs.

MICHAEL HARKEY;
Defendant-Appellant;

Jane Doe, John Doe, AND ALL OCCUPANTS OF THE PREMISES
LOCATED AT 48 Thunder Road, Camano Island, WA 98282,

Defendants.

ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT

CASE NO. 11-2-01044-3

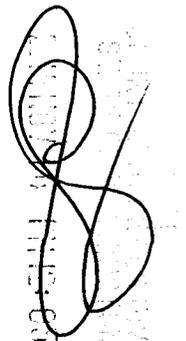
RESPONDENT'S BRIEF

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A handwritten signature in black ink, appearing to be "D. Weibel", is written over a faint, dotted background that resembles a stamp or a watermark. The signature is stylized and somewhat cursive.

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I. INTRODUCTION

Defendant-Appellant Michael Harkey's property was nonjudicially foreclosed in December 2008. Harkey never sought to enjoin the trustee's sale before it was conducted. Harkey never challenged the sale until May 2011, when he appeared in a separate quiet-title action that preceded the present lawsuit and moved to vacate a default judgment that had been entered against him earlier that month. Harkey did not present any evidence to establish good cause for vacating the default. His untimely notice to appeal in that case was filed nearly three years after final judgment was entered.

The present appeal is from an unlawful-detainer proceeding commenced in December 2011 for the purpose of ejecting any tenants from the foreclosed property. Once again, Harkey did not appear until after a default had been entered. Once again, Harkey challenged the default, proffering the same arguments as he had in the quiet-title action. Once again, Harkey failed to present any evidence to establish good cause for vacating the default. Once again, Harkey's notice of appeal was not timely filed. Harkey's appeal should be dismissed or, alternatively, denied.

II. STATEMENT OF ISSUES

1. Should Harkey's appeal be dismissed when it was filed two years after entry of a final order and he never submitted a timely motion under CR 59?

2. Did the Superior Court act within its scope of discretion in denying Harkey's motions to vacate a default writ of restitution when he never presented evidence of excusable neglect and due diligence?

3. Did the Superior Court act within its scope of discretion in denying Harkey's repeated motions to vacate a default writ of restitution when his proffered defenses were all barred by RCW 61.24.127?

4. Is the Deed of Trust Act (RCW Chapter 61.24) a constitutional exercise of the Legislature's powers?

III. STATEMENT OF THE CASE

In September 2007, Harkey borrowed \$417,000 from Plaintiff-Respondent US Bank, NA. He granted a deed of trust on property he owned on Camano Island as security for the loan. Harkey defaulted on the loan, not making the payment due on January 1, 2008, or any subsequent payments.

US Bank initiated a nonjudicial foreclosure. The trustee's sale was held on December 5, 2008. US Bank was the successful bidder and

took title to the property by trustee's deed recorded on December 12, 2008, in the Island County Auditor's Office.¹

In July 2010, US Bank commenced an action for declaratory relief and to quiet title in Island County Superior Court. By order entered April 7, 2011, the Superior Court granted US Bank's motion for default against Harkey. The Superior Court entered a default judgment on May 3, 2011. On May 31, 2011, Harkey finally appeared in the action by filing a "Motion to Set Aside Default Judgment and to Suspend Its Operation." Harkey's motion was denied on June 21, 2011. Harkey continued to file motions to vacate the default judgment through October 24, 2013. Including a motion for reconsideration filed in January 2014, Harkey made a total of six attempts to vacate the default judgment. All of the motions asserted one ground or another for attacking the validity of the trustee's sale in December 2008. None of Harkey's motions were successful, and he finally filed a notice of appeal in the quiet-title action on March 5, 2014.²

While Harkey was filing his serial motions to vacate in the quiet-title action, US Bank commenced the present unlawful-detainer proceeding. Service of the summons and complaint was attempted multiple times

¹ CP 339.

