

72113-5-I  
No. 752113-5-I-5

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

Byron & Jean Barton,

Appellants

v.

Triangle Property Development, LLC,

Respondent.

BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

This appeal stems from a post-foreclosure unlawful detainer action brought by Plaintiff-Respondent Triangle Property Development, LLC (Triangle). Defendant-Appellants, Byron and Jean Barton's property was nonjudicially foreclosed in April 2014. The Bartons did not attempt to enjoin or restrain the trustee's sale before it was conducted. Triangle, as a bona fide purchaser for value, purchased the property at the trustee's sale.

The present appeal is from an unlawful detainer proceeding commenced in May 2014 for the purpose of removing the Bartons and all occupants from the foreclosed property.

The trial court correctly denied the Bartons' motion for stay of unlawful detainer proceeding, and properly issued a writ of restitution against the Bartons. An unlawful detainer action is a limited proceeding resolving the right to possession and does not extend to other civil claims within the superior court's general jurisdiction. The trial court also correctly denied the Bartons' motion for stay of judgment pending appeal because they were unable to post an adequate bond to supersede the judgment.

## **II. RESTATEMENT OF THE CASE**

On April 11, 2014, Respondent, Triangle Property Development (hereafter "Triangle") purchased the property commonly known as 6548

41<sup>st</sup> Ave. SW, Seattle, WA 98136, at a nonjudicial foreclosure sale. CP 48-50. Triangle learned of the sale through public advertisement. Triangle was the highest bidder at the trustee's sale, paying \$646,000.00 for the property. CP 49-50. Title was conveyed to Triangle by trustee's deed dated April 16, 2014, which was recorded on April 28, 2014 in King County, under instrument number 20140428001985. CP 48-50.

After the sale, Appellants, the Bartons, as previous owners, continued to occupy the property. The Bartons did not bring an action to restrain or enjoin the foreclosure before the sale. They do not deny that they defaulted on the now-foreclosed deed of trust. On April 19, 2014, Triangle provided a notice of sale to Appellants by first class and certified mail as required by RCW 61.24.060. CP 2-4.

The twentieth day after the sale was May 1, 2014, and the Bartons failed to vacate the house after the twentieth day. On May 22, 2014, an unlawful detainer lawsuit was filed in King County Superior Court. The Bartons were served on May 23, 2014. CP 32, 57-58. A Show Cause hearing was originally set for May 30, 2014. Upon agreement of counsel for both parties, the hearing was rescheduled for June 11, 2014. CP 16.

On May 5, 2014, the Bartons filed a separate lawsuit against their lender in King County Superior Court, *Barton v. JP Morgan Chase, et al.* 14-2-12762-6 SEA, alleging wrongful foreclosure and seeking damages.

On June 2, 2014, the Bartons filed a motion to stay the unlawful detainer proceedings due to the pending allegations against their lender. On June 6, 2014, Chief Civil Judge Mariane Spearman denied the stay of the proceedings, and the parties were ordered to appear for the previously scheduled June 11 Show Cause Hearing. CP 35.

The Unlawful Detainer Show Cause Hearing was held as scheduled on June 11, 2014. The Bartons failed to show cause why the writ of restitution should not be issued. The trial court found the Bartons guilty of unlawful detainer, granted judgment in favor of Plaintiff-Respondent Triangle and issued a Writ of Restitution. CP 61-64.

On June 24, 2014, Appellants filed their Notice of Appeal. The Bartons also filed a Motion for Stay of Writ of Restitution Pending Appeal, which was scheduled for July 3, 2014. CP 74. At the hearing on the Motion for Stay of Writ, on July 3, 2014, Triangle requested that the court deny the stay, or in the alternative, order that the Bartons post a bond equivalent to one year of rent to supersede enforcement of the judgment. CP 84-95. Triangle presented evidence of the fair market rental value of the property. CP 91-94. After considering the parties' evidence, briefing, and oral arguments, the court ruled in favor of Triangle and denied the Bartons' motion to stay enforcement of the judgment. CP 96-98. The court found that the Bartons did not have the funds to deposit an adequate

bond to supersede the judgment and compensate Triangle for its economic loss for the duration of the appeal. VRP vol 2., 17:23–18:12, July 3, 2014. The court also ruled that Triangle was entitled to possession of the property while the appeal was pending, and that the Writ of Restitution should not be stayed. VRP vol. 2, 18:9-18, July 3, 2014; CP 97-98.

