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COURT OF APPEALS
DIVISION ONE

JUL 03 2013

CASE NO. 69204-6-I
COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

KEVIN M. YOUNG
Appellant

vs.

U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR MASTR
ADJUSTABLE RATE MORTGAGE TRUST 2007-1, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2007-1
Respondent

RESPONDENT'S BRIEF

Appeal from Judgment of King County Superior Court
Case No.: 12-2-16087-2
Commissioner Nancy Bradburn-Johnson
Commissioner Carlos Velategui
Honorable James E. Rogers

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MASTR Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-
Through Certificates, Series 2007-1

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COURT OF APPEALS
STATE OF WASHINGTON

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I. RESTATEMENT OF ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR

The Trial Court did not err when it granted U.S. Bank National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-Through Certificates, Series 2007-1's ("U.S. Bank, as Trustee") (1) ex Parte Motion for Order of Default Issuing Writ of Restitution (the "ex-Parte Order"), (2) when it issued an Order Denying Defendants' Motion to Vacate and Motion to Stay (the "Order Denying Motion to Vacate") and (3) when it entered an Order Denying Defendant's Motion for Revision (the "Order Denying Motion for Revision").

First, the Court properly ruled on the ex-Parte Order, because U.S. Bank personally served the summons and complaint on the occupant of the property located at 1601 1st Street, Kirkland, WA 98033 (the "Property"), on April 13, 2013. The occupant of the property, Robbie Spidell, did not appear or otherwise respond to the unlawful detainer action before the response deadline on April 27, 2012.

U.S. Bank, as Trustee also named borrower Barbara Young and Kevin Young ("Young" and collectively the "Youngs") in the unlawful detainer action. Accordingly, three copies of the summons and complaint were served upon Robbie Spidell, as the occupant. U.S. Bank, as Trustee

did not receive a response to the unlawful detainer action before the response deadline, and moved for a default.¹

Second, the Trial Court properly ruled when it issued the Order Denying Defendant's Motion to Vacate. CP 18. Young's Motion to Vacate under CR 60 was improperly predicated on arguments that exceed the limited scope and jurisdiction of an unlawful detainer action. In support of his challenge, Young provided a written declaration and a recorded Appointment of Successor Trustee and Recession of Trustee Sale. CP 10. Young's declaration stated that the foreclosure sale was invalid because the foreclosure trustee did not have authority to conduct the sale due to an Appointment of Successor Trustee that was recorded a few days prior to the sale.² The recorded documents each contain factual errors on the face of the document and reflect that they were recorded at Young's request, presumably in an effort to hinder and delay U.S. Bank, as Trustee's possession to the Property. CP 10. In denying the Motion to Vacate and Motion to Stay on May 25, 2012, the Court properly ruled that Young's counterclaims were not cognizable in an unlawful detainer action. RP

¹ Young contends that he served a Motion to Dismiss to prior counsel for U.S. Bank on April 25, 2012, two days before the deadline to respond to the unlawful detainer complaint in lieu of answering the complaint. However, the record reflects that counsel never received a Motion to Dismiss. The declaration states "the Defendants did not make any contact, serve a written answer or notice of appearance on Plaintiffs' legal counsel on or before April 27, 2012." CP 5. The Motion to Dismiss was not filed until July 30, 2012.

² The Appointment of Successor Trustee was actually recorded on January 30, 2012, which was three days after the January 27, 2012 foreclosure. CP 1, 10.

p.24, ln. 15. The court also found that Young, who did not reside at or own the Property did not have standing to challenge the unlawful detainer. RP p.26, ln. 9.

Third, the Court properly ruled when it denied Young's untimely Motion for Revision on July 30, 2012. The Court held that Young's claims exceeded the scope of an unlawful detainer action. RP p.17, line 4-11. The Court also acknowledged that the unlawful detainer action was filed by the owner of the property and that Mr. Young did not seek an injunction to restrain the sale. RP p. 16, ln. 14-17. The Court further found that the unlawful detainer action was properly served on the occupant of the Property and that the occupant did not respond to the summons and complaint. RP p. 17, 12-19. Therefore, the Court properly found that the ex-Parte Order and Writ was proper. RP p. 17, 18-19.³

Furthermore, Young's appeal is untimely as to the ex Parte Order, the Order Denying Motion to Vacate, and the Order on Continuance because the notice of appeal was filed beyond the 30-day limit. For the foregoing reasons, the Court should uphold all the orders in their entirety, and dismiss the appeal and award fees to Respondents.

³ Young's Motion for Revision was also untimely served and untimely filed. CP 22, 23.

II. STATEMENT OF THE CASE

A. Barbara Young Obtained a \$760,000.00 Mortgage Loan

On October 23, 2006, Barbara Young executed a promissory note with American Brokers Conduit in the amount of \$760,000.00 (the “Loan”). CP 14, 21. The promissory note was secured by the Property. The Deed of Trust identifies Mortgage Electronic Registration Systems, Inc. (“MERS”) as a nominee for Lender, American Brokers Conduit, its successors and assigns, and Commonwealth Land Title Company of Puget Sound as the Trustee with the power of sale in the event of default. *Id.* Kevin Young signed the Deed of Trust and is identified as Barbara Young’s husband. *Id.*

B. The Youngs Defaulted Under the Loan in September 2009

Beginning in September 2009, Kevin and Barbara Young (“the Youngs”) failed to make their monthly payments. On or about June 4, 2010, as a result of the Youngs’ failure to make payments under the Note, a Notice of Default was issued. On June 9, 2010, MERS executed an Assignment of Deed of Trust, memorializing the assignment of the beneficial interest in the Deed of Trust to U.S. Bank, as Trustee.

C. The Youngs Failed to Cure the Default and Foreclosure Proceedings Were Commenced

On June 15, 2010, U.S. Bank, as Trustee executed an Appointment of Successor Trustee appointing Northwest Trustee Services, Inc. (“Northwest Trustee”), as successor Trustee to Commonwealth Land Title Company of Puget Sound and vesting Northwest Trustee with the powers to sell the Property.

