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SUPREME COURT
STATE OF WASHINGTON

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No. 81813-4


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SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 58303-4-I

JOHN and DARCEE JOHNSTON, husband and wife

Appellants

v.

JULIA TORKILD, an individual

Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT JULIA TORKILD

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Respondent Julia Torkild (“Torkild”) respectfully provides this Supplemental Brief in association with the Washington State Supreme Court’s acceptance of review on this matter. In accepting review, the Court did not identify a particular issue of fact that was the focus of consideration. In her Response to Appellants’ Petition for Review, Torkild did not substantively address the applicability or correctness of Truly v. Heuft, 138 Wn.App. 913, 158 P.3d 1267 (2007), as the issue was before the Court of Appeals and the Supreme Court on a Motion to Dismiss for lack of subject matter jurisdiction. Although both motions were denied, Torkild takes this opportunity to substantively address the Truly case as part of this appeal. In addition, she provides further citation to legal authority on Appellants’ lack of a viable defense to the unlawful detainer action.¹

I. Truly Either Does Not Apply, and the Summons Complies With the Pertinent Requirements.

The Truly decision was issued June 4, 2007, by the same panel that reviewed and upheld the judgment in this case on February 4, 2008, and

¹ In addition, the Supreme Court should be made aware that the “criminal charges” against Torkild noted by Appellants in seeking review have all been dismissed.

thereafter denied Appellants' Motion to Vacate on May 1, 2008. In Truly, the Court of Appeals concluded that under the facts of that case, RCW 59.18.365(3) required that the summons contain a fax number and instruction that the defendant's answer or notice of appearance could have been delivered via fax. Truly v. Heuft, supra, 138 Wn.App. at 922. RCW 59.18.365(3) provides a sample "form" summons that may be used in an unlawful detainer action. The relevant language used in the Torkild Summons was the same used by the landlord in Truly: "You can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to your landlord's attorney (or your landlord if there is no attorney) to be received no later than the deadline stated above." Exhibit A to Motion to Dismiss for Lack of Jurisdiction and to Vacate Judgment ("Motion to Dismiss"), p. 1 (emphasis in original).

The underlying question in evaluating compliance with RCW 59.18.365(3) is whether the Torkild Summons used in this case "substantially complies" with the form summons. The facts in this case are distinguishable from Truly in several significant ways which favor a determination that the Torkild Summons substantially complied:

- In Truly, the tenant was evicted for failing to pay rent. In this case, Appellants were evicted because they failed to pay rent and/or

because the lease had expired . Appellants therefore had no legal right to possess, nor could such right be renewed or cured under any set of circumstances. In Truly, the tenant still had the potential to renew the possessory rights contained in the lease.

- In Truly, the tenant did not appear or raise any arguments at the show cause hearing. Here, Appellants appeared through counsel, and actively and aggressively argued, albeit unsuccessfully, that they should be allowed to continue to occupy based upon title claims.

- Unlike in Truly, all substantive issues have been reviewed and ruled upon by both the Trial Court and the Court of Appeals. Vacating the judgment will not serve any purpose, alter the ultimate substantive results, provide Appellants with any additional opportunities to argue their position, nor provide any basis for Appellants to regain possession of the property. This is a dramatic distinction from the Truly case, where the merits of the case were never presented, at least to the Court of Appeals.

- Appellants have argued that the language in the Torkild Summons identified “only personal delivery as the proper manner for responding...” Motion to Dismiss, p. 2 (emphasis added). On the contrary, there is nothing within the pertinent language that “requires” personal or any other form of delivery. It simply declares that an answer

or notice of appearance be “delivered.” This language does not define how delivery is to occur or limit means to serve.

These important distinctions avoid application of Truly; otherwise, the very panel that decided Truly would not have denied Appellants’ Motion to Dismiss. Unlawful detainer actions are intended to be summary proceedings. There is no contention or question that Appellants fully presented their arguments, and all issues were fully litigated.

Equally important, allowing Appellants to apply Truly to this distinctive fact pattern will promote destabilization of land title and land possession. For instance, a tenant could fully participate in an unlawful detainer action and then years later move to vacate a judgment. In the meantime, the space may have a new occupant or owner. Given the above, the proper result is to recognize, as the Court of Appeals did, that the facts in this case are distinct from the relevant situation in Truly.

Even if the facts of this case were the same as Truly, application of the relevant standards to the Torkild Summons establishes that it complies. The Torkild Summons complies with the statutory requirements for the following reasons:

- RCW 59.18.365(1) identifies the language that “shall” be contained in an unlawful detainer summons. Although a fax number must

be included (which in this case there is), nothing in this provision requires that the summons state that an answer can be delivered via fax. Accordingly, there is no dispute that the Torkild Summons complies in all respects to RCW 59.18.365(1).

- Although RCW 59.18.365(3) provides a “form” sample summons that includes a list of ways that an answer or notice of appearance can be delivered, a summons need only “substantially” comply with this form.

- The language used in the Torkild Summons does not state that personal service is the only way to deliver an answer or notice of appearance. In fact, the only difference between the language used in the Torkild Summons and RCW 59.18.365(3) is the absence of the following language contained in the form summons that specifies the potential ways that delivery can occur, i.e., “by personal delivery, mailing, or facsimile to the address or facsimile number stated below....” By failing to list these methods, the Torkild Summons does not restrict or limit the ways in which Appellants could have delivered, but instead leaves every method available.