The King County Sheriff finally executed the Writ of Restitution on July 18, 2014, and removed the Appellants from the property, and posted “No Trespassing” signs on the doors of the property. Within an hour of the eviction, the Bartons forcibly broke into the house and remained there for another month, until they were arrested for trespass.

### **III. RESTATEMENT OF THE ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR**

1. Whether the trial court properly denied Appellants’ Motion for Stay of Unlawful Detainer proceedings, when an unrelated lawsuit has no basis on the purchaser’s right to possession of the property after a trustee sale?
2. Whether the trial court properly issued the Writ of Restitution when the bona fide purchaser at a trustee sale is entitled to possession of the property twenty days after the sale?
3. Whether the trial court properly denied the stay of the Writ of Restitution when Appellants were unable to post an adequate supersedeas bond?

### **IV. SUMMARY OF ARGUMENT**

The sole issue in an unlawful detainer action is the right to possession of the property. A bona fide purchaser at a foreclosure auction

has a right to summary proceedings to determine the right to possession of the property. The court properly denied the stay of the unlawful detainer proceedings because a separate lawsuit against the foreclosing lender is not relevant to the bona fide purchaser's right to possession, and the bona fide purchaser's possession of the property should not be delayed while separate issues are litigated.

The court properly issued a Writ of Restitution and judgment in favor of Respondent because Triangle is the bona fide purchaser at a trustee sale and entitled to possession of the property on the twentieth day following the sale. Unlawful detainer proceedings are not the forum to litigate claims against the foreclosing lender.

The court properly denied the stay of enforcement of the Writ of Restitution because Triangle had the right to possession of the property, and the Appellants' paltry bond proposal was not adequate security to protect Triangle against the loss it would incur while the appeal was pending.

## **V. ARGUMENT**

### **A. Standard of Review**

When the trial court has weighed evidence, the appellate courts review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings support

the conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978). Unchallenged findings of fact should be treated as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). An appellate court reviews issues of law de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001). Questions of statutory interpretation are also reviewed de novo. *Hartson P'ship v. Goodwin*, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000). Since the issues on appeal are questions of law and statutory interpretation, the court should apply the de novo standard of review.

**B. The Court properly denied a Stay of Unlawful Detainer Proceedings because Appellants have other statutory remedies and the Ex Parte Department was the appropriate court to hear the Motion for Stay**

The trial court properly denied the appellants Motion to Stay the Unlawful Detainer proceeding because a pending lawsuit challenging the validity of the foreclosure sale has no bearing on the sole issue of possession.

The court considers a variety of factors when deciding whether to grant a stay, including the comparable harms, the effect of refusal to grant a stay on the appeal, and the strength of the appeal on the merits. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (interpreting RAP 8.1(b)(2)). Under CR 62(b), a trial court has discretion

to stay its judgment, but it is not required to do so. A trial court abuses its discretion when its “decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Bird v. Best Plumbing Group*, 175 Wn.2d 756, 774–75, 287 P.3d 551 (2012).

The unlawful detainer action is a summary proceeding limited solely to the question of possession and collateral issues may not be asserted. *Josephinium Assos. v. Kahli*, 111 Wn. App 617, 624, 45 P.3d 627 (2002). The purpose of the unlawful detainer action is “to preserve the peace by providing an expedited method for resolving the right to possession of property.” *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996). Therefore, to protect the summary proceeding, “other claims, including counterclaims, are generally not allowed.” *Id.* The unlawful detainer proceeding “does not provide a forum for litigating claims to title.” *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998). Furthermore, a trustee's deed is prima facie evidence of a proper sale and the only evidence necessary to prove the right to possession. RCW 61.24.040(7); *Glidden v. Municipal Authority of City of Tacoma*, 111 Wn.2d 341, 758 P.2d 487 (1988).

In this present case, Appellants moved to stay the unlawful detainer proceedings on June 2, 2014, on the basis that they had a pending

lawsuit against JP Morgan Chase and Quality Loan Service Corp., challenging the validity of the foreclosure sale. CP 19-26. The court denied the motion on June 6, 2014. CP 72. In this appeal, Appellants argue that a stay in the unlawful detainer case should have been granted until the Barton's civil claims in the pending suit were resolved. However, the Barton's defenses to stay the unlawful detainer were improper and exceeded the Court's jurisdiction. A pending lawsuit challenging the validity of the foreclosure sale has no bearing on the sole issue of possession in an unlawful detainer case.