On July 21, 2010, Northwest Trustee filed a Notice of Trustee’s Sale in King County, Washington, setting the foreclosure sale date for October 22, 2010 and advising that failure to restrain the sale could result in waiver of claims. A second Notice of Trustee’s Sale was recorded setting the sale for October 14, 2011. The sale was postponed to January 27, 2012.

D. The Youngs Filed a Complaint, but Took No Action to Request an Injunction or Restrain the Pending Foreclosure Sale

On January 20, 2012, the Youngs filed a quiet title complaint in under King County Cause Number 12-2-02558-4 SEA, naming Northwest Trustee, U.S. Bank, and American Brokers Conduit. The complaint raised standing objections, the “show me the note” argument which has been rejected in Washington State, and a securitization audit. However, the

Youngs did not seek or obtain an order restraining the sale. The Youngs' complaint was subsequently dismissed with prejudice against Northwest Trustee. The record reflects that U.S. Bank, as Trustee was not properly served.

E. The Property Was Sold at a Foreclosure Sale on January 27, 2012 to U.S. Bank, as Trustee and U.S. Bank, as Trustee Sought Possession of the Property

The Property was sold to U.S. Bank, as Trustee, on January 27, 2012. As evidence of its purchase, Northwest Trustee executed a Trustee's Deed to U.S. Bank, as Trustee. The Trustee's Deed was recorded with the King County Recorder's Office on February 7, 2012, under recording number 20120207001524. U.S. Bank, as Trustee was the purchaser of the property.

On April 13, 2013, U.S. Bank served three copies of the Summons and Complaint for Unlawful Detainer on Robbie Spidell, the occupant of the Property. Counsel for U.S. Bank, as Trustee did not receive a response from Barbara Young, Kevin Young, or any other occupant of the property by the response deadline. CP 5.

F. The Court Granted U.S. Bank as Trustee's Writ of Restitution for Possession of the Property

On May 4, 2012, U.S. Bank as Trustee filed an Ex Parte Motion for Order of Default Issuing Writ of Restitution for possession of the Property. CP 5. On May 7, 2012, the Court issued an Ex Parte Default Order Issuing Writ of Restitution. CP 6.

G. Young Filed an Order to Vacate and a Motion to Stay, Which Were Denied

On May 15, 2012, Young filed a Motion for an Order to Show Cause, Motion to Stay, and concurrently filed a Motion to Vacate the "Ex Parte" Default Order Issuing Writ of Restitution" ("Motion to Vacate") under CR 60. CP 7, 9, 12. The documents acknowledged that the Youngs did not reside at the Property, and that the occupant of the Property was properly served. CP 10. The Motion to Vacate also made allegations regarding service, alleging that Young served a Motion to Dismiss before the response deadline, and makes allegations regarding the underlying foreclosure.

On May 22, 2012, U.S. Bank, as Trustee filed a Response arguing that (1) Young lacked standing to challenge the eviction proceedings; (2) that the motion to vacate and motion to stay were predicated on recorded documents that appeared to be fraudulent; (3) that Young waived his

claims by failing to take advantage of pre-sale remedies under the Washington Deed of Trust Act; (4) Young's arguments had previously been raised, litigated, and dismissed with prejudice against Northwest Trustee in an affirmative action filed by the Youngs; and (5) that for the foregoing reasons, Young had failed to show a likelihood of prevailing on the merits. CP 13, 14.

The Youngs did not file a written response. On May 25, 2012, Young testified under oath. The Court denied both motions. CP 18.

H. Young Filed a Motion for Revision That was Also Denied

On June 6, 2012, Young filed an untimely Motion for Revision. CP 20. The Motion for Revision raised the same allegations regarding the underlying foreclosure, the recorded Appointment of Successor Trustee and Rescission, and service.

U.S. Bank opposed the motion for revision, on the grounds that the motion was untimely and that therefore, the Superior Court lacked jurisdiction to hear the motion. CP 6. U.S. Bank also argued that (1) Young failed to provide sufficient grounds warranting a vacation of the order; (2) that Young could not prevail on his claims disputing the unlawful detainer action because U.S. Bank owned the Property and was entitled to possession; (3) that Young lacked standing to challenge the

unlawful detainer action; (4) that Young's claims were waived under the Deed of Trust Act; and (5) that Young's claims were litigated, and dismissed with prejudice in the state court action. CP 21. Young's motion to vacate was denied.

I. Young Filed a Letter Seeking a 60 Day Continuance and the Court Issued a Conditional Continuance Requiring Young Pay into the Court's Register

On June 19, 2012, Young requested a 60 day continuance of the Motion for Revision. U.S. Bank opposed the motion for a continuance because the underlying Motion for Revision was not filed timely and because Young scheduled and agreed to the hearing date. CP 28. The Court entered an order granting a conditional continuance of the motion for revision. CP 28. The continuance was contingent upon Young paying \$3,652.31 every thirty days into the Court's registry. The hearing was continued but the record does reflect that any payments were made

J. The Court Denied Young's Motion for Revision on the Merits

Despite the fact that the Motion for Revision was not timely filed or timely served, the trial court considered the Motion for Revision on the merits. On July 30, 2012, the Court heard argument from both parties. The Court, in denying the motion for revision properly ruled that the

unlawful detainer was served on the occupant of the Property and that the occupant of the Property did not respond to the unlawful detainer. RP p. 17, 12-19. The Court also confirmed that Young did not have possession of the property and that the default order was proper. The Court also stated that the issues raised by Young regarding ownership and damages may be addressed in a separate civil action, as they are improper in the context of an unlawful detainer action. RP p.17, line 4-11.

