

NO. 48383-1-II

[Pierce County Superior Court Cause No. 15-2-05879-2]

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUTH SOUND CHARITIES, INC.,

Defendant/Petitioner,

and

SOUTH SOUND SPORTS MANAGEMENT, LLC, AND SOUTH
SOUND SPORTS VENTURES, INC.,

Defendants,

vs.

UNION STREET HOLDINGS, LLC,

Plaintiff/Respondent.

FILED
COURT OF APPEALS
DIVISION II
2016 JUN 17 AM 10:55
STATE OF WASHINGTON
BY  DEPUTY

RESPONDENT'S BRIEF

Elizabeth Heber Norwood
WSBA #40930
Matthew D. Green
WSBA #18046
GREEN & NORWOOD PLLC
2722 Eastlake Ave E., #350
Seattle, WA 98102
elizabeth@gnlawseattle.com
matt@gnlawseattle.com
Attorneys for Plaintiff/Respondent

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION4

II. COUNTER-STATEMENT OF THE CASE7

 a. The Loan, the Foreclosure and the Trustee’s Deed.7

 b. Defendant’s Continued Occupancy to March 7, 2015.....8

 c. Plaintiff Takes Possession of Its Property.10

III. ARGUMENT12

 a. Standard of review.12

 b. Charities had no right to possession after February 5, 2015.....12

 c. The unlawful detainer action properly awarded possession to Union Street as the holder of trustee’s deed.18

 d. Union Street was entitled to possession and the trial court properly awarded possession by ordering Charities’ to vacate21

 e. Union Street was never Charities’ landlord; the proceedings under RCW 59.12.032 do not convert the relationship into one of landlord-tenant.22

 f. Charities was allowed its day in court and lost.....25

 g. Issues Appealed Are Moot.....26

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

Cases

Angelo Prop. Co., LP v. Hafiz, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012)..... 12, 17, 19

Bain v. Metro. Mortgage Grp., Inc., 175 Wash. 2d 83, 104 (2012) ... 15, 28

Chan v. Smider, 31 Wash. App. 730, 734, 644 P.2d 727,730 (1982)..... 24

Fed. Nat. Mortgage Ass'n v. Ndiaye, 188 Wash. App. 376, 382, 353 P.3d 644, 646-47 (2015)..... 18, 20

Holland v. Boeing Co., 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978)..... 12

In re Emerald Outdoor Advertising, L.L.C., 300 B.R. 775, 786 (Bankr. E.D. Wash. 2003), *aff'd*, 444 F.3d 1077 (9th Cir. 2006) 12

In re Trustee's Sale of Real Property of Upton, 102 Wn. App. 220, 224, 6 P.3d 1231 (2000)..... 12

<i>Josephinum Associates v. Kahli</i> , 111 Wash. App. 617, 622, 45 P.3d 627, 630 (2002).....	27
<i>Mann v. Household Finance Corp. III</i> , 109 Wn. App. 387, 392-93, 35 P.3d 1186 (2001).....	12
<i>Munden v. Hazelrigg</i> , 105 Wash.2d 39, 711 P.2d 295 (1985).....	25
<i>Puget Sound Inv. Grp., Inc.</i> , 92 Wash.App. at 526.....	20, 28
<i>Signal Oil Co. v. Stebick</i> , 40 Wash. 2d 599, 605, 245 P.2d 217, 221 (1952)	22
<i>State v. McCormack</i> , 117 Wn.2d 141, 143, 812 P.2d 483 (1991)	12

Statutes

RCW 59.12.032	24
RCW 59.12.090	21
RCW 59.12.170	21
RCW 61.24.005(2).....	15
RCW 61.24.040	19
RCW 61.24.040(7).....	13, 19, 20
RCW 61.24.050	17
RCW 61.24.050(1).....	16
RCW 61.24.060	4, 6, 19
RCW 61.24.060(1).....	13
RCW 61.24.070	15

I. INTRODUCTION

This case involves an unlawful detainer action commenced following a trustee foreclosure sale, wherein the new owner of certain real property sought possession of that property. The Deed of Trust Act, and specifically, RCW 61.24.060, provides – without qualification – that the purchaser at a nonjudicial foreclosure sale is entitled to possession of the property on the twentieth (20th) 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” who was given any required notice of the sale.

