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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 296334

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC,
an Oregon limited liability co.,
Plaintiff-Respondent,
v.
STEVEN F. SCHROEDER,
Defendant-Appellant.

REPLY BRIEF OF APPELLANT

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I. Introduction

The Plaintiff has chosen to hide the identity of any first-hand percipient witnesses of the alleged Trustee's Sale (if it actually occurred). The Plaintiff's entire case in this unlawful detainer matter depends on the occurrence of this alleged sale for which it has never identified any first-hand percipient witnesses.

The Plaintiff moved for summary judgment on one of the theories of its complaint. In context, this motion was a motion for partial summary judgment. In support of this motion for summary judgment, the Plaintiff submitted numerous documents which were not business records as understood by the evidence rules and defined in case law, documents which were inadmissible hearsay, and documents which the Plaintiff chose not to authenticate adequately.

The Trial Court erroneously granted total summary judgment to the Plaintiff. This decision was error for the above reasons and because the Trial Court did not even have jurisdiction because the Plaintiff chose not to provide required statutory notice under RCW 59.12.030.

This Court should reverse the Trial Court's erroneous rulings and either dismiss the Plaintiff's case or remand for further proceedings.

II. Reply Statement of the Case

The Brief of Respondent makes numerous false assertions about the facts, the record, and the Appellant's argument. To the extent necessary, this reply brief will address these false assertions in due course.

III. Summary of Argument.

The Plaintiff chose to provide no support from anyone with first-hand percipient knowledge that a Trustee's Sale occurred of the disputed property. The

Plaintiff also chose to pursue this Unlawful Detainer action without providing the required statutory notice under RCW 59.12.030. The Plaintiff is not entitled to any relief. All relief that the Plaintiff received from the Trial Court was erroneous.

Because the Plaintiff has never moved for total summary judgment and never moved for an order to show cause why a writ of restitution should issue, the granting of an order of total summary judgment has never been appropriate. For the same reason, the issuance of an order for writ of restitution has never been ripe.

The Trial Court should not have granted total summary judgment or ordered a writ of restitution. The Trial Court should not have entered a final order and judgment. All of these decisions of the Trial Court are error which this Court should reverse.

IV. Argument

A. Because the Plaintiff has never provided a witness with first-hand percipient knowledge of the Trustee's Sale, any summary judgment is error. The Trial Court should have denied summary judgment as well as any other relief for the Plaintiff.

The Plaintiff has deliberately chosen not to identify any first-hand percipient witness of the alleged Trustee's Sale. CP 185 (17-19). If the alleged sale actually occurred, a person acting on behalf of the Trustee must have been present at the location of the alleged sale. If so, this person is a witness that the Plaintiff had a legal duty to identify. CP 120. The deliberate failure of the Plaintiff to disclose this witness (if such a person exists) tells this Court that the alleged sale never occurred.

Because the Plaintiff's non-disclosure tells this Court that the sale never occurred, the Trial Court erred in granting any relief for the Plaintiff. Consequently, this Court should reverse all of the Trial Court's rulings and dismiss this entire case.

B. *Because a trial court may not grant summary judgment on the basis of inadmissible evidence, the Trial Court should have sustained the objection of Defendant Steven F. Schroeder.*

The treatment of this issue in the Brief of Respondent raises three issues for reply. First, the Plaintiff misconstrues and mishandles Raymond v. Pacific Chemical, 98 Wn. App. 739, 992 P.2d 517 (1999).

Second, although the Plaintiff impliedly complains that Mr. Schroeder should have asked the Trial Court to strike the inadmissible evidence instead of objecting to it, a motion to strike such is not proper under Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d 150 (2009) (rev. denied, 168 Wn.2d 1018 (2010)).

Third, the Plaintiff inexplicably chose not to address the specifics of Mr. Schroeder's detailed argument and provides no support for most of the exhibits (including an un-authenticated alleged photograph).