III. SUMMARY OF ARGUMENT

This is a case where Barbara C. Young obtained a \$760,000.00 mortgage loan in 2006 and defaulted on the loan beginning September 1, 2009. Appellant Young is the borrower's ex-husband. Young does not dispute that the loan was over \$87,970.76 in arrears when the Notice of Trustee Sale was recorded on July 13, 2011 and does not dispute that the property was sold at a foreclosure sale to U.S. Bank, as Trustee on January 27, 2012.

Kevin Young contends that the foreclosure was improper due to an Appointment of Successor Trustee that was recorded at the time of the foreclosure sale and that the sale was subsequently rescinded. In his appeal, Mr. Young also alleges standing. However, the record reflects that the Appointment was recorded after the foreclosure sale where U.S. Bank, as Trustee purchased the Property. Young's appeal is untimely as to the

ex-Parte Order, the Order Denying Motion to Vacate, and the Order Continuing the Motion to Reconsider. Furthermore, Young's claims are improper because they exceed the scope of an unlawful detainer and the record reflects that U.S. Bank, as Trustee purchased the property on January 27, 2012. Young's claims were waived by his failure to exercise his pre-sale remedies under the Washington State Deed of Trust Act, and Young's only recourse is money damages. Because Young's claims did not support even prima facie defense, there was no point setting aside the sale and conducting further proceedings. It was reasonable for the Trial Court to deny Young's Motion to Vacate and Motion for Revision and the Court's orders should stand.

On appeal, Mr. Young appears to assign error to the trial court's issuance of the ex-Parte Order, the order dismissing the motion to vacate, and the Court's order continuing the motion for revision. Mr. Young also alleges that the trial court denied Young's "right to exercise his due process of the law by allowing him to file his answer and defend the unlawful detainer." AP at 1.

The Court should dismiss the appeal for the following reasons: (1) Young failed to timely file an appeal as to the ex-Parte Order, the order denying the motion to vacate, and the order to continue the motion for revision; (2) U.S. Bank, as Trustee was entitled to possession of the

Property and the occupant of the Property did not respond to the summons and complaint, which were properly served on the occupant; and (3) the Court properly denied the motion to vacate because Young's claims did not constitute a defense to the unlawful detainer action and Young could not demonstrate a likelihood of success on the merits. Accordingly, Young's appeal should be dismissed.

IV. ARGUMENT

A. Young's Appeal Should be Dismissed Because it is Untimely

Young seeks to appeal various orders, including: (1) Ex Parte Default Order Issuing Writ of Restitution (2) Order Denying Defendants' Motion to Vacate "Ex Parte Default Order Issuing Writ of Restitution," (3) the Order granting a conditional continuance of the Motion for Revision.⁴

A party is allowed 30 days to file a notice of appeal after the entry of the offending decision of the Trial Court. RAP 5.2(a). This 30-day time limit can be extended due to some specific and narrowly defined circumstances. RAP 5.2(a). It can also be prolonged by the filing of

⁴⁴ It is unclear why Young has assigned error to the July 19, 2012 order continuing the hearing on the motion for revision. The record reflects that Young requested a continuance and that it was granted, continuing the hearing to July 30, 2012 and requiring payments into the court's register. While the hearing was continued, the record does not reflect that Young made the requirement payment. For the reasons below, the appeal is untimely as to this order because the notice of appeal was not filed within 30 days of the entry of the order, as required by RAP 5.2(a).

“certain *timely* posttrial motions,” including a motion for reconsideration and a motion for amendment of judgment under CR 59. *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974); RAP 5.2(a), (e). A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A Trial Court may not extend the time period for filing a motion for reconsideration. CR 6(b); *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974).

Here, Young filed a notice of appeal on August 15, 2012. CP 37. With the exception of the Court’s order denying Young’s Motion for Revision, the appeal as to all other orders are untimely. Specifically:

1. Young’s Appeal of the ex-Parte Order is Untimely

Young’s appeal as to the ex-Parte Order granting the Writ of Restitution is untimely. The Order granting the Writ of Restitution was entered on May 7, 2012. CP 6. Young did not file an appeal within 30 days of the entry of the order pursuant to RAP 5.2(a) and Young did not file a motion for reconsideration or a motion for amendment of judgment. Instead, Young filed a motion to vacate under 60(b) and (e) on May 15, 2012 and the motion to vacate was denied on May 25, 2012. CP 9. The disposition of this case is governed by RAP 18.8(b), which states:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of

appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

See also Schaefco, 121 Wash. 2d 366, 368 (1993) (dismissing the appeal as untimely where appellant had not provided sufficient excuse for its failure to file a timely notice of appeal and failed to demonstrate sound reasons to abandon the preference for finality).

The factual and procedural posture of this case does not warrant a finding of extraordinary circumstances. Young's claims were considered and dismissed in his affirmative lawsuit. Young's claims were also considered and dismissed by Commissioner Velategui and Young did not timely appeal the decision. CP 18. Young's claims were considered, continued, and then dismissed by Judge Rogers. CP 32. Meanwhile, U.S. Bank, as Trustee purchased this property on January 27, 2012 and the litigation is still ongoing eighteen months later. Young, who was represented by counsel at the Motion to Vacate, and at the time of his appeal has not provided sufficient excuse for his failure to timely notice the appeal as to the appeal of the first two untimely orders.

2. Young's Appeal of the ex-Parte Order is Untimely, Even if the Court Determines that the Motion to Vacate Tolled the Deadline to File the Notice of Appeal and the Appeal of the Motion to Vacate is Similarly Untimely

Even assuming, *arguendo*, that the Court found that the motion for reconsideration extended the 30-day window, Young's appeal of the ex-Parte writ would still fail because it was untimely. The Order Denying Motion to Vacate was entered on May 25, 2012. CP 18. Applying an additional 30-day would provide a deadline of June 24, 2012. However, Young did not appeal the ex-Parte order until August 15, 2012. CP 37. Therefore, the appeal as to the ex-Parte Order fails. Based on the foregoing, Young's appeal of the Order Denying Motion to Vacate also fails because the appeal was filed 52 days past the allowable time limit. Young failed to perfect an appeal as to these assignments of error and the rulings issued by the Superior Court should stand.