Petitioner/Defendant South Sound Charities, Inc. (“Defendant” or “Charities”), occupied the Pacific Sports Center at 7845 So. Pine Street in Tacoma (the “Property”) by virtue of an unrecorded June 20, 2013, lease with defendant South Sound Sports Management, LLC (“Management”). On November 4, 2011, prior to entering into the lease, Management had given Fortune Bank a deed of trust on the Property to secure a loan of \$3,460,000. Management defaulted on the loan, and HomeStreet Bank (“HomeStreet”), as successor to Fortune Bank, foreclosed. At the nonjudicial foreclosure sale on January 16, 2015 (“Trustee’s Sale”), all interest of Management, Ventures and Charities were extinguished. Charities failed to vacate by the twentieth day following the sale.

On February 9, 2015, Union Street Holdings, LLC, a wholly owned subsidiary of HomeStreet, purchaser at the trustee's sale and holder of the trustee's deed, filed an unlawful detainer action to secure possession of the Property. Though the trial court allowed Charities a short reprieve from being removed from the Property so as to finish certain soccer leagues that were already underway, the trial court terminated Charities' right to possession as of March 7 and acknowledged Union Street's ownership pursuant to the trustee's deed. Union Street took possession of the Property as of March 8, and thereafter, the trial court converted the action to a regular civil matter, which was ultimately dismissed with prejudice.

Charities has appealed the trial court's decisions alleging, essentially, that there were defects in the Trustee's Sale, that the court lacked jurisdiction to proceed in unlawful detainer, and that the trial court did not have authority to order Charities to vacate following the Trustee's Sale. None of Charities arguments, however, undermine the basis undisputable issue that Charities' right to possess the Premises was terminated and they were obligated to relinquish possession on the twenty-first day after the Trustee's Sale. The mere fact that Charities *failed to do so* and further action was instituted – here the unlawful detainer action brought by Union Street – does not change the fact that pursuant to RCW

61.24.060, Charities' right to possession was terminated by well-settled law.

It is important to note at the outset what Charities apparently seeks in this appeal: Charities seeks to have this Court force Union Street to enter into a multi-year lease wherein Charities gets to remain on the Property in spite of the fact that a Trustee's Sale was conducted and Charities' rights were undeniably extinguished. Simply put, Charities does not want to live with the consequences of the Property being foreclosed upon, which occurred as a result of its related entities (South Sound Management LLC, South Sound Ventures LLC, and those managing members who, as the Court will recall, are the same managers who control Charities) defaulting on loan obligations owed to Fortune Bank.

The Deed of Trust Act statute is clear, and Charities agrees, that the Trustee's Sale extinguished Charities right to possession. Charities attempts to avoid statutory termination of its rights however by arguing that either the Trustee's Sale is capable of attack *or* that Union Street's acceptance of interim payment for the right to continued possession of the Premises during the unlawful detainer action created a long-term, contractual relationship between Charities and Union Street where one had never previously existed. Neither is true and Charities' appeal should be dismissed, and the trial court's decisions upheld.

II. COUNTER-STATEMENT OF THE CASE

a. The Loan, the Foreclosure and the Trustee's Deed.

Fortune Bank, predecessor in interest to HomeStreet, extended a \$3,460,000 loan to Management, owner of the Property, and Ventures. App. 36. The loan was secured by a deed of trust on the Property executed by Management and recorded on November 7, 2011. CP 8-16. Ventures had originally leased the Property from Management until a \$492,141 judgment was entered against it in April, 2013. On June 20, 2013, Management entered into a new lease for the Property with Charities, which was organized and operated as a successor to Ventures.¹ CP 256. The facility was consistently used to operate adult and youth indoor soccer leagues. . All three defendants were managed and/or owned by Marian Bowers and her husband. CP 68, 101-102 . The lease between Management and Charities was never recorded. CP 43.

Management defaulted on the loan and declared bankruptcy. After HomeStreet, as successor to Fortune Bank, obtained relief from the bankruptcy stay to proceed with foreclosure, the loan was assigned to Union Street Holdings, effective January 8, 2015. The deed of trust was foreclosed

¹ On December 19, 2014, in Pierce County Cause No. 14-2-12453-3, Charities was found to be a mere continuation of Ventures, and judgment was entered against it for \$492,141. CP 256.

at the trustee's sale on January 16, 2015. CR 56.² The Trustee's Deed was issued to Union Street on January 21, 2015, and recorded two days later. *Id.*

All Defendants were provided notice of the Trustee's Sale. Although advance notice of the Trustee's Sale was not required to be provided to Charities because its lease was unrecorded (RCW 61.24.040(b)(iii)) it is undisputed that its owners and managers, who were also the owners and managers of Management and Ventures, received timely notice. App. 43.

b. Defendant's Continued Occupancy to March 7, 2015.

