

NO. 72315-4-I

COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION I

MAHARUKH GHADIALI, respondent,

vs.

CATHERINE CINA, *et al.*, appellants.

BRIEF OF RESPONDENT

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Introduction

The appellant owned property in King County, Washington, subject to the terms of a deed of trust. The appellant defaulted on the terms of the deed of trust. The trustee gave notice of an impending trustee’s sale. The appellant sought to stay the sale of the home in federal court but was unsuccessful. The property was purchased by the respondent. The respondent brought this action in forcible or unlawful detainer when the appellant refused to vacate the premises.

The appellant sought to stay the action pending resolution of the federal court matter and was unsuccessful. After a show cause hearing the court found the defendant guilty of forcible detainer or unlawful detainer and issued a writ of restitution. The appellant moved the court for an order staying enforcement of the writ of restitution pending this appeal but then withdrew the motion.

Issues Raised on Appeal

1. Was the court in error to find a party guilty of unlawful detainer where the party is a former owner in possession of real property more than 20 days after a trustee's sale?
2. Was the court in error when it did not rule on appellant's motion to stay enforcement of the writ of restitution where the appellant voluntarily struck the motion?

Statement of the Case

The appellant, Catherine Cina, is the former owner of the property located at 4915 Talbot Place South, Unit 3-C, Renton, Washington (the "premises"). CP 2. Ms. Cina stopped making payments on her mortgage in May 2011. CP 13. A notice of trustee's sale was recorded on November 27, 2013, advising Ms. Cina the premises would be sold at auction due to her default under the terms of a deed of trust. CP 8-11. Ms. Cina sued the trustee and attempted to stay the sale of her home in federal court. CP 12. Finding there was "no likelihood of success on the merits" of her case, and noting that Ms. Cina had not offered or demonstrated an ability to pay the clerk of the court the periodic amount of principal, interest and reserves due on the loan, the court denied the requested relief. CP 12-19. Ms. Cina appealed that ruling to the Ninth

Circuit Court of Appeals but did not apply to that court for a stay of proceedings or a stay of the trustee's sale.

The respondent, Maharukh Ghadiali, purchased the premises at public auction on June 6, 2014. CP 5-7, 137. Ms. Cina did not vacate the premises within 20 days after the sale as required by the notice of trustee's sale. CP 8-10. Ms. Ghadiali commenced this action on July 7, 2014, by filing a summons and complaint with the King County Superior Court alleging Ms. Cina was unlawful detaining or forcibly detaining the premises. CP 1-23.

Ms. Cina answered the complaint, admitting she was still in possession of the premises but denying the premises had been sold. CP 42. Ms. Cina moved the court on shortened time to stay proceedings on the unlawful detainer on the grounds that there was a pending action in federal court. CP 65-75. On July 30, 2014, the court denied the motion to hear the matter on shortened time as a show cause hearing had been properly noted for the next day. CP 130; 7/30 VRP 8. On July 31, 2014, the court conducted a show cause hearing at which time Ms. Cina's attorney again requested that the matter be stayed pending her appeal of the federal court's denial of her motion to stay the sale. 7/31 VRP 13-14. At the close of the hearing, the court declined to stay the action, noting that the judge in federal court had already ruled on the same motion. 7/31

VRP 19-20. The court entered findings of fact, conclusions of law and judgment finding Ms. Cina guilty of unlawful detainer or forcible detainer and issued a writ of restitution directing the King County Sheriff to restore possession of the premises to the plaintiff. CP 136-139.

Ms. Cina filed a notice of appeal on August 4, 2014. CP 141. On August 5, 2014, Ms. Cina filed a motion to stay execution of the writ of restitution. CP 149-53. On August 7, 2014, Ms. Cina was physically evicted from the premises by the King County Sheriff. CP 187. Ms. Cina struck her motion on August 11, 2014. CP 186. 8/11 VRP 4.

The Ninth Circuit Court of Appeals dismissed the appeal of the federal court's order denying injunctive relief for mootness on December 3, 2014. Exhibit A. Federal court dismissed Ms. Cina's case on summary judgment on December 22, 2014. Exhibit B.¹

Argument

1. The appellant cites to the wrong standard of review

Ms. Cina states that this appeal involves the statutory interpretation of law and that the standard of review should therefore be de novo. Both statements are incorrect. The argument Ms. Cina raised at the show cause hearing was whether the court should stay the state court proceedings

¹ Washington State courts take judicial notice of facts that are not subject to reasonable dispute. ER 201. The court may take judicial notice of matters of public record previously adjudicated relating to the same parties and issues. *DeLong v. Parmelee*, 157 Wn. App. 119, 166-167, 236 P.3d 936 (2010).

pending the results of her appeal of the federal court's refusal to grant injunctive relief with the 9th Circuit Court of Appeals. CP 65-75; 7/31 VRP 17. Essentially, Ms. Cina was requesting that the matter be continued or stayed until there was a ruling affecting the validity of the trustee's sale in federal court. Whether this is a request for a continuance or for injunctive relief, the standard of review is whether there was an abuse of discretion.

“Granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case.” *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). Furthermore, the “trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary.” *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). It is a fundamental principle that a “trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion.” *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986).

Alternatively, Ms. Cina's request could be construed as a continuance. The trial court's grant or denial of a motion for continuance

will not be disturbed absent a showing of manifest abuse of discretion.

Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)

Here, Ms. Cina asked for the court to grant an order to stay the proceedings pending resolution of her case in federal court. CP 75. The court considered the fact that Ms. Cina had tried and failed in federal court to obtain the same relief. Trial court in this matter was aware of the federal court's ruling on the matter and noted the federal court order was "pretty thorough" that the defendant had made no showing of there being any likelihood of prevailing on the merits of her federal court case. 7/31 VRP 11; CP 12-19. Considering that the facts had not changed and that a federal judge had already denied injunctive relief, it cannot be considered an abuse of discretion to refuse the same relief in state court.

2. Issuing a writ of restitution was not error

Ms. Ghadiali properly followed the procedures to evict Ms. Cina. As the purchaser of the property at a foreclosure sale, Ms. Ghadiali was entitled to possession of the premises twenty days after the sale. RCW 61.24.060. Ms. Ghadiali had the right to bring an eviction action pursuant to Chapter 59.12 RCW to lawfully gain possession of the premises. *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 207, 741 P.2d 1043 (1987). Jurisdiction in unlawful detainer, forcible detainer and forcible

entry actions is proper in the county superior court in which the subject premises are located. RCW 59.12.050.

The causes of action set forth under Chapter 59.12 RCW provide for a summary proceeding to determine the right of possession between an owner and a non-owner. The action is a narrow one, 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). “In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims are generally not allowed.” *Id.*

The Washington State Deed of Trust Act, Chapter 61.24 RCW, allows for lenders to nonjudicially foreclose properties by trustee’s sale. *Albice v. Premiere Mortg. Servs.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). “The act furthers three goals: (1) that the nonjudicial 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.” *Id.* (citing *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.3d 683 (1985)).

The act requires the trustee to provide the delinquent homeowner with statutory notice of the impending trustee sale:

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 a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f)(IX). The Washington Supreme Court stated that “a waiver of a postsale contest occurs when ‘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.’” *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

Ms. Cina's allegations against the trustee concerning violations of the Deed of Trust Act were litigated—unsuccessfully—in another forum. The federal court considered Ms. Cina's motion to restrain the sale pending the outcome of said litigation and determined she had failed to demonstrate any likelihood of success on the merits, and further noted she had made no payment of any amount to the court clerk. The sale was therefore allowed to proceed. Ms. Cina appealed that decision and lost. The merits of the case were subsequently ruled on when federal court granted the trustee's motion for summary judgment.

Ms. Ghadiali is the owner of the property. This was established by the trustee's deed transferring ownership to her as the high bidder at a trustee's sale on June 6, 2014, and her testimony at the show cause

hearing. Ms. Cina was still in possession of the premises on July 31, 2014, more than twenty days after the trustee's sale. A federal court judge had declined to stay the foreclosure sale based on the defenses Ms. Cina raised at the show cause hearing. It was appropriate for state court, faced with this information, to rule that Ms. Ghadiali had the right to possession and issue a writ of restitution.

3. The defendant struck her hearing on the motion to post a stay bond and therefore failed to preserve the issue on appeal

Ms. Cina filed a motion after the show cause hearing to stay execution on the writ of restitution pending the outcome of the appeal. Ms. Cina's appellate brief states the court "the court denied the stay pending appeal because Appellant could not pay the HOA dues and the back rent in one lump sum at the day of the hearing." Appellant's Brief, 10. The record establishes, however, that Ms. Cina struck her motion to stay the writ. CP 186.² Counsel for Ms. Cina provided testimony to this effect. CP 215, 219-20. It is reckless and improper for Mr. Cina to accuse the trial court of making such a ruling in her opening brief.

² The order on civil motion reads, "The above-entitled Court, having heard a motion to stay the writ of restitution pending appeal, and the defendant having stricken the motion at 8:30 a.m. for a 9:00 a.m. hearing, and the court and plaintiff's counsel having learned of the strike at 9:00 a.m. when the hearing was called, the court finds that defense counsel, Ms. Smith, should pay terms to plaintiff. Plaintiff may note a motion for presentation for judgment on the underlying case at which time the court will consider the amount of terms—if any—Ms. Smith shall pay." CP 186.