3. Young's Appeal of the ex-Parte Order is Not Tolled by the Untimely Motion for Revision

Any argument for extending the deadline to appeal the ex-Parte Order based on the motion for revision also fails. In order to expand the 30-day limit to file an appeal, the motion for revision of the commissioner's order denying motion to vacate within 10 days of the

entry of the Order, or no later than June 4, 2012. RCW 2.24.050 states in relevant part that, “unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the court.” Once the 10 days have passed, the Superior Court lacks authority to hear a defendant’s motion for revisions and the defendant’s only course of action is through the Court of Appeals. *Id.*; see also *Robertson v. Robertson*, 113 Wn.App. 711, 714 (2002). Service of an action may be made by electronic means, provided the recipient consented in writing to the electronic service. CR 5(b)(7). Electronic service is effectuated upon transmission when made prior to 5:00 p.m. on a judicial day. *Id.*

The record reflects that U.S. Bank, as Trustee did not consent to service by electronic means. CP 21. However, even if U.S. Bank, as Trustee had agreed to electronic service, service of the Motion for Revision was untimely. Specifically, Young did not transmit the email until 10:40 p.m. CP 23. Accordingly, service would not have been deemed complete until June 5, 2012, pursuant to CR 5(b)(7). Furthermore, the Court’s docket reflects that the motion for revision was not filed until June 6, 2012, which is twelve (12) days after the entry of the court’s order.

Because the Young's Motion for Revision was not timely, it did not extend the 30-time limit for filing the notice of appeal for either the Writ of Restitution or the motion to vacate. *See Schaeferco, Inc. v. Columbia River George Comm'n*, 121 Wash. 2d 366, 368 (1993) (dismissing the appeal as untimely since the late filing of a motion for reconsideration does not extend the 30-day limit for filing the notice of appeal).

Young has not provided any excuse, sufficient or otherwise, for his failure to timely notice the appeal of the ex-Parte Order or the Motion to Vacate. However, the record reflects that Mr. Young has had multiple bites of the apple and at each juncture, the Court found that Young's claims lack merit. Thus, the Court should dismiss the appeal and uphold the Trial Court's Order granting Writ of Restitution and denying Young's motion to vacate.

B. Standard of Review

The decision to vacate an order of default or default judgment is within the sound discretion of the trial court. *In re Estate of George C. Stevens*, 94 Wash.App. 20, 29 (1999), 971 P.2d 58 (1999), citing *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wash.App. 266, 271, 818 P.2d 618 (1991). Judgment under CR 60 is within the trial court's discretion. *State v. Santos*, 104 Wash.2d 142, 145, 701 P.2d 1179, 70 A.L.R.4th 1021 (1985). The reviewing court "will overturn the trial

court only if it plainly appears that its discretion has been abused.” *Id.* (citing *Haller v. Wallis*, 89 Wash.2d 539, 573 P.2d 1302 (1978)). A trial court abuses its discretion when it exercises discretion on untenable grounds or for manifestly unreasonable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d, 12, 26, 482 P.2d 775 (1971). Equitable principals guide the court considering a motion to vacate. *Norton v. Brown*, 99 Wash.App. 118, 123 992 P.2d 1019, 3 P.3d 207, *review denied*, 142 Wash.2d 1004, 11P.3d 826 (2000). “[T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted... What is just and proper must be determined by the facts of the each case, not by a hard and fast rule applicable to all situations regardless of outcome.” *Griggs v. Averbek Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979) (quoting *Widecus v. Southwestern Elec. Coop., Inc.*, 26 Ill.App.2d 102, 109, 167. When deciding a motion to vacate a default judgment, the court must consider two primary and two secondary factors that must be shown by the moving party.” *Norton*, 99 Wash.App. at 123, 992 P.2d 581 (1968). The two primary factors are (1) “the existence of substantial evidence to support at least a prima facie defense” to the opposing party’s claim; and (2) the “failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect.” *Norton*, 99

Wash.App. at 123, 992 P.2d 581 (1968). The secondary factors are (3) the party seeking relief acted with diligence after receiving notice of the default judgment; and (4) the effect on the opposing party would not be prejudicial if the judgment was vacated. These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.” *Id.* at 124, 992 P.2d 1019 (citing *White*, 73 Wash.2d at 352-53, 438 P.2d 581). Accordingly, in determining whether a party is entitled to vacation of a default judgment, a trial court’s initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff’s claims. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal*, 140 Wash.App. 191, 200, 165 P.3d 1271, citing *Cash Store*, 116 Wash.App. at 841–42, 68 P.3d 1099. The nature of the trial court’s further inquiry depends upon its determination of that question. *Id.* If a CR 60 movant cannot produce substantial evidence with which to oppose the claim, there is no point setting aside the judgment and conducting further proceedings. *Pfaff v. State Farm Mutual Auto. Ins. Co.*, 103 Wash.App. 829, 834, 14 P.3d 837 (2000).

Subject matter jurisdiction over a controversy is a question of law, which is reviewed de novo. *Angelo Prop. Co., LP v. Hafiz*, 167 Wash.

App. 789, 808 (2012). Parties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter jurisdiction or it does not. *In re Marriage of Furrow*, 115 Wash.App. 661, 667 (2003). Lack of subject matter jurisdiction renders a Trial Court powerless to decide the merits of the case. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 556, 958 P.2d 962 (1998).