Charities failed to vacate by the twentieth day after the Trustee's Sale, as required by RCW 61.24.060. On February 9, 2015, Union Street commenced an unlawful detainer action in Pierce County Superior Court. CP. 1-30. On February 11, 2015, the trial court issued an order directing defendants to appear on February 18, 2015, to show cause why the court should not issue a writ of restitution directing the Sheriff to place Union Street in possession of the Property. CP 33-34.

Charities submitted a memorandum in opposition requesting that the trial court exercise its equitable powers and allow it to remain in possession;

² HomeStreet Bank assigned its interest in the loan to its affiliate, Plaintiff Union Street Holdings, LLC. The assignment, notarized on January 21, 2015, was made as of January 8, 2015. CP 257.

the opposition included declarations espousing the benefits of the soccer facility to the community. CP 75-121. In his order of February 18, 2015, Court Commissioner Clint Johnson acceded to Charities' entreaties by entering an order allowing Defendant to continue to occupy the Property until March 7, 2015, the last day of the ongoing soccer season, but only on condition that it make two payments to Plaintiff totaling \$44,000. CP 123-124. In denying Charities' request to occupy and operate future leagues after the end of the ongoing season, the order expressly prohibited "further solicitation or entering into other league or other activity beyond the expiration date set forth above [March 7, 2015]." *Id.* The order further noted that "[t]he ownership set forth in the Trustee's Deed is restated herein." *Id.*

Charities promptly moved for reconsideration, characterizing its motion as seeking an order "Allowing South Sound Charitie [sic] to Continue Operations and Occupancy Through May 10, 2015." CP 130. Defendant asked the court to reconsider its March 7th deadline and the prohibition against soliciting or entering into agreements for a new season to start after that date, specifically asking that it be allowed to operate a new season of soccer leagues beginning on March 8, 2015, and continuing to May 10, 2015. *Id.* The record before the court indicated that Charities had, in fact, solicited and entered into further league activity in violation of the

court's earlier prohibition on doing so. CP 162-163. Judge Katherine M. Stolz denied Charities' motion by order dated March 6th, reiterating that, "Defendant is required to vacate no later than midnight on March 7, 2015." CP 198-199.

c. Plaintiff Takes Possession of Its Property.

Pursuant to the trial court's March 6 and February 18 orders, Union Street entered the Property on March 8, 2015, changed the locks and took possession. CP 259. On March 12th, Defendant filed its "Motion (1) To Dismiss Under CR 12(b)(6); To Dismiss For Lack Of Jurisdiction; And Reconsideration [sic]." The motion consisted of a single 21 page pleading in violation of PCLR 7(a)(8) and was noted for hearing on minimum notice, requiring a response in four (4) business days, in violation of PCLR 7(c)(3). CP 202-220. Plaintiff moved to strike due to the rule violations, CP 335-338, and opposed Defendant's Motion substantively. CP. 240-254. Judge Stolz denied Charities' Motion by order dated March 20, 2015 (there was no ruling on Plaintiff's motion to strike). CP 429-431.

The unlawful detainer action had been given a trial date of March 26, 2015, and the parties appeared on that date. Union Street was by then in possession of the Property, and as such, Judge Stolz inquired what issues remained for trial. CP 442. Counsel for Charities asserted that possession was at issue, but after hearing from counsel, the Judge Stolz ordered that

“Plaintiff is entitled to possession of the property described as 7845 South Pine Street, Tacoma, Pierce County, Washington.” CP 438. With possession determined, all remaining issues would be reserved and set over on a regular civil case schedule. CP 444.³ Presumably this included Charities’ affirmative defenses, claims for damages and any counterclaims (if any had been properly pled.)

Charities sought discretionary review following the unlawful detainer trial and the trial court’s order converting the matter to a regular civil action, which motion was denied. CP 458. The order denying review noted that “Union Street now has possession of the Property and there is no authority for ordering that a former lessee be restored to possession of a property as to which the lease had been terminated or extinguished.” CP 464. Thereafter, Charities made no effort to pursue its affirmative defenses or counterclaims. As the trial date approached, Union Street opted not to pursue its remaining claims and sought dismissal. Charities agreed to dismissal on the condition that it be entered “with prejudice.” CP 475. Accordingly, the action was dismissed, with prejudice on November 20, 2015. CP 481. Charities’ appeal followed.