Here, the court's written order denying the Stay after having reviewed both parties written briefs, stated the issues raised would be heard at the scheduled Show Cause hearing on June 11, 2014, which is the proper venue to hear unlawful detainer actions. CP 35. The King County Local Court Rules clearly state unlawful detainer actions and matters related shall be presented and heard in the Ex Parte and Probate Department. KCLCR 40.1(b)(2)(O). Appellants erroneously filed for a Motion to Stay before the Chief Civil Judge prior to the Show Cause hearing in the Ex Parte Department. The trial court's denial of the stay did not affect the Bartons' remedies or an opportunity to present similar arguments at the Show Cause hearing. The trial court's decision to deny the stay was reasonable and not based on untenable grounds because the

Bartons failed to present even a prima facie defense to the unlawful detainer action to satisfy the court that it should exercise its discretion to stay the unlawful detainer. Accordingly, the Order Denying the Motion to Stay the Unlawful Detainer was proper and the Trial Court should be affirmed.

**C. The Court properly issued the Writ of Restitution at the Show Cause Hearing because Triangle is a Bona Fide Purchaser and Entitled to Possession**

The trial court properly entered an order issuing the Writ of Restitution in favor of Triangle Property Development because the Bartons' failed to raise a valid defense to the unlawful detainer action.

1. Unlawful detainer actions are narrow proceedings limited to the question of possession of the premises

An unlawful detainer action is a narrow proceeding, "limited to the question of possession and related issues such as restitution of the premises and rent." *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). To protect the proceeding's summary nature, "other claims, including counterclaims, are generally not allowed." *Heaverlo*, 80 Wn. App. at 728; see also *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 809, 274 P.3d 1075 (2012) (unlawful detainer court "sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute"). Unlawful detainer proceedings thus "do not

provide a forum for litigating claims to title.” *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523,526, 963 P.2d 944 (1998). Furthermore, a trustee's deed is prima facie evidence of a proper sale and the only evidence necessary to prove the right to possession. RCW 61.24.040(7); *Glidden v. Municipal Authority of City of Tacoma*, 111 Wn.2d 341 (1988).

RCW 61.24.060(1) grants the purchaser at the trustee's sale “a right to the summary proceedings to obtain possession of real property provided in RCW Chapter 59.12.” The initial questions before the court in an unlawful detainer action brought by a purchaser are: (1) Did the trustee's sale occur; (2) Have the requisite 20 days since the sale elapsed; and (3) Has the plaintiff complied with the other procedural requirements of the unlawful detainer statute? *See* RCW 61.24.040(7) (stating the effect of the trustee's deed); RCW 61.24.060(1) (requiring 20 days' notice following the sale to the borrower to commence an unlawful detainer suit); *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008) (“To take advantage of these summary proceedings, the purchaser must comply with all statutory requirements.”).

In an unlawful detainer action, the plaintiff bears the burden to prove, by a preponderance of the evidence, the right to possession of the premises. *Duprey v. Donahoe*, 52 Wn.2d 129, 135, 323 P.2d 903 (1958).

Triangle's evidence was (1) the trustee's deed which was recorded after Triangle purchased the property at a trustee's sale on April 11, 2014; (2) the requisite 20 day period following the sale had elapsed after the notice was sent pursuant to RCW 61.24.060(1); and (3) Triangle complied with all the requirements of the unlawful detainer statute. Having provided this evidence and showing that the Bartons were still residing in the property after they were required to vacate, Triangle met its burden of proof and was entitled to a writ of restitution.

Here, Appellants were represented by counsel through the entirety of the proceedings and are not challenging defects in the unlawful detainer process. Instead, they are arguing defects in the foreclose process and that Triangle was not entitled to possession until these issues were resolved. While appellants allege the trial court erred by granting the writ of restitution, the Bartons never provided a valid defense to the unlawful detainer regarding the issue of possession. Appellants only raised challenges to the foreclosure sale. The trial court has no jurisdiction to consider a defense or counterclaim that is not necessary to determine the right to possession. *Josephinium*, 111 Wn. App. at 625. Appellants' assignments of error rest entirely on their assertion the sale was not conducted properly, however, this issue is outside of the court's authority

to determine the sole issue of possession. Therefore, Appellants' assertions regarding the unlawful detainer fail and so does their appeal.