A decision to deny a motion for reconsideration is reviewed for an abuse of discretion. *Arrow Elecs., Inc. v. Justus (In re Kaypro)*, 218 F.3d 1070, 1073, (9th Cir. 2000). A two-part test is applied to determine objectively whether the Court abused its discretion. *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009). The “first step is to determine de novo whether the Trial Court identified the correct legal rule to apply to the relief requested.” *Id.* Second, “whether the Trial Court’s resolution of the motion resulted from a factual finding that was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Id.* If any of these three apply, only then is the court of appeals able to have a “definite and firm conviction” that the district court reached a conclusion that was a “mistake” or was not among its “permissible” options, and thus that it abused its discretion by making a clearly erroneous finding of fact. *Id.*

A trial court's decision will affirmed on appeal if it is sustainable on any theory within the pleadings and proof. *Wendel v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *Gross v. City of Lynwood*, 90 Wn.2d 395, 401, 583 P2d 1197 (1978).

C. The Trial Court Correctly Issued an Order for Writ of Restitution Because U.S. Bank was Entitled to Possession of the Property

The Trial Court did not err when it issued the ex-Parte Order for Writ of Restitution. The purchaser at a trustee's sale is entitled to possession of the Property on the twentieth day following the sale. RCW 61.24.060. The trustee's deed is considered prima facie evidence of a proper sale. RCW 61.24.040(7). The deliverance of the trustee's deed, following the trustee's sale, conveys all rights, title and interest in the real property sold. RCW 61.24.050(1). The purchaser also has a right to summary proceedings under RCW 59.12 et. Seq. The issue in an unlawful detainer action is possession, not title. Chapter 59.12 RCW governs unlawful detainer actions and creates a special, summary proceeding for the recovery of possession of real property. *See Housing Auth. v. Terry*, 114 Wash.2d 558, 563, 789 P.2d 745 (1990), (citing *Wilson v. Daniels*, 31 Wash.2d 633, 643–44, 198 P.2d 496 (1948)). "The purpose of an action for unlawful detainer is to determine the right of possession." *First Union*

Management Inc. v. Slack, 36 Wash.App. 849, 679 P.2d 936 (1984), citing *Little v. Catania*, 48 Wash.2d 890, 893, 297 P.2d 255 (1956); *Motoda v. Donohoe*, 1 Wash.App. 174, 175, 459 P.2d 654 (1969). The only required defendants in an unlawful detainer action are those “in the actual occupation of the premises when the complaint is filed.” RCW 59.12.060. Service is accomplished by delivering a copy personally to the person entitled thereto. RCW 59.12.040. CR 55 (a)(1) provides for entry of a default order where a party has failed to appear, answer, or defend.⁵

The record reflects that Northwest Trustee Services, Inc. (hereinafter “Northwest Trustee”) conducted a non-judicial foreclosure of the Property. CP 14. On January 27, 2012, U.S. Bank, as Trustee purchased the Property. *Id.* Pursuant to RCW 61.24.060, U.S. Bank, as Trustee was entitled to possession of the Property on February 16, 2012.⁶ Northwest Trustee executed a Trustee’s Deed to U.S. Bank, as Trustee, evidencing the bank’s purchase of the Property. CP 14. The Trustee’s Deed was recorded with the King County Recorder’s Office on February

⁵ Young cites to CR 55(f)(1) for the proposition that U.S. Bank, as Trustee was required to notify Young before it took a default judgment against him. However, CR 55(f)(1) addresses setting aside a default judgment where more than one year has elapsed since service of summons, where no appearance is made. In this case, U.S. Bank, as Trustee served the summons and complaint on April 13, 2012 and moved for default on May 4, 2012. Accordingly, CR 55(f)(1) is not applicable to this case.

⁶ RCW 61.24.060 provides for sixty-days notice for tenant and subtenants. However, the unlawful detainer action was not served until April 13, 2012, which is well after the 60 day notice period.

7, 2012 under recording number 20120207001524, constituting prima facie evidence of a proper sale.

On April 13, 2012, three copies of the unlawful detainer summons and complaint were personally served upon Robbie Spidell, the occupant of the Property. CP 5. The response deadline was 5:00 p.m. on April 27, 2012. Counsel for U.S. Bank did not receive a response from Barbara Young, Kevin Young, or any other occupant of the premises. CP 5.

On May 3, 2012, U.S. Bank, as Trustee filed its Complaint for Unlawful Detainer. On May 4, 2012, U.S. Bank filed an ex Parte Motion for Order of Default Issuing Writ of Restitution, seeking an order of default against the Defendants and entering an order directing issuance of a writ of restitution. CP 5. In support of the ex Parte Motion, U.S. Bank filed a declaration stating that “Defendants did not make any contact, serve a written answer or notice of appearance on [U.S. Bank, as Trustee’s] legal counsel on or before April 27, 2012.” CP 5, Declaration p.1, ln.9-10.

On May 7, 2012, the Court granted the motion for Writ of Restitution. CP 6.

D. The Trial Court Did Not Err when it Denied Young’s Motion to Vacate and Motion to Stay Because Young Failed to Demonstrate a Defense to the Unlawful Detainer Action

The decision to vacate a judgment is within with trial court’s discretion and the reviewing court will overturn the trial court only if it plainly appears that its discretion has been abused.

1. Young’s Claims Exceeded the Scope of an Unlawful Detainer Action and the Jurisdiction of the Court

Washington courts do not generally allow parties to raise claims, including counterclaims, in unlawful detainer actions that do not relate to the issue of possession of the property at issue. *Munden v Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Kessler v. Nielsen*, 3 Wn. App. 120, 123-24, 472 P.2d 616 (1970).

In *Angelo*, the Washington Court of Appeals clarified that when the superior court hears an unlawful detainer action under RCW 59.12,⁷ it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute:

An unlawful detainer action under *RCW 59.12.030* is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the Trial Court to resolve is the “right to possession” as

⁷ RCW 61.24.060 provides that a purchaser at a trustee’s sale shall “have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.”

between a landlord and a tenant. *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 436, 979 P.2d 917 (1999); *see also Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). It is well settled in Washington that,

[i]n 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.

Granat v. Keasler, 99 Wn.2d 564, 571, 663 P.2d 830, *cert. denied*, 464 U.S. 1018 (1983). Thus, ***an unlawful detainer action is a “narrow one, limited to the question of possession*** and related issues such as restitution of the premises and rent.” *Munden*, 105 Wn.2d at 45.