³ Judge Stolz also reserved Union Street’s request for an award of reasonable attorney’s fees and costs. CP 440.

III. ARGUMENT

a. Standard of review.

The questions before the court on appeal are questions of law and fact. An appellate court reviews issues of law de novo. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). Whether the trial court had jurisdiction over this unlawful detainer action is a question of law, which is accordingly reviewed de novo. *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012) (internal citation omitted). The balance of Charities' assignments of error essentially seek review of the trial court's findings. A trial court's findings of fact are reviewed for substantial evidence. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978). Substantial evidence is evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premise. *Id.* Contrary to Union Street's unsupported assertions, the matters before the trial court were not decided and should not be reviewed on appeal on a summary judgment standard.

b. Charities had no right to possession after February 5, 2015.

It is undisputed that under Washington law, a deed of trust foreclosure terminates and extinguishes a lessee's junior interest in the property. *Mann v. Household Finance Corp. III*, 109 Wn. App. 387, 392–93, 35 P.3d 1186 (2001); *In re Trustee's Sale of Real Property of Upton*,

102 Wn. App. 220, 224, 6 P.3d 1231 (2000); *In re Emerald Outdoor Advertising, L.L.C.*, 300 B.R. 775, 786 (Bankr. E.D. Wash. 2003), *aff'd*, 444 F.3d 1077 (9th Cir. 2006). Charities' interest was extinguished as junior interest both because its lease was executed after the deed of trust was recorded and because the lease itself was never recorded. Accordingly, 20 days following the January 16, 2015, Trustee's Sale, Union Street became entitled to possession of the Property pursuant to RCW 61.24.060(1), which provides,

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 by chapter 59.12 RCW.

As set forth in the Trustee's Deed, the trustee sold the Property to Union Street as the highest bidder on January 16, 2015. CP 56-59. Union Street was the purchaser at the Trustee Sale, and became the holder of the Trustee's Deed. The Trustee's Sale was final as of January 16, 2015; the Trustee's Deed was executed on January 21, 2015; and it was recorded on January 23, 2015. *Id.* The Trustee's Deed is prima facie evidence of compliance with all requirements of the deed of trust act. RCW 61.24.040(7).

Charities attempts to assign error to the trial court's rulings by making the unsupported argument that Union Street was not the "purchaser" at the Trustee's Sale, and that the trial court should have held a trial on validity of the Trustee's Sale. Both arguments are unavailing in light of Washington's statutory scheme and controlling case law, and further, are not supported by the evidence before the court. Charities' lack of citation to the record or relevant case law highlights the deficiencies in its argument on appeal.

Effective January 8, 2015, eight days prior to the Trustee's Sale, HomeStreet transferred all right, title and interest in the South Sound loan documents to Union Street. CP 306-313. The testimony of Kathleen Johanson (vice-president of HomeStreet) explains that HomeStreet assigned the South Sound loan to Union Street, that Union Street bid on and was the successful purchaser of the Property at the Trustee's Sale. CP 257.⁴ There is nothing remarkable or improper about an assignment from HomeStreet to its wholly owned subsidiary, Union Street; and there is plainly no dispute between HomeStreet and Union Street as to the validity

⁴ Note that even in Ms. Johanson's first declaration wherein she referred to "the Bank" as the successful bidder this testimony then attached the Trustee's Deed which plainly showed that Union Street was the purchaser. CP 41. While the language of the declaration could have been more precise so as to preemptively shut down Charities' argument, the use of the term "Bank" does not change the legal reality and presumptive validity of the Trustee's Deed reflecting the purchaser and legal owner to be Union Street.

or effective date of the transfer. Charities challenges the effectiveness of the transfer by the dubious argument that because the Assignment was not notarized until January 21, 2015, and recorded on January 23, 2015, the Trustee could not have properly sold the Property to Union Street.

Under the deed of trust act, a beneficiary may bid at the trustee's sale and do so with a credit bid. RCW 61.24.070. A beneficiary is defined as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). A beneficiary need not be the holder of the deed of trust itself. Indeed, "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wash. 2d 83, 104 (2012). Charities' argument that the lack of notary or recording prior to the Trustee's Sale defeats Union Street's right to credit bid on the Property is without merit.