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1. What Raymond v. Pacific Chemical actually holds about the timeliness of objections

Here is the entirety of the body of the pertinent section of the above case:

Nonconforming Declarations

At oral argument on the summary judgment motions, the Raymonds moved to strike all evidence submitted by the defendants in support of the motions, arguing in part that the declarations of Glen Gay, Richard Hunter, William Boring, and Phil Ward did not conform to RCW 9A.72.085 and the civil and general rules.«1» None of the declarations were declared under penalty of perjury and under state law, and none stated the place of execution. The court declined to consider the motion, indicating that it was not timely. The Raymonds contend that the court erred in failing to strike the declarations.

[1, 2] A trial court may not consider inadmissible evidence when ruling on a summary judgment motion. King County Fire Protection Dists. Nos. 16, 36, & 40 v. Housing Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994). But if the documents supporting the motion do not conform to the requirements of the rules, the opposing party must file a timely motion to strike the documents. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 365, 966 P.2d 921 (1998); Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 881, 431 P.2d 216 (1967). The court's ruling on a motion to strike is discretionary. Burmeister, 92 Wn. App. at 365.

Here, the Raymonds did not move to strike the nonconforming declarations until oral argument on the summary judgment motions. In addition, before judgment was entered, the defendants submitted

amended declarations that were identical in content and that complied with the statutory requirements. Thus, there is no indication that the trial court improperly relied on inadmissible testimony in ruling on the summary judgment motions. We conclude that the trial court did not err in refusing to consider the motion to strike.

Raymond, 98 Wn. App. at 743-744 (footnote omitted).

The above passage shows absolutely no “holding” by the court regarding the timeliness of objections. Indeed, the passage does not even mention objections at all! What the court actually said is that the trial court’s denial of the motion to strike was not error because the moving party “submitted amended declarations that were identical in content and that complied with the statutory requirements.” Id.

The filing of the amended declarations is the actual basis for the court’s determination that the trial court did not commit error because, as the court itself notes, “there is no indication that the trial court improperly relied on

inadmissible testimony in ruling on the summary judgment motions.” Raymond, Id.

This Court should find that the objections of Mr. Schroeder were timely made.

2. A Motion to Strike Inadmissible Summary Judgment Evidence is Improper.

The Plaintiff complains that Mr. Schroeder “merely filed an objection and failed to ask for relief of any kind.”

Brief of Respondent, page 15, note 50.

Plaintiff’s complaint is not well taken.

To begin with, materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a ‘motion to strike’ what is actually an objection to the admissibility of evidence

Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d

150 (2009).

3. The Plaintiff Chose Not to Address the Substance of the Evidentiary Issues in this Case.

The third page of Exhibit C appears to be some sort of photograph. CP 40. The Plaintiff has done nothing to authenticate this photograph. It is not a business record. It is also inadmissible. RCW 5.45.020. Exhibit G is unsigned. CP 89-90. As such, it is inadmissible.

These exhibits and the others discussed in the Brief of Appellant are inadmissible on a motion for summary judgment. The Trial Court should have sustained the objection of Mr. Schroeder.

C. Because the Plaintiff's motion was only a motion for partial summary judgment, the Plaintiff was not entitled to total summary judgment or a writ of restitution. For these reasons, the Trial Court's granting of an order for writ of restitution and a final order and judgment were both error.

1. At best, the Plaintiff's motion only entitled the Plaintiff to partial summary judgment.

The Plaintiff's complaint pled three theories of relief. CP 1-4. The first theory of relief under the complaint is

non-judicial foreclosure. Id. The second theory of relief under the complaint is waste. CP 3, line 10.

In the Plaintiff's Reply, the Plaintiff even admits that it is not "seeking summary judgment on its claim for waste, as it desires to conduct additional discovery and prove damages with respect to waste on the property." CP 223.