² That appeal is currently pending before this Court as Case No. 71634-4-I. The appeals have not been consolidated. US Bank respectfully refers the panel to its brief and the Clerk's Papers filed in Case No. 71634-4-I for the record supporting the procedural history of that lawsuit.

between October 26, 2011, and November 2, 2011.³ When US Bank filed the summons and complaint with the Superior Court on December 8, 2011, it also moved for permission to serve by publication.⁴ The order authorizing service by publication was entered on December 9, 2011.⁵ After publication was completed, US Bank moved for a default and issuance of a writ of restitution, which were granted on February 3, 2012.⁶

Harkey finally appeared on February 23, 2012, by filing an “Emergency Complaint re: Fraudulent Foreclosure Action Involving M.E.R.S. Securitization; Notice of Lis Pendens; Order to Show Cause; As an Offer of Evidence, ER 103; As an Offer of Proof, ER 103(2); Mandatory Judicial Notice, ER 201(d)(e)(f).”⁷ The Superior Court denied Harkey’s motion for a temporary restraining order on March 8, 2012.⁸

As he did in the quiet-title action, Harkey filed a series of motions in the unlawful-detainer proceeding seeking to set aside the trustee’s sale on various grounds. These efforts culminated in a motion to set aside default that Harkey filed simultaneously in both lawsuits on October 23,

³ CP 329-34.

⁴ CP 338-48; CP 317-28.

⁵ CP 315-16.

⁶ CP 303-08; CP 300-02.

⁷ CP 246-92. Harkey also filed a “Counter/Cross Complaint Rule 60(b) Motion to Vacate Judgment on Grounds of Fraud and Collusion / Conflict of Interest” on the same day, but he has not designated this for inclusion in the Record on Appeal.

⁸ CP 239. Harkey apparently did not designate the actual order for inclusion in the Record on Appeal.

2013.⁹ The motion was denied by an order entered on December 26, 2013.¹⁰ Harkey filed a motion for reconsideration on Thursday, January 6, 2014.¹¹ This was 11 days after the order denying his motion was entered. The Superior Court denied reconsideration by orders entered on February 4, 2014, and February 19, 2014.¹²

Harkey finally filed a notice of appeal from the default writ of restitution and other orders on March 4, 2014.¹³

IV. ARGUMENT

Harkey's appeal is untimely because he failed to file a notice within the time limits set by RAP 5.2.

In addition, however he labeled them, Harkey's motions below all sought to vacate the default order entered against him. Harkey, however, failed to present any evidence to establish good cause for setting aside the

⁹ Harkey has not included his motion in this case's Record on Appeal. His motion appears in the Record on Appeal for Case No. 71634-4-I at CP 179-235. Harkey frequently filed the same papers in both actions. For example, his filing on February 23, 2012, also has the case number for the quiet-title action. *See* CP 246.

¹⁰ Record on Appeal for Case No. 71634-4-I at CP 101-05.

¹¹ Record on Appeal for Case No. 71634-4-I at CP 61-100.

¹² Record on Appeal for Case No. 71634-4-I at CP 23-24. Harkey's Notice of Appeal lists the February 4, 2014, order and attaches a copy that is not from the official court file. *See* CP 1 (Item No. 6) and CP 19-20. The Clerk's Papers provided to this Court, however, do not include copies of either order. In effect, the February 19, 2014, order denying reconsideration superseded the earlier order, as explained in a letter from Hon. Alan R. Hancock. Record on Appeal for Case No. 71634-4-I at CP 25-26.

¹³ CP 1-23.

default. His brief to this Court fails to argue, much less cite anything in the record to demonstrate, that the Superior Court abused its discretion in refusing to vacate the default entered in this unlawful-detainer proceeding.

Harkey's single brief filed in his two appeals focuses almost exclusively on his proposed defenses to US Bank's quiet-title action. He essentially incorporates those arguments as a defense to the unlawful detainer by a single sentence in his brief.¹⁴ Not only do those defenses lack merit, but Harkey had already litigated those same questions in the quiet-title action and lost, and so was barred from attempting to resurrect them.

A. STANDARD OF REVIEW

On an appeal from an order denying a motion to vacate a default judgment under CR 60, the Court of Appeals reviews the order for abuse of discretion.¹⁵

To the extent that pure questions of law are properly before this Court, its standard of review is *de novo*.¹⁶

¹⁴ See Appellant's Brief, 36.