If, however, an issue is not incident to the right to possession, the trial court must hear the issue in a general civil action. *Kessler v. Nielsen*, 3 Wn. App. 120, 123-24, 472 P.2d 616 (1970). In other words, although a superior court is normally a court of general jurisdiction and it may resolve most civil claims, ***when the superior court hears an unlawful detainer action under RCW 59.12.030, it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute.*** *See Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66-68, 925 P.2d 217 (1996); *First Union Mgmt., Inc. v. Slack*, 36 Wn. App. 849, 853-55, 679 P.2d 936 (1984).

Angelo Property Co. v. Hafiz, 2012 Wash.App. LEXIS 881 (Ct. App., Div. 2, Filed April 17, 2012) (emphasis added). While the Washington Supreme Court has recognized an exception for counterclaims “based on facts which excuse a tenant’s breach,” citing as permissible examples, breach of implied warranty of habitability and breach of covenant of quiet

enjoyment, this exception does not apply to the present case. *Munden*, 105 Wn.2d at 45.

In determining whether Young was entitled to vacate the default judgment, the court's inquiry is whether Young can demonstrate the existence of a strong or virtually conclusive defense. The nature of the trial court's further inquiry depends on its determination of that question. Here, Young admitted that he did not reside in the Property. CP 10. Young's challenges to the unlawful detainer were improperly premised on issues of title. Because an unlawful detainer action is limited in scope and the Superior Court lacks jurisdiction to consider issues outside possession, Young's claims regarding title exceeded the Court's jurisdiction and were properly dismissed. Specifically, Young argued that Northwest Trustee "was not vested with authority to act as trustee" and therefore "the trustee's sale was therefore void." CP 9. This argument relates to whether U.S. Bank, as Trustee, was the appropriate title owner and does not affect the issue of possession. Young argued that Northwest Trustee lacked authority to conduct the foreclosure because an Appointment of Successor Trustee was issued, appointing Federal National Service, LLC as trustee on January 2012. The motion further argued that the sale was also rescinded by the beneficiary. CP 9. Even if the Court took the evidence in the light most favorable to Young, his arguments, which related only to

title, could not constitute even a prima facie defense to the unlawful detainer action.

Furthermore, Young's allegations regarding the underlying foreclosure were waived as a matter of law when Young failed to exercise his pre-sale remedies to restrain the foreclosure. RCW 61.24.127 permits a borrower to bring post-sale claims for certain causes of action, but expressly states that such claims "may not seek any remedy at law or in equity other than monetary damages," and "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." Because Young failed to restrain the sale, Young's sole remedies under the Washington Deed of Trust Act were limited to monetary damages, and he was statutorily proscribed from attempting to set aside the sale. RCW 61.24.127. This issue is discussed in more detail below.

Young's defenses to the unlawful detainer were improper and exceeded the Court's jurisdiction. Young did not have possession of the property. It was reasonable for the Court to deny the Motion to Vacate and Motion to Stay. Because Young failed to present even a prima facie defense to the unlawful detainer action, there would be no point in setting aside the judgment and conducting further proceedings. Accordingly, the Order Denying the Motion to Vacate was proper.

2. Young's Claims were based on Documents That Appeared to be Fraudulent

Furthermore, Young's motions heavily relied on two recorded documents and Young's declaration ("Declaration"). CP 10. Young's declaration was signed under penalty of perjury. Id. The Declaration inaccurately states that the foreclosure was completed on or about February 2, 2012 and stated that the Trustee's Deed was defective, because the actual trustee at the time of the foreclosure was Federal National Services, LLC, not Northwest Trustee.⁸ In addition, Mr. Young declared that "on February 16, 2016 [SIC] a "Rescission of Trustee's Deed" was executed by the beneficiary Bank and recorded apparently indicating that the subject trustee's deed was not valid and therefore it was being rescinded." CP 10. However, the recorded documents appear irregular on their face, misidentify the parties, and recorded documents, and reflect that they were recorded at Kevin Young's request. CP CO 10. At the hearing, Young's attorney examined him on this matter.

Q. Kevin, tell me about – it was obviously your house that was the subject of this process. Tell us what you know about this notice of rescission that was recorded.

A. I know that there was a decision filed by a trustee.

⁸ The foreclosure occurred on January 27, 2012 at 10:00 a.m. CP 1. The Appointment of Successor Trustee reflects that it was not recorded until January 30, 2012. CP 10. The appointment of successor trustee is only effective upon recording the appointment in the county where the deed of trust is recorded. RCW 61.24.010. Therefore, the alleged Appointment of Successor Trustee would have had no effect on the foreclosure.

Q. Okay. **Did you record the trust- -- the document?**

A. Yes.

Q. You did have the document recorded? What – describe the circumstances.

A. I don't quite understand the question.

Q. How did you come by the document? How did it get recorded?

A. I'd rather talk to you about that first. Well, no, I-"

The Court cautioned Young and his attorney that it appeared as though Mr. Young filed documents that were false, for the purpose of causing delay, confusion, and harassment, and excused Mr. Young from further testimony, so he could converse with his attorney. RP p. 6, line 20-25, Hearing May 25, 2012. When Young returned, he advised that he had not recorded the documents; they were found through an online search. The transcript from the hearing reflects that the Court inferred that either Kevin Young or someone known to Kevin Young recorded the rescission and appointment of successor trustee. Hearing p. 22, line 24-7, 25, line 17-19.

The Court properly held that Young's claims were not cognizable in an unlawful detainer action under *Angelo Property Co., LP v. Hafiz*, 167 Wash.App. 789 (2012). The Court properly denied the motion to vacate because Young failed to present a defense to the unlawful detainer action. The Court addressed that Young admitted that he did not live in the property and therefore lacked standing to challenge the unlawful detainer action. The Court also considered the quiet title action filed by the

Youngs against NWTs, which had been dismissed with prejudice. Accordingly, the Court entered an order denying the motion to vacate and motion to stay with prejudice.