2. The Trustee's Deed is prima facie evidence that the trustee's sale was properly conducted and that the Plaintiff in an Unlawful Detainer action is a Bona Fide Purchaser

The trustee's deed is evidence of a properly conducted sale. RCW 61.24.040(7) (providing a trustee's 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..."). Here, Appellants claim the Writ of Restitution should not have been issued because Triangle was not the rightful owner. However, this argument fails. Triangle purchased the property at a trustee's sale, and at the time of purchase has no knowledge of any potential defects in the sale process. The trustee's deed is prima facie evidence that the sale was properly conducted.

Furthermore, as the highest bidder at the auction, Triangle is considered a bona fide purchaser. "A bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212

(1960). Under the Washington Deed of Trust Act (DTA), a bona fide purchaser receives the benefit of conclusive recitals contained within a proper deed:

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.

RCW 61.24.040(7). The trustee's deed conveyed to Respondent contains the required language. CP 48-50. By paying the highest bid at the trustee's sale, Plaintiff paid the vendor valuable consideration. Therefore, Triangle is a bona fide purchaser and RCW 61.24.040(7) "renders these recitals conclusive as to the correctness of the foreclosure sale procedures." *Glidden v. Municipal Authority of the City of Tacoma*, 111 Wn.2d 341, 347, 758 P.2d 487 (1988). As a bona fide purchaser at a trustee's sale, Triangle is the legal owner of the property and entitled to possess and use the property.

Here, the trial court correctly determined that the appropriate time for the Bartons to raise defenses to the foreclosure proceeding was before the foreclosure sale, not after the sale. A primary purpose of the non-judicial foreclosure statute is to avoid expensive and lengthy judicial foreclosure proceedings. *Cox v. Helenius*, 103 Wn.2d 383, 390, 693 P.2d

683 (1985). The process should also promote the stability of land titles. *Id.* at 387. By allowing for collateral issues to be asserted in the unlawful detainer action, the court would be forcing purchasers at a trustee's sale to effectively proceed with a second foreclosure, and shift the burden to the purchaser to prove the validity of the sale. A bona fide purchaser does not know how the property came to be sold at auction, does not have the means to disprove allegations of wrongful foreclosure, and cannot be made to prove the validity of the sale.

Courts have noted that in enacting the non-judicial foreclosure statute, "the legislature did not contemplate that after a trustee's sale further lengthy proceedings would be required to obtain possession. It gave the purchaser the right to obtain possession of the real property by summary proceedings in an unlawful detainer action." *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113-114, 725 P.2d 385 (1988). Presale judicial remedies provided to borrowers under the Deed of Trust Act are adequate, and an unlawful detainer action is not an appropriate proceeding to raise challenges to the foreclosure. *Id.* at 113.

The DTA provides the borrower a specific method in which to restrain or halt a trustee's sale of the property. If a borrower fails to effectively halt or restrain the sale, only certain claims survive, which must be raised in a separate civil action. RCW 61.24.127; *Plein v. Lackey*,

149 Wn.2d 214, 226, 67 P.3d 1061 (2003). There are three requirements for the waiver of defects in a trustee's sale. "Waiver of any post sale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (2008).

RCW 61.24.127(2)(b) proceeds to state that the borrower's "claim may not seek any remedy at law or in equity other than monetary damages." RCW 61.24.127(2)(c) provides that "the claim may not affect in any way the validity or finality of the foreclosure sale." Therefore, if the borrower does in fact bring a civil suit to enjoin the foreclosure, the borrower will be limited to monetary damages; the borrower will not be entitled to possession of the property. The Waiver Doctrine, as described above, promotes the three main goals to the DTA, which are: (1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383 (1985). An assertion by defendants that they did not have knowledge of their claims or that they were ignorant of the legal bases is insufficient to

defeat application of the waiver doctrine because all that is required is for the defendant to have “knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure.” *Brown*, 146 Wn. App. at 164.

Here, the Bartons waived any post sale challenge by failing to pursue a presale injunction. “Waiver is an equitable doctrine, and we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.” *Klem v. Wash. Mut. Bank*. 176 Wn.2d 771, 783 n. 7, 295 P.3d 1179, 1185 (2013) (quoting *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012)).

“Where the interest holder believes noncompliance results in prejudice, an injunction should be sought.” 174 Wn.2d 581 n.4 (Stevens, J., concurring).