It is an obvious proposition that the appellant may not make a motion in trial court, voluntarily strike the motion, and then complain on appeal that the motion should have been granted. The Rules of Appellate Procedure state that the court will review decisions or parts of decisions designated in the notice of appeal. RAP 2.4(a). Here, Ms. Cina assigns error to a decision it never made due to her own decision to strike the hearing. There is no decision of the court to review. To the extent Ms. Cina is arguing the court erred by not staying execution of the writ of restitution *sua sponte* that argument is raised for the first time on appeal. The court of appeals should refuse to review claims of error not raised and adjudicated at the trial court level. RAP 2.5(a).

4. The respondent should be awarded attorney's fees under RAP 18.9

The Court may award terms and compensatory damages for a frivolous appeal or for a party's failure to comply with the rules of appellate procedure. RAP 18.9(a); RAP 18.1; *see also, In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983) (noting an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney's fees). The issues presented by Ms. Cina on appeal are so devoid of merit as to be frivolous and advanced without reasonable cause.

“A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts.” *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review denied*, 141 Wn.2d 1010 (2000). “An appellate court may award attorney fees under RAP 18.9(a) if the appeal, considering the record as a whole, presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.” *Watson v. Maier*, 64 Wn. App. 889, 901, 27 P.2d 311 (1992). In the instance of a frivolous appeal, attorney’s fees are appropriate. *See Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987).

Ms. Cina brings this appeal despite ample case law refuting her arguments. It is a waste of this Court’s time and the parties’ time. Even resolving all doubt in favor Ms. Cina, her appeal of the trial court’s orders raises no debatable issues upon which reasonable minds could differ.

This Court has the authority to sanction Ms. Cina or her counsel by awarding Ms. Ghadiali her reasonable attorney’s fees. She respectfully requests this appropriate sanction.

Conclusion

Ms. Ghadiali legally purchased the subject premises and brought this action to gain possession when Ms. Cina refused to move. The court commissioner did not err by refusing to grant injunctive relief to stay the case pending the outcome of litigation between Ms. Cina and the trustee in

federal court where the federal court judge had already refused the same relief. Nor did the commissioner err to find the Ms. Cina guilty of unlawful detainer or forcible detainer where she was undisputedly in possession of Ms. Ghadiali's property more than twenty days after a trustee's sale. It is inappropriate for Ms. Cina to falsely represent to this court that the trial court erred in denying a post-trial stay of the proceedings where, in fact, she struck her motion prior to the court making a ruling.

Accordingly, Ms. Ghadiali requests that the judgment be affirmed and that this court award attorney's fees and terms.

Respectfully submitted this 2nd day of March, 2015.

LOEFFLER LAW GROUP PLLC



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WSBA No. 24105

Attorney for Maharukh Ghadiali, respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2015, I caused to be served the foregoing Brief of Respondent on the following parties by delivering to the following address:

Jill J. Smith
Natural Resource Law Group, PLLC
2217 NW Market Street, Suite 27
Seattle, WA 98107

By: U.S. Postal Service, ordinary first class mail
 U.S. Postal Service, certified or registered mail
 return receipt requested
 legal messengers
 facsimile
 electronic service
 other (specify) _____

DATED at Seattle, Washington, this 2nd day of March, 2015.


Printed Name: Margaret I. Schmidt

FILED

UNITED STATES COURT OF APPEALS

DEC 03 2014

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CATHERINE CINA, AKA Cici Ceres,

Plaintiff - Appellant,

v.

QUALITY LOAN SERVICE CORP. OF
WASHINGTON; et al.,

Defendants - Appellees.

No. 14-35788

D.C. No. 2:14-cv-00781-RSL
Western District of Washington,
Seattle

ORDER

Before: GOODWIN, RAWLINSON, and IKUTA, Circuit Judges.

Appellees' motion to dismiss this appeal as moot is granted. *See Vegas*

Diamond Prop., LLC v. FDIC, 669 F.3d 933 (9th Cir. 2012).

DISMISSED.

KML/MOATT

EXHIBIT A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CATHERINE CINA,

Plaintiff,

v.

QUALITY LOAN SERVICE CORP. OF
WASHINGTON, et al.,

Defendants.

Case No. C14-0781RSL

ORDER GRANTING MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the Court on a “Motion for Summary Judgment” filed by defendants Wells Fargo Bank, N.A., and Federal Home Loan Mortgage Corporation (Dkt. # 23) and a “Motion for Summary Judgment by Defendant Quality Loan Service Corporation of Washington” (Dkt. # 26). Plaintiff did not file substantive responses, instead requesting a Rule 56(d) continuance. That request has been denied. Having reviewed the memoranda, declarations, and exhibits submitted by the parties,¹ the unopposed motions for summary judgment are GRANTED.

Dated this 22nd day of December, 2014.


Robert S. Lasnik
United States District Judge

¹ Defendants’ request for judicial notice is GRANTED as stated in footnote 1 of the Order Denying Motion for Temporary Restraining Order. Dkt. # 16 at 1-2.

ORDER DENYING MOTION FOR
CONTINUANCE

EXHIBIT B