¹⁵ See *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2014).

¹⁶ See *West Consultants, Inc. v. Davis*, 177 Wn.App. 33, 38, 310 P.3d 824 (2013).

B. HARKEY'S APPEAL MUST BE DISMISSED AS UNTIMELY

Harkey failed to file a notice of appeal until two years after he was defaulted and a writ of restitution issued. His appeal is untimely and must be dismissed.

Generally, a notice of appeal must be filed within the longer of 30 days after: (i) entry of final judgment; or (ii) as relevant here, motions made pursuant to CR 50(b), CR 52(b), or CR 59.¹⁷ An extension of the deadline will be granted “only in extraordinary circumstances and to prevent a gross miscarriage of justice.”¹⁸

An order of default was entered against Harkey on February 3, 2012. A writ of restitution was issued the same day. This started the running of Harkey's time to file a notice of appeal, which would expire on Monday, March 7, 2012, unless he timely filed a motion that would extend the deadline.

On February 23, 2012, Harkey filed papers with the Superior Court that essentially sought a temporary restraining order enjoining enforcement of the writ of restitution. Harkey's motion did not invoke CR 59. Harkey's motion was denied by an order entered on March 8,

¹⁷ See RAP 5.2(a), (e).

¹⁸ RAP 18.8(b). See also RAP 1.2(c) (appellate courts' power to waive or alter provisions in Rules of Appellate Procedure is “subject to restrictions in rule 18.8(b) and (c)”).

2012. Harkey did not move for reconsideration from the March 8, 2012, order.

Harkey filed his notice of appeal on March 5, 2014, 25 months after he was defaulted and the writ of restitution was issued, and 24 months after the order denying his post-judgment motion for a temporary restraining order.¹⁹ Harkey failed to file his notice of appeal within the 30-day period prescribed by RAP 5.2.

Harkey's notice of appeal also designates a December 26, 2013, order denying a motion to vacate a default judgment and two subsequent orders, dated February 4 and 19, 2013, respectively, denying reconsideration.²⁰ The order denying his motion to vacate was filed on December 26, 2013. He did not file a motion for reconsideration until January 6, 2014. This was one day more than the 10-day deadline to request reconsideration.²¹ Because Harkey's motion was late, it did not serve to extend his time to appeal from the December 26 order.²² Harkey's notice

¹⁹ CP 1-23, 239, 300-02.

²⁰ Neither the motion to vacate nor the orders appear in the Index to Appellant's Clerk's Papers filed in this appeal. Although the motion itself has both case numbers in the caption, it does not appear to have been filed in this unlawful-detainer proceeding. See discussion at notes 9-13, above.

²¹ See RAP 18.6(a) (Saturdays, Sundays, and legal holidays included if period of time greater than six days); *accord*, CR 6(a).

²² See *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (untimely motion for reconsideration did not extend time to appeal, even when Superior Court ruled on merits of motion).

of appeal was due by Monday, January 27, 2014. He did not file it for another 37 days, on March 5, 2014.

Harkey's appeal is untimely and must be dismissed.

C. THE SUPERIOR COURT PROPERLY DENIED HARKEY'S MOTIONS TO VACATE BECAUSE HE DID NOT ESTABLISH GOOD CAUSE

In order to have the default set aside, Harkey was required to establish both excusable neglect and due diligence.²³ Harkey presented no evidence to explain why he had not responded to service or to show that he had acted promptly on learning of the unlawful-detainer proceeding. Because Harkey did not provide any factual basis to find good cause, the Superior Court did not abuse its discretion by denying Harkey's motions to vacate.