“The same standard applies to defects occurring at or after time of the sale-absent actual prejudice from the error, a claim is waived if no action is taken to set aside the sale.” *Id.*

Furthermore, the Appellants contend that this matter is similar to *Albice v. Premier Mortgage Services of Washington, Inc.*, however, that decision does not apply to the case at hand. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P. 3d 1277 (2012). In *Albice*, the trustee’s sale was undisputedly conducted outside the 120 day window permitted by statute. *Id.* at 1282. Here, that was not the case.

Unlike *Albice*, which involved an interpretation of the DTA, this appeal is based on an unlawful detainer matter which is limited solely to the issue of possession.

The Bartons have alleged irregularities with the non-judicial foreclosure process and per, RCW 61.24.127(2)(b), the Bartons “may not seek any remedy at law or in equity other than monetary damages.” However, *Albice* does not discuss or cite RCW 61.24.127, which preserves a few causes of action for damages, but explicitly states that the non-waived claims “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(2)(c). The court based its waiver analysis on the “may” language in the former RCW 61.24.040(1)(f)(IX). In contrast to RCW 61.24.040(1)(f)(IX), RCW 61.24.127 does not contain any permissive language. Lastly, the court’s failure in *Albice* to discuss RCW 61.24.127 is seemingly attributable to the fact that the foreclosure sale in *Albice* occurred before 2007, which is before the Washington Legislature enacted the statute in 2009. *See* Engrossed S.B. 5810, at 8–9, 61st Legis. Reg. Sess. (2009). By enacting RCW 61.24.127, the legislature clarified which claims a borrower retains after a foreclosure sale, even if the borrower failed to seek or obtain an injunction to restrain the sale. In addition, a borrower may obtain only damages in most post-sale actions since, after

the sale, the borrower “cannot recover property sold to a bona fide purchaser.” *Albice*, 174 Wn.2d at 580 n.2 (citing RCW 61.24.127(2)(c)). In interpreting a statute, the Court strives to “determine the legislature's intent.” *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). Therefore, the *Albice* holding should not have an impact on the unlawful detainer.

Lastly, in *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013), the Washington Supreme Court reaffirmed the waiver doctrine, which restricts certain post-sale claims and prohibits challenges to the validity and finality of a completed sale. *Id.* *Frizzell* cites RCW 61.24.040(1)(f)(IX), which provides that:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in waiver of any proper grounds invaliding the Trustee's sale.

RCW 61.24.040(1)(f)(IX). In *Frizzell*, the Supreme Court found that, even when an order to enjoin the sale was sought, ignoring “the conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless.” *Frizzell v. Murray*, 179 Wn.2d at 308.

Here, the claims the Bartons raised are not proper in an unlawful detainer action because they reach beyond the scope of possession, and is

outside the court's jurisdiction. The trustee's deed conveying the property to Triangle contains the required language by the DTA, which is prima facie evidence the sale was conducted properly. Lastly, the claims asserted were waived by the Bartons' failure to obtain an injunction prior to the foreclosure sale. The Bartons are not entitled to possession of the property and even if they are successful in their separate civil claim, they could only recover monetary damages not return of the house. Therefore, the trial court's decision to grant the writ of restitution should be affirmed.

**D. The Court properly denied the Stay of the Writ of Restitution pending Appeal because Appellants could not provide an adequate bond to reasonably protect Respondents from economic loss**

RCW 59.12.200 provides that a defendant seeking appellate review of a judgment in an unlawful detainer proceeding desires a stay of proceedings pending appeal, the defendant "shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the proceeding." Further, under the Rules of Appellate Procedure, if a party seeks to stay the enforcement of a decision affecting the rights to possession or use of real property, the appellant must file a supersedeas bond, cash, or alternate security in the trial court. RAP 8.1(b)(2). The amount of the supersedeas bond shall be:

the amount of any money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs and expenses likely to be awarded on appeal entered by the trial court plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review. **Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review.**

RAP 8.1(c)(2) (emphasis added).

