

**COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II**

RIVER STONE HOLDINGS
NW, LLC, a Washington
Limited Liability Company,

Plaintiff/Respondent,

v.

ALICE M. LOPEZ, an
individual, and all others
occupying 14030 SE 35th
Loop, Vancouver, WA 98683,

Defendant/Appellant.

NO. 48432-3-II

BRIEF OF
RESPONDENT

RIVER STONE HOLDINGS NW, LLC, a Washington Limited
Liability Company,

v.

ALICE M. LOPEZ, an individual, and all others occupying 14030
SE 35th Loop, Vancouver, WA 98683

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent moves the Court to affirm the trial court's ruling granting Respondent an Order for Writ of Restitution.

II. ASSIGNMENTS OF ERROR

Whether the trial court was correct in denying Appellant's demand for a jury trial in an unlawful detainer proceeding as there was no issue of fact presented.

III. STATEMENT OF THE CASE

The parties do not dispute that Respondent River Stone Holdings NW, LLC ("River Stone") purchased the subject property at a foreclosure sale on November 13, 2015, that River Stone issued Appellant Alice Lopez ("Ms. Lopez") a Notice to Vacate, that Ms. Lopez did not vacate, that River Stone commenced an unlawful detainer action, and that a show cause hearing was held on January 5, 2016 wherein the trial court issued River Stone an Order for Writ of Restitution. See Appellant Lopez's Opening Brief, 9-10.

Ms. Lopez appeals the trial court's granting of said order based solely on the trial court "failing to grant Defendant's demand

Ms. Lopez appeals the trial court's granting of said order based solely on the trial court "failing to grant Defendant's demand for jury trial." See Appellant Lopez's Opening Brief, 7. Ms. Lopez argues that she is entitled to a jury trial under RCW 59.12.130 and RCW 59.18.380 because an issue of fact was presented by the pleadings. Ms. Lopez states that the issue of fact is whether the foreclosure sale was proper and whether River Stone was the true owner of the subject property. *Id.* at 11 (see also RP, 43:2-5 (Hearing on Plaintiff's Motion to Show Cause) where counsel for Ms. Lopez states that "she's entitled to remain in possession and her claim for ownership be assessed. We're requesting a trial on that issue..."). As shown below, no issue of fact exists so the trial court was correct in denying Ms. Lopez's request for a jury trial.

IV. ARGUMENT

Ms. Lopez cites two statutes in support of her position that she is entitled to a jury trial: RCW 59.12.130 and RCW 59.18.380. RCW 59.18.380 is a provision of the Residential Landlord-Tenant Act and does not apply here because the parties did not have a Landlord-Tenant relationship. See Appellant Lopez's Opening Brief, 9-11. Further, RCW 59.18.380 only allows for a trial when "it appears to the court that the plaintiff should not be restored to possession of the property..." As further discussed below, the trial

only issues Ms. Lopez raises here—when determining possession in an unlawful detainer action.

RCW 59.12.130 deals with unlawful detainer proceedings and states that “whenever an issue of fact is presented by the pleadings it must be tried to a jury...” Ms. Lopez states that the “issues of fact” are whether the foreclosure sale was conducted properly and whether River Stone has clear title to the subject property. *Id.* at 11. As counsel for Ms. Lopez stated at the January 5, 2016 show cause hearing; “the issue here is ownership” and “we want a trial on that issue.” RP, 31:25, 36:25-37:1.

The Appellate Court has held time and again that issues concerning the foreclosure process and title to the subject property are beyond the scope of an unlawful detainer hearing. The court’s jurisdiction in an unlawful detainer proceeding is limited to possession of the real estate and related issues such as damages. The Appellate Court has specifically held that the trial court cannot decide foreclosure or title issues in an unlawful detainer proceeding:

The unlawful detainer chapter, RCW 59.12, provides a summary proceeding for obtaining possession of real property and gives priority over other civil cases. **The court’s jurisdiction in unlawful detainer proceedings is limited to the right to possession of real property and a few related issues such as damages and rent due.** Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but **do not provide a forum for litigating**

claims to title. As a means to gain possession of real property, **unlawful detainer is available to one who holds title as a purchaser at a deed of trust foreclosure sale...** because the statutes governing those proceedings authorize a purchaser to bring suit under RCW 59.12. *Puget Sound Inv. Group, Inc. v. Bridges*, 92 Wn.App. 523, 527 (Div. 1 1998) (emphasis added). See also *Munden v. Hazelrigg*, 105 Wn.2d 39, 45 (1985) (holding that an unlawful detainer action is limited to questions of possession and related issues such as restitution of the premises and rent and that other claims, including counterclaims, are generally not allowed); *Torkild v. Jonston*, 58303-4-1 (Div. 1 2008) citing *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728 (1996) (“The court’s jurisdiction in an unlawful detainer action is limited to determining the right to possession of the property.”).