Charities also makes the argument that Union Street was not the purchaser because certain pleadings and informal communications to Charities used the term "Bank" in referring to the purchaser at the Trustee's Sale, instead of expressly stating that Union Street, the wholly owned subsidiary of HomeStreet, was the purchaser at the Trustee's Sale. The colloquial use of the word "Bank" used interchangeably by HomeStreet and Union Street's counsel and representatives has zero legal significance with

respect to Union Street's purchase and ownership of the Property. The Trustee's Deed – issued to Union Street as the purchaser – is controlling and gave Union Street the right to possession and the trial court the authority and jurisdiction to proceed with the unlawful detainer action.

Charities' final attempt to question the Trustee's Deed relies on the absurd argument that Union Street could not be the purchaser at the Trustee's Sale because it "acquired its interest on Wednesday February [sic] 21, 2015" (Appellant's Brief, p. 16, emphasis in original), referring to RCW 61.24.040(5) that provides that a trustee's sale must take place on a Friday. There is no dispute the sale occurred on Friday, January 16, 2015. The fact that the Trustee's Deed was executed and recorded thereafter, has no effect on the validity of the sale or the deed. RCW 61.24.050(1) expressly states that a trustee's sale is final as of the date and time of the trustee's acceptance of a bid, so long as the deed is recorded within fifteen days thereafter. This argument highlights the unreasonableness of Charities' overall position and attempt to create a legitimately debatable issue where none exist. The facts before the court plainly reflect that the Trustee's Deed was issued to Union Street as the *purchaser* at the Trustee's Sale. None of Charities arguments defeat this basic fact, and none of them support Charities contention that they were entitled to further proceedings on any of these issues.

Even assuming *arguendo* that Union Street was the assignee of the Deed of Trust after the Trustee's Sale – which it was not – Union Street was still undoubtedly entitled to possession of the Property and Charities was required to vacate on the twentieth day. Union Street was thereafter authorized to proceed with the unlawful detainer action as the holder of the Trustee's Deed. Washington's deed of trust act expressly recognizes that the Trustee's Deed may be issued to “the purchaser, or a different grantee as designated by the purchaser following the trustee's sale....” and that the trustee's deed transfers all right, title and interest in the real and personal property sold at the trustee's sale. RCW 61.24.050. Union Street was issued the Trustee's Deed in accordance with the deed of trust act. And the alleged discrepancy as to whether HomeStreet or Union Street was the ‘purchaser’ at the trustee's sale vs. the assignee of the grantor is a distinction without a difference with respect to whether Charities' right to possession was extinguished by the sale. Having all right title and interest in the real and personal property sold by the trustee, Union Street properly commenced the unlawful detainer action that thereafter removed Charities from the Property.

c. The unlawful detainer action properly awarded possession to Union Street as the holder of trustee's deed.

It is well-settled that the Washington unlawful detainer statute is designed to quickly and efficiently facilitate the recovery of possession of leased premises. *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075, 1085 (2012) . In addition to recovery of the possession of *leased* premises, an unlawful detainer may be commenced “as a result of a trustee's sale under chapter 61.24 RCW.” RCW 59.12.032. The plaintiff in such an action is not a landlord, but the holder of a Trustee’s Deed with the right to possession of certain real property subject to the deed. Notably, Washington’s unlawful detainer statute does *not* restrict use of unlawful detainer to a “purchaser” as Charities would argue, but rather allows such proceedings “as a result of a trustee’s sale” thereby encompassing any holder of a trustee’s deed following a sale. Notwithstanding, Union Street is both the holder of the Trustee’s Deed as the “purchaser” and “as a result of a trustee’s sale” and therefore is entitled to the relief provided in RCW 59.12 *et seq.*

The following provides a concise summary of the current state of the law as it pertains to unlawful detainer actions in Washington:

Unlawful detainer is a summary proceeding for obtaining possession of real property, and the cause of action holds priority in scheduling over other civil cases. The action is a narrow one, limited to the question of possession and

related issues such as restitution of the premises and rent. Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title. Counterclaims may not be asserted in an unlawful detainer action. The only exception to this rule is “when the counterclaim, affirmative equitable defense, or setoff is ‘based on facts which excuse a tenant's breach.’”.