The chief purpose of a supersedeas bond is to delay execution of the judgment while ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired pending appeal. *Lampson Universal Rigging, Inc. v. WPPSS*, 105 Wn.2d 376, 378, 715 P.2d 1131 (1986). “An appellant is not obligated to supersede a judgment from which it is appealing; it *must*, however, post security if it desires to stay enforcement of an adverse judgment pending appeal.” *Id.* at 379 (emphasis in original). In ordering a supersedeas bond, the court sets an amount which would represent a potential fund available to the respondent to recover damages in the event of an appellant’s unsuccessful appeal. See *Seventh Elect Church v. Rogers*, 34 Wn.App. 105, 120, 660 P.2d 280 (1983). Although the Bartons are not debtors in the traditional sense, as the judgment in post-foreclosure unlawful detainer cases is a non-monetary judgment for the right to possession to the plaintiff, the purpose of the supersedeas bond still applies. To delay enforcement of the adverse judgment, the Bartons

were required to post security to create a fund that Triangle could receive if it prevailed on appeal.

1. Triangle was entitled to an equivalent of rent for the duration of the appeal.

Rental value has often been relied upon as an offset against the purchase price for a defendant's delay in conveying title. *Colby v. Phillips*, 29 Wn.2d 821, 824, 189 P.2d 982 (1948). In the instant case, although the Trustee's Deed conveyed title to the property to Triangle, and Triangle had been awarded the right to possess the property, the Bartons continued to possess and occupy the property, and sought to delay Triangle's possession of the property. Without actual possession, Triangle could not truly use the property to which it lawfully had title. Thus, if the Appellants sought to delay Triangle's ability to enforce its judgment and prevent Respondent from possessing and using the property, Triangle was entitled to payments to offset against the purchase price and loss of use of the property.

Generally, under the Rules of Appellate Procedure, the time between the filing of the notice of appeal and the due date of an appellant's reply brief is 195 days. *See* RAP 9.2(a), 9.5(a), 10.2. This 195 days is equivalent to 6.5 months, and also assumes that neither party will delay the proceedings or require extensions of time. As a practical matter,

it can often take more than a year between the time the notice of appeal is filed and the time the appeal is decided. A respondent deprived of possession and use of the real property faces substantial uncertainty during the pendency of the appeal, and can encounter significant economic loss. The supersedeas bond procedure prescribed by RCW 59.12.200–220 and RAP 8.1, are designed to compensate the aggrieved respondent for this deprivation of property, and must do so for the appeal’s duration. Further, the respondent incurs attorneys fees, costs, and expenses while responding to the appeal, and the supersedeas bond must compensate the respondent for these costs.

In their initial motion to stay enforcement of the judgment, the Bartons offered only a \$4,000 total bond, and in their motion argued that the appeal should take only nine weeks. CP 79. They did not provide not provide any evidence to support their contention that \$4,000 was the reasonable value for nine weeks—or 63 days—of rent. They also did not offer any further security or show an ability to compensate Respondent Triangle past the first nine weeks of the appeal. They also did not provide evidence to show that the appeal would be decided within nine weeks.

In their opening brief, the Bartons claim they offered \$4,000 per month for the pendency of the appeal, an assertion not supported by the record. At the hearing on the supersedeas bond, the Bartons only offered

\$1,500 per month for the pendency of the appeal, but could not demonstrate to the court they had the money available to deposit into the court registry. VRP vol 2., 5:12-21, July 3, 2014. The source of these funds was merely speculative: the disbursement of surplus funds from the foreclosure sale. VRP vol 2., 16:23–17:18, July 3, 2014. Ironically, while Appellants argue the foreclosure was wrongful, they allege they are entitled to surplus proceeds from the very sale they contest. They seek to "have their cake and eat it too" by petitioning for disbursement of proceeds from the sale they allege is invalid, thereby profiting and benefitting from Respondent's purchase of the property while they sue their lender for selling the property, and delay Respondent's ability to use the property it purchased. On the date of the supersedeas bond hearing, the surplus funds from the trustee's sale had not been disbursed, so the Bartons did not have the ability to supersede the judgment.

For the trial court to grant a stay of enforcement of a judgment, the appellant must deposit the entire supersedeas bond up front, to adequately protect the respondent from economic loss while the appeal is pending. If the source and ability to provide the security is merely speculative, the trial court cannot ensure the respondent is compensated for its loss of use during the appeal.

In contrast, Triangle provided evidence of the reasonable monthly rental amount for the property and requested that the court set a bond amount equivalent to a year of rent payments. CP 91-94. Triangle substantiated this request with the knowledge of the typical duration of an appellate case. CP 91-92. Triangle's request of \$2,835 per month, or \$34,000, for a year of rent, was a reasonable approximation for its inability to make productive use of its property for a year. CP 91-94; VRP vol 2., 17:23–18:9, July 3, 2014. In fact, the trial court implied that to compensate Triangle for its inability to make productive use of its property, the bond should be seven percent of the purchase price, which would be the equivalent return a real estate investor would earn from renting the property. VRP vol 2., 3:24–25, July 3, 2014. Thus, by requesting a lower bond amount than a regular real estate investment, Triangle's request was reasonable.