D. HARKEY'S ARGUMENTS ARE UNSUBSTANTIATED AND BARRED BY ISSUE-PRECLUSION DOCTRINES

Harkey's brief in this appeal is almost entirely an attack on orders entered in the quiet-title action that is the subject of Appellate Case No. 71634-4-I. His argument for reversal in this case is limited to two paragraphs, which assert two grounds for reversal: it was error for US

²³ See *In re Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

Bank to sue Harkey as “John Doe” instead of by his proper name; and the foreclosure was improper.²⁴

1. Harkey Did Not Present Evidence of Any Harm from Being Sued as John Doe

Harkey’s objection to being identified in the complaint as “John Doe” is unavailing. Harkey does not argue that because his actual name was not used, he was unaware that the proceeding had been commenced or he was somehow prejudiced by the use of “John Doe.”²⁵ Harkey does not proffer any evidence that his failure to timely appear resulted from US Bank’s use of “John Doe” in its complaint. In the absence of any argument that his failure to appear was due to excusable neglect, Harkey has waived this issue as a ground for appeal.²⁶

2. Harkey Cannot Reargue His Unsuccessful Challenges To The Foreclosure Sale That Were Rejected In The Quiet-Title Action

The propriety of the foreclosure was addressed in Case No. 10-2-00558-1, a quiet-title action. By the time Harkey appeared in this proceeding to challenge the writ of restitution, he had already presented, and lost, motions to vacate the default judgment in Case No. 10-2-00558-1.

²⁴ See Appellant’s Brief, 36.

²⁵ Cf. *Bresina v. Ace Paving Co.*, 89 Wn.App. 277, 948 P.2d 870 (1997) (allegation against unknown “ABC Corporation” not sufficient to preserve claim against Ace Paving Company when named in amended complaint served after running of statute of limitations).

²⁶ See *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 128, 138 n.4, 331 P.3d 40 (2014).

His similar arguments in this unlawful-detainer case are just a collateral attack on the default judgment. Furthermore, he is barred by *res judicata* or collateral estoppel from challenging the default entered against him in this proceeding.²⁷

US Bank's brief in Appeal No. 71634-4-I explains why the Superior Court properly acted within its discretion to keep intact the default judgment quieting title. US Bank respectfully refers the Court to that brief. To summarize US Bank's position as pertinent to this proceeding:

- Harkey's proposed claims to set aside the foreclosure were waived because he never moved to enjoin the trustee's sale before it occurred.²⁸
- His proposed claims to set aside the foreclosure were time-barred under the two-year limitation of RCW 61.24.127(2)(a).²⁹
- His proposed claims to have the foreclosure deemed void were barred by the statutory proscription barring an owner from "any remedy at

²⁷ Harkey has presented no argument here directly challenging the order authorizing service by publication; the order granting default; the entry of the writ of restitution; or the order denying his order for a temporary restraining order, which appear as Item Nos. 1 through 4 in Harkey's Notice of Appeal. An appeal from an order denying a motion to vacate does not bring up the original order for review. See Tegland, 4 WASHINGTON PRACTICE: RULES PRACTICE, CR 60, at 548, 565 (5th ed. 2006). By failing to present any argument, Harkey has waived any appeal as to those four orders. See *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d at 138 n.4, *supra*.

²⁸ See RCW 61.24.130(1); see also *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

²⁹ US Bank assumes for the sake of argument that RCW 61.24.127 applies to claims concerning a trustee's sale conducted before the statute became effective in 2009.

law or in equity other than monetary damages” set forth in RCW 61.24.127(2)(b).

- The Deed of Trust Act complies with the Washington Constitution.³⁰

Harkey’s attempt to resurrect these arguments in the unlawful-detainer proceeding is barred by *res judicata* or collateral estoppel.

The party raising *res judicata* must demonstrate that the action involves the same subject matter, cause of action, persons or parties, and quality of persons as a prior adjudication. ... *Res judicata* applies both to points upon which the previous court was required to pronounce a judgment, and to every point “which the parties, exercising reasonable diligence, might have brought forward at the time.”³¹

The elements for applying *res judicata* are present here.

The persons and parties are obviously the same: US Bank and Harkey.