**3. Young's Challenges to the Foreclosure were Waived
When Young Failed to Utilize his Presale Remedies**

Young's challenges to the underlying foreclosure are barred by statute. Even if Young's claim regarding the underlying foreclosure sale was appropriate for an unlawful detainer action (which it is not), any request for stay or other injunctive relief is be precluded by statute. The legislature enacted the nonjudicial foreclosure status to further three objections: (1) to keep the non-judicial foreclosure process efficient and inexpensive; (2) to provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) to promote the stability of land titles. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash.App. 108, 111, 752 P.2d 385 (1988). It is undisputed that Young failed to enjoin the trustee's sale. As a result, Young's post-sale remedies are limited. "A party waives the right to post-sale remedies where the 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." *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008) citing to *Plein v. Lackey*, 149 Wash.2d 214,

221 (Wash. 2003). If the borrower has knowledge of a defense to the trustee's sale but fails to enjoin the sale, the borrower waives any claims related to the underlying obligation and the sale itself. *Plein v. Lackey*, 149 Wash.2d 214, 227-228 (2003).

RCW 61.24.127 permits a borrower to bring post-sale claims for common law fraud, misrepresentation and CPA violations, but expressly states that such claims "may not seek any remedy at law or in equity other than monetary damages," and "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property."

RCW 61.24.127 is set forth below in pertinent part:

(1) The 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*.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

- (a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with *RCW 4.56.190*, become a judgment lien on real property then owned by the judgment debtor; and

(emphasis added). Challenging the trustee's deeds after the sale undermines the policy of land title stability. *Amresco Independents Funding, Inc., v. SPS Properties, LLC*, 129 Wash.App. 532, 119 P.3d 884 (2005) (citing *Plein v. Lackey*, 149 Wash.2d 214, 227-28, 491 P.2d 1058; *Ostrander*, 6 Wash.App. at 31-32, 491 P.2d 1058). Once the sale is completed, the legislature intended the purchaser to obtain possession with no need for further lengthy proceedings. *Koegel*, 51, Wash.App. at 31-32, 491 P.2d 1058.

The notice of trustee sale was recorded in the County Recorder's office on July 13, 2011 as document no. 20110713001089. CP 1, Exh. A. The Notice of Trustee's Sale specifically states that failure to restrain the

sale may result in waiver. Therefore, Young had actual or constructive notice of right to enjoin the sale. Furthermore, it is undisputed that the Youngs filed an affirmative action, based on standing to foreclose, the securitization audit, and seeking to quiet title, before the foreclose sale occurred. It is also undisputed that the Youngs failed to take any action to restrain the sale. Accordingly, Young's claims have been waived pursuant to *Plein*. To the extent that the claims are not waived in their entirety, pursuant to the RCW 61.24.127, Young's only remaining remedy would be monetary; Young's motion to stay would be considered an impermissible injunctive remedies specifically prohibited by subsection (2)(b) and (c). Accordingly, any claims Young may allege in connection with the underlying foreclosure cannot affect possession and allowing Young to challenge the trustee's deed after the sale would undermine Washington's policy of land title stability.

E. The Trial Court Correctly Denied Young's Motion for Revision

On July 30, 2012, the Honorable Jim Rogers denied the Young's Motion for Revision because the Court lacked subject matter jurisdiction to hear Young's Claims. CP 32. The Court correctly ruled on this issue.

In the Motion for Revision, Young sought an order from the Court striking the order issued by Commissioner Velategui based on the

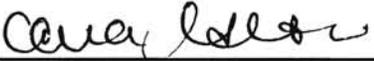
Appointment of Successor Trustee, the Rescission of Trustee Sale, and the Declarations of Kevin Young and Steven Hall. CP 32. U.S. Bank, as Trustee filed its response to the Motion for Revision. CP 47. At the hearing on the motion, the Honorable Jim Rogers correctly denied Young's motion for revision because the Court lacked subject matter jurisdiction to hear the Young's claim. CP 53. Young's claims are outside the scope of the Trial Court's statutorily limited jurisdiction in an unlawful detainer action; therefore, the Court correctly ruled that it lacked authority to resolve such claims.

V. CONCLUSION

For the reasons set forth in the record and above, Respondent U.S. Bank National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-Through Certificates, Series 2007-1 requests the Court to affirm the Trial Court's decisions in full and/or to dismiss the instant appeal with no relief to the Young and award fees to Respondents.

DATED: July 3, 2013

HOUSER & ALLISON
A Professional Corporation

By: 
Robert W. Norman, Jr. (SBN 37094)
Cara C. Christensen (SBN 43198)
Attorneys for Respondent, granted U.S.
Bank National Association, as Trustee
for MASTR Adjustable Rate
Mortgages Trust 2007-1, Mortgage
Pass-Through Certificates, Series 2007-
1

APPENDIX OF CITED STATUTES PURSUANT TO RAP 10.4

1. STATUTES

RCW 2.24.050 Revision by Court.

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

RCW 4.56.190 Lien of Judgment.

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the district court of the United States rendered in this state and any judgment of the supreme court, court of appeals, superior court, or district court of this state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200 and to run for a period of not to exceed ten years from the day on which such judgment was entered unless the ten-year period is extended in accordance with RCW 6.17.020(3), or unless the judgment results from a criminal sentence for a crime that was committed on or after July 1, 2000, in which case the lien will remain in effect until the judgment is fully satisfied. As used in this chapter, real estate shall not include the vendor's interest under a real estate contract for judgments rendered after August 23, 1983. If a judgment debtor owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien on the interest of the defendant only

RCW 59.12.030 Unlawful Detainer Defined

A tenant of real property for a term less than life is guilty of unlawful detainer either:

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him or her. When real property is leased for a specified term or period by express or implied contract, whether written or

oral, the tenancy shall be terminated without notice at the expiration of the specified term or period;

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period;

(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;

(4) When he or she continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in manner in RCW 59.12.040 provided) upon him or her, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture;

(5) When he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit;

(6) A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040. Such person may also be subject to the criminal provisions of chapter 9A.52 RCW; or

(7) When he or she commits or permits any gang-related activity at the premises as prohibited by RCW 59.18.130.