Fed. Nat. Mortgage Ass'n v. Ndiaye, 188 Wash. App. 376, 382, 353 P.3d 644, 646-47 (2015) (internal citations omitted). Sitting as a special tribunal, the court in an unlawful detainer proceeding lacks subject matter jurisdiction to hear counterclaims or matters outside of the specific right to possession conferred by RCW 59.12 *et seq.* *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. at 808. This includes questions of title or challenges to trustee's sales as discussed below.

RCW 59.12.032 confers unlawful detainer jurisdiction following a trustee's sale where there has been compliance with RCW 61.24.040 and 61.24.060. As noted above, the Trustee's Deed is prima facie evidence of compliance with all requirements of the deed of trust act. RCW 61.24.040(7). Here, there is no evidence that the Trustee's Sale failed to comply with RCW 61.24.040 or 060. Charities asserts for the first time on appeal that it suspects the Trustee allowed a non-beneficiary to credit bid and that the sale therefore did not comply with RCW 61.24.040. However, as discussed above, Charities' argument fails to accept that Union Street was the beneficiary – as that term is defined by the statute – simply because

the Assignment was not notarized and recorded until after the Trustee's Sale. There is nothing in the record that indicates that the trustee failed to comply with RCW 61.24.040(7) as Charities argues. Having met the necessary prerequisites of RCW 59.12.032, Union Street was entitled to proceed in unlawful detainer.

The unlawful detainer was properly limited to the question of possession and not – as Charities would argue – a trial on the validity of the Trustee's Sale. In *Fed. Nat.*, the trial court addressed a scenario much like this one. 188 Wash. App. 376 (2015) . In that case an unlawful detainer action had been commenced following a trustee's sale, and the occupant of the foreclosed property answered and asserted various affirmative defenses that essentially sought to raise a collateral attack on the nonjudicial foreclosure itself. *Id.* at 381. The trial court found that the unlawful detainer action was *not* the appropriate place to make such an attack. *Id.* The court of appeals affirmed, noting that “unlawful detainer actions are not the proper forum to litigate questions of title.” *Id.* at 384 (citing *Puget Sound Inv. Grp.*, 92 Wash. App. at 526).

The same is true here where Charities' right to possession was extinguished by operation of the deed of trust act, issuance of Trustee's Deed and passage of the requisite twenty-day period. Charities' did not have a right to collaterally attack the validity of Union Street's right to

enforce the Trustee's Deed and the trial court properly ordered it to vacate the Property.

- d. Union Street was entitled to possession and the trial court properly awarded possession by ordering Charities' to vacate

There was no legal basis for Charities to continue to occupy the Property. Its right to occupy the Property was extinguished by the Trustee's Sale and issuance of the Trustee's Deed on January 19, 2015. RCW 59.12.032 authorized Union Street to proceed with an unlawful detainer action to remove Charities. The trial court's order of February 18, 2015, directed Defendant to vacate by March 7, 2015. The March 6th order reiterated that directive. Charities takes exception with the trial court's issuance of an order directing Charities to vacate on March 7, arguing that a writ of restitution was required. However, nothing in the unlawful detainer statute *requires* a trial court to order a writ of restitution to restore plaintiff to possession. To the contrary, RCW 59.12.090 provides that a plaintiff "may" seek an order for issuance of a writ of restitution. And where the court finds "in favor of the plaintiff and against the defendant, judgment *shall* be entered for the restitution of the premises..." RCW 59.12.170 (emphasis added.) The unlawful detainer statute provides for an order for restitution of the premise, but does not provide that a writ is the exclusive manner for doing so. Charities provides no authority to the

contrary. The Trustee's Deed issued to Union Street conferred jurisdiction for an unlawful detainer action, and was prima facie evidence upon which the court could rely, to determine that Charities' right to possession was terminated and that it should "vacate" the Property. That is precisely what happened on February 16 and again on March 6: the trial court found in favor of plaintiff and ordered restitution of the premises by way of an order directing Charities to vacate. While it may not be the conventional method, issuance of an order to "vacate" versus an order for restitution of the Property makes no substantive difference where Charities had no further right to occupy.⁵ The assignment of error to the order to vacate is unfounded.

- e. Union Street was never Charities' landlord; the proceedings under RCW 59.12.032 do not convert the relationship into one of landlord-tenant.