Regardless of whether Triangle's request was reasonable, the Bartons only demonstrated they could post security in the total amount of \$4,000, which was the amount they had available in hand on the date of the motion. All other amounts were speculative and undisbursed. VRP vol 2., 16:23–18:1, July 3, 2014. \$4,000 was grossly inadequate to protect Triangle from the loss it would incur from its inability to use a \$646,000 property during the pendency of the appeal. The trial court determined

that the minimum bond amount would be \$39,000 based on the purchase price, and Appellants were unable to deposit that amount into the registry. VRP vol 2., 17:25–18:7. Therefore, because Appellants were unable to post adequate security into the court registry, the court properly denied the stay of enforcement of the writ of restitution.

2. Alternate Security Cannot Be Speculative

While RAP 8.1(b)(4) allows the appellant to post security other than bond or cash, the Bartons did not demonstrate they had other assets or security that would be a reasonable means of securing enforcement of the judgment. The Bartons' proposal of \$1,500 per month was based on speculation that surplus funds from the sale would be disbursed to them. They could not demonstrate to the court they could actually make periodic payments to supersede the judgment. There was also no way to guarantee that if disbursed, the Appellants would make the required payments into the registry.

3. The Deed of Trust Act is irrelevant to the issue of bonds superseding judgments in unlawful detainer actions

Appellants cite a provision of the Deed of Trust Act which outlines the procedure a borrower must follow to restrain or enjoin a trustee sale.<sup>1</sup>

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<sup>1</sup> The relevant text of the statute states:

...The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that

RCW 61.24.130. This provision of the Deed of Trust Act does not apply once the property has been sold. The bona fide purchaser is not in a beneficiary-borrower relationship with the foreclosed borrower. Because there is no longer a sale to restrain, Appellants' reliance on this statute is misplaced. The relevant statutes and rules are RCW 59.12.200–220 and RAP 8.1, which set forth the procedure for posting a bond to delay enforcement of a judgment affecting real property. These statutes and rules require that the security be deposited with the court—in full—before the court can deprive the plaintiff of possession of its property.

4. The trial court has discretion in ordering a bond pending appeal

As stated above, the trial court has discretion to grant a stay of judgment, and considers a variety of factors when deciding whether to grant a stay, including the comparable harms, the effect of refusal to grant a stay on the appeal, and the strength of the appeal on the merits. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). The trial court has discretion to stay its judgment, but it is not required to do so. A trial court abuses its discretion when its “decision is manifestly

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would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

RCW 61.24.130(1).

unreasonable or is based on untenable grounds or untenable reasons.”

*Bird v. Best Plumbing Group*, 175 Wn.2d 756, 774–75, 287 P.3d 551 (2012).

The language of the bond statute places the bond amount within the trial court’s discretion.

[I]f the defendant appealing desires a stay of proceedings pending review, the defendant **shall** execute and file a bond, with two or more **sufficient** sureties to be **approved by the judge**, conditioned to abide the order of the court, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the proceeding. RCW 59.12.200 (emphasis added).

The judge hearing a motion for stay pending appeal has discretion to determine and approve whether the defendant-appellant’s proposed bond is sufficient to pay the damages accruing to the plaintiff during the appeal. The Bartons’ proposed bond of only \$4,000, was insufficient to protect Triangle from damages resulting from loss of use of a \$646,000 property. Their offer of \$1,500 per month was only hypothetical, and also insufficient to protect Triangle from damages that would accrue during the appeal’s pendency. The court’s decision to deny the stay of judgment was reasonable and based on tenable grounds.

Because the Bartons were unable to provide adequate security to stay enforcement of the judgment, the trial court properly denied the Bartons’ motion.

## VI. CONCLUSION

For the reasons set forth in the record and above, this Court should affirm in full the trial court's denial of stay of the unlawful detainer proceedings; entry of judgment and issuance of writ of restitution in favor of Triangle; and denial of stay pending appeal, and dismiss this appeal.

Submitted this 27<sup>th</sup> day of February, 2015.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division I, and properly served to the counsel listed below, on February 27, 2015.

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