The Plaintiff only moved for summary judgment based on the non-judicial foreclosure theory of relief that it pled in the complaint. CP 96-102 (esp. 101). The Plaintiff did not move for summary judgment based on its theories of waste or unpaid rent. For this reason, its motion for summary judgment was only a motion for partial summary judgment, whether titled as such or not.

2. The Plaintiff's complaint that it could not anticipate Mr. Schroeder's defenses is not well taken.

Without argument or citation to any authority, the Plaintiff alleges that "the 'affirmative defenses' . . . are not

affirmative defenses.” Brief of Respondent, page 17. Affirmative defenses, however, are defined by CR 8(c), not by the unsupported assertions of the Plaintiff. Moreover, one can easily find a list of almost four dozen “potential affirmative defenses.” WEST’S WASHINGTON COURT RULES ANNOTATED, 2008-2009, volume 2, pages 77-79. One finds all of Mr. Schroeder’s affirmative defenses listed at the citation above. The Plaintiff’s claim that these affirmative defenses are not such is complete nonsense.

The Plaintiff complains that it “is not clairvoyant and could not anticipate [Mr. Schroeder’s] defenses.” Brief of Respondent, page 17. This is a non-problem with an easy solution. All the Plaintiff has to do to discover the defendants’ defenses is to move for default. See, generally, CR 55. A motion for default would uncover the defenses, or they could very well be lost. One wonders

why the Plaintiff chose not to move for default. In any event, the Plaintiff could have solved this non-problem by moving for default. The Plaintiff's choice not to do so is the real problem for the Plaintiff.

3. The Plaintiff's choice never to pursue an order to show cause why a writ of restitution should be issued means that Mr. Schroeder never had the burden of producing evidence for or proving any of his defenses.

The Plaintiff complains that "the party raising an affirmative defense has the burden of proving the elements of the defense." Brief of Respondent, page 18. This statement of the Plaintiff is irrelevant. The procedural posture of the case at the time of the summary judgment hearing makes production and proof of evidence of affirmative defenses not ripe.

If, for example, the Plaintiff had moved for Mr. Schroeder to show cause why a writ should not be issued, then the burden of production and proof would be procedurally ripe. Compare RCW 59.18.370.

Given the Plaintiff's legal theory, it would have been entirely appropriate for the Plaintiff to bring the issue of non-judicial foreclosure to the Trial Court's attention by way of a motion for partial summary judgment. The Trial Court granted total summary judgment. This situation is analogous to the Plaintiff walking in to the courtroom with a chicken egg and hatching an ostrich.

The final point on this heading is to correct a misleading statement from the Respondent's Brief. Mr. "Schroeder had over four months to properly file an objection . . ." Brief of Respondent, page 19. This implies that Mr. Schroeder did not file an objection. The opposite is true. Mr. Schroeder did file an objection to the entry of the orders. CP 185-190 (dated 12/3/2010).

Consequently, this Court should conclude that the Plaintiff is not entitled to a total summary judgment (if the Plaintiff is even entitled to any summary judgment at all).

For these reasons, this Court should reverse the Trial Court's entry of the Final Order and Judgment and granting of the Order for Writ of Restitution.

D. Because an alleged former owner is not guilty of unlawful detainer merely due to continuing in possession after an allegedly complete non-judicial foreclosure, the Trial Court has no jurisdiction and the Plaintiff is not entitled to any relief from the Trial Court. This Court should reverse Trial Court's rulings and dismiss the Plaintiff's case.

Division One decided Savings Bank of Puget Sound v. Mink, 49 Wn. App. 204 (Div. 1, 1987) contrary to the explicit wording of the statute in question. RCW 59.12.030(1) does not declare that one is guilty of unlawful detainer who was without a **lease** and without a **specific term** which has **expired**.

This Court should resist peer pressure from outside this division and follow the explicit wording of the Unlawful Detainer Act.