RCW 59.12.040 Service of Notice – Proof of Service

Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: PROVIDED, That in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging house, boarding house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders, or persons renting such rooms shall not be considered as subtenants within the meaning of this chapter, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this chapter may be had upon a corporation by delivering a copy thereof to any officer, agent, or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent, or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: PROVIDED, HOWEVER, That when service is made by mail one additional day shall be allowed before the commencement of an

action based upon such notice. RCW 59.18.375 may also apply to notice given under this chapter.

RCW 59.12.060 Parties Defendant

No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her. In case a person has become a subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action.

RCW 61.24.010 Foreclosure and sale – Notice of Sale

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

RCW 61.24.026 Notice to Senior Beneficiary of Sale – Residential, Owner-Occupied – Proceeds of Sale Insufficient to Pay in Full Obligation – Timeline – Failure of Beneficiary to Respond

1) Whenever (a) consummation of a written agreement for the purchase and sale of owner-occupied residential real property would result in contractual sale proceeds that are insufficient to pay in full the obligation owed to a senior beneficiary of a deed of trust encumbering the residential real property; and (b) the seller makes a written offer to the senior

beneficiary to accept the entire net proceeds of the sale in order to facilitate closing of the purchase and sale; then the senior beneficiary must, within one hundred twenty days after the receipt of the written offer, deliver to the seller, in writing, an acceptance, rejection, or counter-offer of the seller's written offer. The senior beneficiary may determine, in its sole discretion, whether to accept, reject, or counter-offer the seller's written offer.

(2) This section applies only when the written offer to the senior beneficiary is received by the senior beneficiary prior to the issuance of a notice of default. The offer must include a copy of the purchase and sale agreement. The offer must be sent to the address of the senior beneficiary or the address of a party acting as a servicer of the obligation secured by the deed of trust.

(3) A seller has a right of action for actual monetary damages incurred as a result of the senior beneficiary's failure to comply with the requirements of subsection (1) of this section.

(4) A senior beneficiary is not liable for the actions or inactions of any other lien holder.

(5)(a) This section does not apply to deeds of trust: (i) Securing a commercial loan; (ii) securing obligations of a grantor who is not the borrower or a guarantor; or (iii) securing a purchaser's obligations under a seller-financed sale.

(b) This section does not apply to beneficiaries that are exempt from RCW 61.24.163, if enacted, or if not enacted, to beneficiaries that conduct fewer than two hundred fifty trustee sales per year.

(6) This section does not alter a beneficiary's right to issue a notice of default and does not lengthen or shorten any time period imposed or required under this chapter.

RCW 61.24.040 Foreclosure and Sale – Notice of Sale

RCW 61.24.040(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or

interest and was omitted as a party defendant in a judicial foreclosure proceeding;

RCW 61.24.050 Interest conveyed by trustee's deed — Sale is final if acceptance is properly recorded — Redemption precluded after sale — Rescission of trustee's sale.

(1) Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. Except as provided in subsection (2) of this section, if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.

RCW 61.24.060 Rights and Remedies of Trustee's Sale Purchaser – Written Notice to Occupants or Tenants

(1) The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

RCW 61.24.127 Failure to Bring a Civil Action to Enjoin Foreclosure – Not a Waiver of Claims

(1) The 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.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

- (a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;
 - (b) The claim may not seek any remedy at law or in equity other than monetary damages;
 - (c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;
 - (d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;
 - (e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and
 - (f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.
- (3) This section applies only to foreclosures of owner-occupied residential real property.
- (4) This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.

2. RULES

CR 5 Service and Filing of Pleadings and Other Papers

(b)(7) Service by Other Means. Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person served. Service by facsimile or electronic means is complete on transmission when made prior to 5:00 p.m. on a judicial day. Service made on a Saturday, Sunday, holiday or after 5:00 p.m. on any other day shall be deemed complete at 9:00 a.m. on the first judicial day thereafter; Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service under this subsection is not effective if the party making service learns that the attempted service did not reach the person to be served.

CR 55 Default and Judgment

(a) Entry of Default.

(1) Motion. When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.

CR 59 New Trial, Reconsideration, and Amendment of Judgments

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the

judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law

or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

CR 6 Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

RAP 18.8 Waiver of Rules and Extension and Reduction of Time

(b) Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RAP 5.2 Time Allowed to File Notice

(a) (a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

(e) Effect of Certain Motions Decided After Entry of Appealable Order. A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, or (2) if a statute provides that a notice of appeal, a petition for extraordinary writ, or a notice for discretionary review must be filed within a time period other than 30 days after entry of the decision to which the motion is directed, the number of days after the entry of the order deciding the motion established by the statute for initiating review. The motions to which this rule applies are a motion for arrest of judgment under CrR 7.4, a motion for new trial under CrR 7.5, a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59.

**CERTIFICATE OF SERVICE
(BY OVERNIGHT MAIL)**

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I, the undersigned say: I am a person over the age of eighteen years and not a party to this action. My business address is 800 Fifth Avenue, Suite 4100, Seattle, WA 98104.

On July 3, 2013, I served true copies of the attached

RESPONDENTS' BRIEF

- [X] **VIA OVERNIGHT MAIL/COURIER:** By placing a true copy thereof enclosed in a sealed envelope, addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would in the ordinary course of business, be delivered to an authorized courier or delivery authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day for delivery on the following business day.

Kevin M. Young
11607 77th Place NE
Kirkland, WA 98043

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

Dated: July 3, 2013



Cara Christensen