The "acceptance of rent" argument put forth by Charities is patently false and its reliance upon this line of cases is a misrepresentation of the circumstances of this case. It is true that a landlord who asserts a breach of lease for failure to pay rent, may waive that breach and thereby its right to pursue forfeiture in an unlawful detainer action where it accepts payment of

⁵ Even if the order to vacate was improper and for the sake of argument the court determined the manner of eviction was wrongful, that still does not grant Charities *any* ongoing right to possess the Property following the Trustee's Sale. Such a claim or cause of action may seek damages, but there is no basis for Charities to be put back in possession of the Property that it neither owns, nor has a valid lease for.

rent following the breach. *Signal Oil Co. v. Stebick*, 40 Wash. 2d 599, 605, 245 P.2d 217, 221 (1952). However, *Signal* and all such cases referenced by Charities are cases where an unlawful detainer was initiated between a landlord and a tenant, where there was an actual contractual relationship requiring the payment of rent, and *not* between the purchaser at a trustee's sale and the party who continued in possession following termination of their rights to remain on the property.

When faced with the eviction action, Charities appealed to the court's equitable power to allow it to remain in possession to finish its current soccer seasons. The fact that the court commissioner accepted its equitable plea but ordered Charities to pay for the privilege of remaining on the Property after initiation of the unlawful detainer following the Trustee's Sale does not transform the relationship between Union Street and Charities into one of a landlord-tenant. With respect to the trial court's order that authorized it to remain in the Property and required it to pay to do so, Charities asserts that "HomeStreet [sic] will argue that it was simply following a court order" and that a party cannot accept the benefits of a court order and then challenge that same order on appeal. App. Brief, p. 24. Yet that is *precisely* what Charities is doing! Charities was given the benefit the trial court's decision allowing it to remain on the Property well after its right to occupy had been extinguished by the Trustee's Sale but now seeks

to challenge the trial court's ruling on that very point. Under the "acceptance of benefits doctrine" that Charities cites, Charities in fact waived these issues on appeal by remaining in possession and paying the monies as ordered by the court. *Chan v. Smider*, 31 Wash. App. 730, 734, 644 P.2d 727,730 (1982). As Charities states in its brief, "if you accept the benefit of the court order, it essentially cuts off that issue for further review." App. Brief, p. 24.

It is also somewhat remarkable that Charities argues that the "commissioner should have simply said, 'this case is bound over for trial in front of the department'" (App. Brief, p. 33) when based on the evidence before him the commissioner *should* have simply entered judgment in favor of Union Street at the February 16, 2015 hearing. The statutory and legal prerequisites to do so were plainly met: Union Street was the holder of the Trustee's Deed, the Trustee's Deed expressly stated that Union Street was the purchaser, and more than twenty days had elapsed since the Trustee's Sale. All aspects of RCW 59.12.032 were met. Because the trial court could have entered judgment and restitution that day based on the evidence before the court, it cannot be error that it instead ordered the defendant to vacate on a specific date in the future.

f. Charities was allowed its day in court and lost.

Lastly, Charities makes the unavailing argument that it was essentially denied its day in court in spite of the fact that the trial court ruled on no less than four occasions (plus one ruling by this Court) that its right to possession had been terminated, and that Union Street had the right to possess the Property. Charities was not denied its day in court. It simply didn't like the outcome.

There is no authority in law or statute that grants any party the absolute right to trial. Nor is there any case law or statute that requires the parties to "agree" or "concede" the issues before the court in order for them to have been given their day in court. Yet that is exactly the argument put forth by Charities: that because the trial court resolved the issue of possession in favor of Union Street without a full unlawful detainer trial it was deprived of its right to trial; and because Charities never "conceded" that it had no right to possession, the trial court could not have properly made the determination that it did not have such a right. Neither of these positions are supported by Washington law or procedure or the record of this case.

Further, Charities *was* given an opportunity for the trial court to hear its defenses and its counterclaims but opted not to pursue them. The trial court converted this matter to a regular civil action and set a trial date. CP

444. The trial court was well within its discretion to do so and Charities assigns no error to this action. A trial court has broad authority to fashion the manner in which an action will be converted from unlawful detainer to a regular civil action. *Munden v. Hazelrigg*, 105 Wash.2d 39, 711 P.2d 295 (1985). Charities never pursued the lawsuit and yet tries to make the unbelievable argument that was deprived of its right to do so. This argument is without *any* merit, and because the matter was dismissed, with prejudice, after Charities had the opportunity to pursue any claims, defenses or counterclaims it wished, it cannot now seek relief from this Court to give it back the failed opportunity it squandered the first time around.

g. Issues appealed are moot.