The Plaintiff attempts to muddy the waters here by bringing in citations to cases involving breaches of a

covenant of the lease. Those cases are Christensen v. Ellsworth, 162 Wn.2d 365, 371, 173 P.3d 228 (2007) and Hous. Auth. v. Terry, 114 Wn.2d 558, 569, 789 P.2d 745 (1990). In actual fact, there is no lease between the parties! For this reason, the above cases are completely irrelevant.

Here is something that makes matters even worse for the Plaintiff: The Plaintiff argues that “the entire point of a notice under the Unlawful Detainer statute is to provide the possessor with an opportunity to cure.” Brief of Respondent, 14. The Unlawful Detainer Act, however, provides that one of the circumstances in which a “tenant of real property for a term less than life is guilty of unlawful detainer” (RCW 59.12.030) is when

he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the

end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period.

RCW 59.12.030(2). What opportunity to cure does this notice provide? Answer: None.

The fact that the Unlawful Detainer Act includes the above provision for a twenty-day notice refutes the Plaintiff's argument that the purpose of a notice is to provide an opportunity to cure.

This Court should reject this desperate effort by the Plaintiff to convince this Court to read the words regarding the existence and **expiration** of a **lease** out of RCW 59.12.030(1)

V. Conclusion

This Court should not follow the erroneous ruling of Division One in Savings Bank v. Mink. Mink runs roughshod over the separation of powers to effectively rewrite the Unlawful Detainer Act as if the Mink court were a

legislative body. Instead, this Court should honor the intent of the legislature and follow the actual wording of RCW 59.12.030(1).

The Plaintiff chose not to move for an order to show cause why a writ of restitution should not be issued. The Plaintiff also chose to move for partial summary judgment. This Court should not rescue the Plaintiff from its poor choices by affirming the Trial Court's grant of total summary judgment.

The Plaintiff's allegations that Mr. Schroeder's objections were untimely, the Plaintiff's choice not to address much of Mr. Schroeder's evidentiary argument, and the Plaintiff's insistence that Mr. Schroeder should have moved to strike instead of only objecting—these are the distractions the Plaintiff brings to prop up its weak evidentiary case. This Court should hold that the Trial Court erred in overruling the objections of Mr. Schroeder.

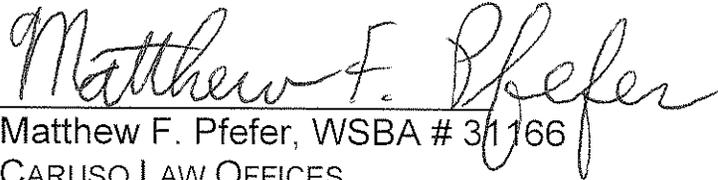
Finally, the Plaintiff's entire case for unlawful detainer depends on the occurrence of an alleged Trustee's Sale for which it has never identified any first-hand percipient witnesses of this alleged sale in the over a year and a half since the alleged sale allegedly occurred.

This Court should reverse the Trial Court's erroneous rulings and dismiss the Plaintiff's case based on RCW 59.12.030(1) and based on the Plaintiff's choice not to identify any first hand percipient witnesses of the alleged Trustee's Sale (if there are any such witnesses).

Alternatively, this Court should reverse the Trial Court's erroneous rulings and remand for further proceedings based on the Trial Court's granting of a total summary judgment when the procedural posture would support, at most, a partial summary judgment and based

on the Trial Court's granting of summary judgment based
on inadmissible evidence.

Respectfully submitted this 26th day of August 2011.



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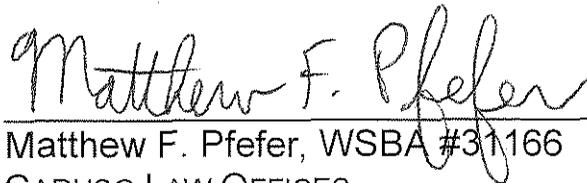
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DECLARATION OF SERVICE

Pursuant to GR 13, I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I have written agreements with Phillip J. Haberthur as attorney for Respondent allowing service by email.
3. I served the attached document on this date via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 29th day of August 2011 in Spokane, Washington.



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