The Court of Appeals has made it clear that only issues of possession and related issues of damages and rent may be considered in an unlawful detainer hearing and not issues of wrongful foreclosure and title. The Court in *Torkild* specifically held that “an assertion of contested title is neither a recognized defense to nor an issue that can be resolved by an unlawful detainer proceeding.” *Id.* There, the Appellant’s “only defense was that they might have a potential claim to possession of the property if another court finds in their favor and restores their title to the property.” *Id.*

These cases are on point. As indicated in *Puget Sound Inv. Group, Inc.*, unlawful detainer is available to a purchaser at a deed of trust foreclosure sale. RCW 61.24.060(1) is the corresponding

statute that entitles the purchaser at a trustee's sale to possession of the property and a right to the summary proceedings in RCW 59.12, the unlawful detainer statute. In this case River Stone has purchased the property at a deed of trust foreclosure sale and is thus entitled to an unlawful detainer proceeding.

Ms. Lopez attempts to argue that River Stone does not have proper title to the property due to an illegal foreclosure. As held in *Torkild*, such a defense is not available to Ms. Lopez in an unlawful detainer proceeding. Like *Torkild*, the only defense that Ms. Lopez has brought is that she might have a claim to possession if another court restores title to her property. Ms. Lopez has stated through counsel that: "...we are raising as a defense, the fact that there is litigation ongoing on the ownership issue that's not resolved" and "[t]hat's the whole issue now is we're entitled to an argument about ownership." RP, 38:13-15; 39:3-4. The ongoing litigation that Ms. Lopez references is the parallel suit that she has filed against the holder of the subject deed of trust in attempts to gain back title to the subject property namely. That suit is *Alice Lopez v. JP Morgan Chase, et al.*, Clark County Superior Court Case No. 15-2-02794-1, Court of Appeals Division II Case No. 483718-II.

This defense is not allowed in an unlawful detainer proceeding. The ruling in *Puget Sound Inv. Group, Inc.* gives the purchaser at a deed of trust foreclosure sale rights to seek

possession through unlawful detainer. The trial court said as much when informing Ms. Lopez at the January 5, 2016 show cause hearing that she was not allowed to “indefinitely frustrate the letter and spirit of the statute, which allows a purchaser at this foreclosure sale to realize or at least gain possession of collateral, which they’ve paid value for and are entitled to after 20 days under Washington law under RCW 61.24.030.” RP, 33:18-22. The trial court clearly indicated its jurisdiction to the parties at the show cause hearing: “So today the question really before the Court is whether there is any real issue as to who is appropriately awarded possession...” RP, 22:10-12.

V. CONCLUSION

In short, no issue of fact exists because the only alleged issues of fact deal with foreclosure and title and are beyond the scope of the trial court’s jurisdiction. Since no issue of fact exists, Ms. Lopez is not entitled to a jury trial under RCW 59.12.130. The failure to grant a jury trial is the only assignment of error that Ms. Lopez raises. Ms. Lopez’s assignment of error is clearly without merit as the issue presented is well settled in law. Therefore, the trial court’s ruling granting an order for writ of restitution should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of September,
2016.

Jesse D. Conway, WSBA #41677
Attorney for Respondent

VI. APPENDIX

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CERTIFICATE OF SERVICE

I certify that I caused true and correct copies of the BRIEF OF RESPONDENT to be served on the following:

James A. Wexler *via email and regular mail*
Attorney at Law
2025 201st Ave. SE
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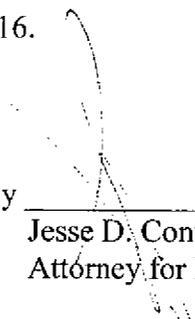
by the following indicated method or methods:

X by mailing a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, WA on the date set forth below.

— by causing a full, true and correct copy thereof to be hand-delivered to the attorney at the attorney's last known office address listed above on the date set forth below.

— by faxing a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the attached confirmation report.

DATED this 28th day of September, 2016.

By 

Jesse D. Conway, WSBA #41677
Attorney for Respondent

RCW 59.12.130**Jury—Actions given preference.**

Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

[1891 c 96 § 15; RRS § 824. Prior: 1890 p 79 § 15.]