Charities, whose interest in the Property was terminated and extinguished by the Trustee's Sale, has no right to possession. It has set forth no case law or statute that provide otherwise. If it could prove any wrong, it would have a remedy in damages, which could have been properly addressed at the trial, but Charities opted not to pursue such claims.

As discussed above, the statutory scheme of Washington's unlawful detainer action is one that promotes expedient resolution and adjudication of a property owner's right to possession of their property. Generally, these actions are one between a landlord and tenant, but in the case of post-trustee's sale action, the statute expressly provides for this remedy and

expedited action following a trustee's sale. Here, it is undisputed that a Trustee's Sale took place and that following the Trustee's Sale an unlawful detainer action was initiated. Over the course of that action, the trial court ruled that Union Street had the right to possess the Property, which ruling effectively resolved the unlawful detainer action. While Charities may take exception (improper and as unfounded as that exception may be) with the ruling, it is undisputed that possession of the Property lies exclusively with Union Street. The trial court's decision was supported by substantial evidence. Charities has no right to possession and there is no scenario in which a court may place them back in possession. This court can provide no 'effective relief' with respect to the unlawful detainer action. As such, the appeal of the unlawful detainer action is a pointless effort. The appeal is moot.

"A case is technically moot if the court cannot provide the basic relief originally sought, or can no longer provide effective relief." *Josephinium Associates v. Kahli*, 111 Wash. App. 617, 622, 45 P.3d 627, 630 (2002) (internal citations omitted). Moot cases are generally dismissed, and such is the case here. The fact is that Charities is not in possession of the Property and that it has no right to possess the Property. Union Street is not a position to explain to Charities what other causes of action it may have sought to allege against Union Street either before or after the

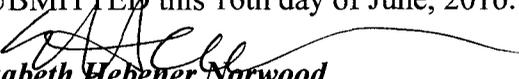
Trustee's Sale. But one thing is clear: any relief Charities may claim can only be awarded in the form of damages. Accordingly, unlawful detainer is not the venue for consideration of those damages and Charities' continuing efforts to pursue them here are a waste of judicial resources. Charities' lease was undeniably extinguished by the Trustee's Sale and as such there is no viable relief to be granted to Charities within the context of an unlawful detainer action.

IV. CONCLUSION

Under Washington law the deed of trust act should be construed to further three basic objectives: 1) the nonjudicial foreclosure process should remain efficient and inexpensive; 2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and 3) the process should promote stability of land titles. *Bain*, 175 Wash. 2d at 94 (internal citations omitted). The unlawful detainer process is intended to provide expedient resolution to the question of rightful possession of real property. *Puget Sound Inv. Grp., Inc.*, 92 Wash.App. at 526. Union Street was never Charities' landlord and therefore the entire line of case law relating landlord-tenant disputes regarding the payment of rent or eviction therefore is inapplicable. The record before the trial court clearly supports the orders and judgment issued in this matter, which properly put Union Street in possession of the real property it purchased and owned by virtue

of the lawfully conducted Trustee's Sale. Based on the record and the appropriate standard of review it is apparent that the appeal is without merit and the decisions of the trial court should not be disturbed.

RESPECTFULLY SUBMITTED this 16th day of June, 2016.


s/Elizabeth Hebenor Norwood

Elizabeth Hebenor Norwood, WSBA #40930

Matthew D. Green, WSBA #18046

GREEN & NORWOOD PLLC

2722 Eastlake Ave E. #350

Seattle WA 98102

Attorneys for Plaintiff/Respondent Union Street Holdings, LLC

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true copy of the foregoing document, to be delivered to counsel at their regular office address below in the manner indicated:

***Attorney for Defendant/Appellant South
Sound Charities, Inc., and Defendant
South Sound Sports Management, LLC***

Martin Burns, WSBA #23412
Burns Law, PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
Ph: 253-507-5586
Fax: 253-507-5713
Email: martin@mburnslaw.com

- Via Legal Messenger
- Via Facsimile
- Via Electronic Mail
- Via United States Mail

FILED APPEALS
DIVISION II
COURT OF APPEALS
2016 JUN 17 AM 10:59
STATE OF WASHINGTON
DEPUTY CLERK

Signed at Seattle, Washington this 16th day of June, 2016.


s/Elizabeth Hebener Norwood
Elizabeth Hebener Norwood,
WSBA #40930