The subject matters of the two lawsuits are essentially the same. In Case No. 10-2-00558-1, US Bank sought a judgment quieting title in itself to the Camano Island property, and Harkey opposed the relief on the ground that US Bank had come into title through an improper foreclosure. In this Case No. 11-2-01044-3, US Bank sought a writ allowing it to take possession of the property to which it held title, and Harkey opposed the

³⁰ See *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812 (1977).

³¹ *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn.App. 222, 227-28, 308 P.3d 681 (2013) (footnote omitted), quoting *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 441, 423 P.2d 624 (1967).

relief on the ground that US Bank had come into title, and acquired its right to possession, through an improper foreclosure. Thus, the central issue in both cases was whether the foreclosure was proper.

Judgment quieting title was entered in Case No. 10-2-00558-1 in May 2011, and an order rejecting Harkey's challenge to the foreclosure was entered in June 2011. Harkey did not file a notice of appeal from the judgment or order until April 2014, long after his time to appeal had run. Harkey first raised a challenge in this Case No. 11-2-01044-3 in February 2012, at least six months after judgment in the earlier quiet-title action became final.

Inconsistent judgments could possibly result if Harkey were allowed to proceed with his challenge here. In the first case, the Superior Court ruled that US Bank could not be ousted from title to the property on the ground that the foreclosure was improper. Assuming for the sake of argument that Harkey's challenges had any merit, the result here *could* be that Harkey is entitled to retain possession of the property on the ground that the foreclosure was improper. Thus, US Bank would end up in a situation where it acquired title to Harkey's property through a proper foreclosure, but it cannot eject Harkey from the same property because of an improper foreclosure.

If Harkey's challenge is not barred by *res judicata*, it is nonetheless prohibited by collateral estoppel.

Collateral estoppel or issue preclusion precludes relitigation of an issue in a subsequent proceeding where the following elements are met: "(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of issue preclusion does not work an injustice on the party against whom it is applied." ...

"Broadly stated, preclusion rules developed under the rubric of *res judicata* and collateral estoppel are designed to prevent repetitive litigation of the same matters."³²

In both cases, the central issue is whether the nonjudicial foreclosure in December 2008 was valid. The quiet-title action ended in a judgment on the merits.³³ Collateral estoppel here is being asserted against Harkey, who is the same party as in the earlier proceeding. And, last, prohibiting Harkey from resurrecting the same unsuccessful arguments in this proceeding would not work any injustice against him.

Harkey's attacks here on the foreclosure lack merit and are barred by *res judicata* and collateral estoppel.

³² *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn.App. 37, 43-44, 321 P.3d 266 (20), (footnotes omitted), quoting *Ullery v. Fulleton*, 162 Wn.App. 596, 602, 256 P.3d 406, review denied. 173 Wn.2d 1003, 271 P.3d 248 (2011); and Tegland, 14A WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.21 (2d ed. 2013).

³³ See Record on Appeal for Case No. 71634-4-I at CP 384-87, rejecting Harkey's challenge because, among other things, it is time-barred under RCW 61.24.127.

V. CONCLUSION

For the foregoing reasons, Respondent US Bank respectfully requests that this Court dismiss Harkey's appeal or, alternatively, affirm the judgment and orders entered below.

RESPECTFULLY SUBMITTED this 12th day of November, 2014.

BISHOP, MARSHALL & WEIBEL, P.S.

By: 
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David A. Weibel, WSBA No. 24031

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ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT

CASE NO. 11-2-01044-3

CERTIFICATE OF SERVICE

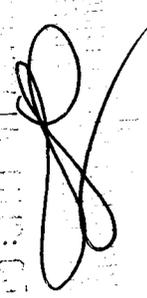
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JUL 11 2011
CLERK OF COURT
ISLAND COUNTY
WA
11-2-01044-3



ORIGINAL

I hereby certify that on the 12th day of November, 2014, I caused to be delivered 1) U.S. Bank's Responding Brief; and 2) this Certificate of Service to the following parties in the manner indicated below:

Via U.S. Mail:

Michael Harkey
1138 S. Altamont Blvd.
Spokane, WA 99202-4235

Dated this 12th day of November, 2014, at Seattle, Washington.



Ana I. Todakonzie