RCW 59.18.380**Forcible entry or detainer or unlawful detainer actions—Writ of restitution—Answer—Order—Stay—Bond.**

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy. If the answer is oral the substance thereof shall be endorsed on the complaint by the court. The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution, returnable ten days after its date, restoring to the plaintiff possession of the property and if it shall appear to the court that there is no substantial issue of material fact of the right of the plaintiff to be granted other relief as prayed for in the complaint and provided for in this chapter, the court may enter an order and judgment granting so much of such relief as may be sustained by the proof, and the court may grant such other relief as may be prayed for in the plaintiff's complaint and provided for in this chapter, then the court shall enter an order denying any relief sought by the plaintiff for which the court has determined that the plaintiff has no right as a matter of law: PROVIDED, That within three days after the service of the writ of restitution issued prior to final judgment, the defendant, or person in possession of the property, may, in any action for the recovery of possession of the property for failure to pay rent, stay the execution of the writ pending final judgment by paying into court or to the plaintiff, as the court directs, all rent found to be due, and in addition by paying, on a monthly basis pending final judgment, an amount equal to the monthly rent called for by the lease or rental agreement at the time the complaint was filed: PROVIDED FURTHER, That before any writ shall issue prior to final judgment the plaintiff shall execute to the defendant and file in the court a bond in such sum as the court may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out. The court shall also enter an order directing the parties to proceed to trial on the complaint and answer in the usual manner.

If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer. If it appears to the court that there is a substantial issue of material fact as to whether or not the plaintiff is entitled to other relief as is prayed for in plaintiff's complaint and provided for in this chapter, or that there is a genuine issue of a material fact pertaining to a legal or equitable defense or set-off raised in the defendant's answer, the court shall grant or deny so much of plaintiff's other relief sought and so much of defendant's defenses or set-off claimed, as may be proper.

[2011 c 132 § 18; 2010 c 8 § 19032; 1973 1st ex.s. c 207 § 39.]

RCW 61.24.030**Requisites to trustee's sale.**

It shall be requisite to a trustee's sale:

- (1) That the deed of trust contains a power of sale;
- (2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;
- (3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;
- (4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;
- (5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;
- (6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;
- (7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.
(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;
- (8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:
 - (a) A description of the property which is then subject to the deed of trust;
 - (b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;
 - (c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;
 - (d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;
 - (e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

- (f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;
- (g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031;
- (h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;
- (i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;
- (j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;
- (k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR LOSING YOUR HOME.

You may be eligible for mediation in front of a neutral third party to help save your home.

CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you might benefit. Mediation **MUST** be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice; and

(l) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust; and

(9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, RCW 61.24.163.

[2012 c 185 § 9; 2011 c 58 § 4; 2009 c 292 § 8. Prior: 2008 c 153 § 2; 2008 c 108 § 22; 1998 c 295 § 4; 1990 c 111 § 1; 1987 c 352 § 2; 1985 c 193 § 3; 1975 1st ex.s. c 129 § 3; 1965 c 74 § 3.]

NOTES:

Findings—Intent—Short title—2011 c 58: See notes following RCW 61.24.005.

Findings—2008 c 108: See RCW 19.144.005.

Application—1985 c 193: See note following RCW 61.24.020.

RCW 61.24.060**Rights and remedies of trustee's sale purchaser—Written notice to occupants or tenants.**

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

(2) If the trustee elected to foreclose the interest of any occupant or tenant, the purchaser of tenant-occupied property at the trustee's sale shall provide written notice to the occupants and tenants at the property purchased in substantially the following form:

"NOTICE: The property located at was purchased at a trustee's sale by on (date).

1. If you are the previous owner or an occupant who is not a tenant of the property that was purchased, pursuant to RCW 61.24.060, the purchaser at the trustee's sale is entitled to possession of the property on (date), which is the twentieth day following the sale.

2. If you are a tenant or subtenant in possession of the property that was purchased, pursuant to RCW 61.24.146, the purchaser at the trustee's sale may either give you a new rental agreement OR give you a written notice to vacate the property in sixty days or more before the end of the monthly rental period."

(3) The notice required in subsection (2) of this section must be given to the property's occupants and tenants by both first-class mail and either certified or registered mail, return receipt requested.

[2009 c 292 § 10; 1998 c 295 § 8; 1967 c 30 § 2; 1965 c 74 § 6.]

THE LAW OFFICE OF JESSE D. CONWAY

September 28, 2016 - 10:01 AM

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