In fact, the language in the “form” summons in RCW 59.18.365(3) makes it clear that the language used in the Torkild Summons cannot be

interpreted as restricting service to “personal delivery.” Again, the form summons in the statute first states the same language used in the *Torkild Summons* that a notice of appearance or answer must be “delivered” to counsel or the landlord, then goes on to list the various ways that an answer can be delivered, including “personal delivery.” If the non-descript word “delivered” is interpreted as proposed by Appellants to mean “personal delivery,” then there would be no need to specifically cite this as a possible method to effect delivery. Specifically listing “personal delivery” as a method would be redundant.

- If the legislature wanted a summons to specifically say that “delivery can be accomplished via fax,” then it would have included this in the list of required language set out in RCW 59.18.365(1).

Given the above, the *Torkild Summons* should be found to comply with all statutory requirements. This particular case has been fully and fairly litigated, and all of Appellants’ arguments have been considered and rejected. Appellants do not contend that they were prejudiced by the *Torkild Summons*, and given their active participation in the case, none could be claimed. Given the above, *Torkild* respectfully requests that this Court conclude that the *Torkild Summons* complies with RCW 59.18.365 and deny the Motion to Dismiss.

II. If the Judgment Is Dismissed and Vacated for Lack of Subject Matter Jurisdiction, Appellants Would Not Be a Prevailing Party and Therefore Not Entitled to Fees.

Appellants have maintained in the past that they are entitled to attorneys' fees and costs under two separate statutes if the judgment is dismissed and vacated, relying upon RCW 4.84.330, which provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

As used in this section 'prevailing party' means the party in whose favor final judgment is rendered.

(emphasis added). Appellants have argued that they would be a "prevailing party" if the judgment is dismissed and vacated due to lack of subject matter jurisdiction for the same reason that one would prevail in a dispute where they successfully defeated the enforceability of a contract, Herzog Aluminum, Inc. v. General American Window Corporation, 39 Wn.App. 188, 692 P.2d 867 (1984), or promissory note, Yuan v. Chow, 96 Wn.App. 909, 915, 982 P.2d 647 (1999).

This is incorrect. In the above cases, the party awarded attorneys' fees obtained a judgment on the merits dismissing claims against them with prejudice under the pertinent contract and promissory note. In other words, the awarded party was free from further liability under the contract and promissory note. Neither case involved dismissal of an action based upon lack of subject matter jurisdiction, or a claim otherwise dismissed without prejudice.

Should the Court vacate the judgment based upon a lack of subject matter jurisdiction, then it must be "dismissed without prejudice." As explained in State v. Northwest Magnesite Co., 28 Wn.2d 1, 42, 182 P.2d 643 (1947):

However, we do not agree with the trial court that the order dismissing those respondents should be with prejudice to the state's cause of action against them. The court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties.

(emphasis in original). See also Peacock v. Piper, 81 Wn.2d 731, 734, 504 P.2d 1124 (1973) (case dismissed for lack of jurisdiction is not res judicata and is not a bar to a subsequent action).

For this reason, courts have consistently concluded that a party successfully obtaining vacation of a judgment based upon lack of subject

matter jurisdiction is not a “prevailing party,” including in an unlawful detainer action. Housing Authority of the City of Everett v. Terry, 114 Wn.2d 558, 570, 789 P.2d 745 (1990). For instance, in Richards v. City of Pullman, 134 Wn.App. 876, 142 P.3d 1121 (2006), the court dismissed a declaratory judgment action challenging a municipality’s decision that a home violated applicable setback requirements, based upon lack of subject matter jurisdiction. The City of Pullman then requested attorneys’ fees and costs under RCW 4.84.370(1), which allows an award to a “prevailing party” in an appeal of a land use decision.

The Court of Appeals denied the request, concluding that the city was not a “prevailing party” because the case was not adjudicated on its merits:

Pullman’s decision was not ‘upheld’ at superior court because the Richardses’ complaint for declaratory judgment was merely dismissed for lack of subject matter jurisdiction.....Dismissal for want of jurisdiction is not the same as a final decision on the merits...Consequently, Pullman is not entitled to attorney fees and costs pursuant to RCW 4.84.370(2).

Id. at 884; see also Overhulse Neighborhood Association v. Thurston County, 94 Wn.App. 593, 601, 972 P.2d 470 (1999).

Under the pertinent statute, a “prevailing party” is one in “whose favor final judgment is rendered.” RCW 4.84.330 (emphasis added); see

also Transpac Development, Inc. v. Oh, 132 Wn.App. 212, 217, 130 P.3d 892 (2006). If the judgment is vacated, then neither party will have a final “judgment” rendered in their favor. Instead, there will be no judgment at all. Moreover, if vacated, Appellants will not have “substantially prevailed,” in that they still have no legal right to possess the property, nor any legal determination that they do not have to pay unpaid rent or other monetary obligations.

The situation is similar to a case dismissed voluntarily without prejudice. In Wachovia SBA Lending v. Kraft, 138 Wn.App. 854, 158 P.3d 1271 (2007), the Court of Appeals considered for the first time “the applicability of RCW 4.84.330 to a CR 41 dismissal without prejudice....” Id. at 860. It first recognized that a dismissal without prejudice rendered “the proceedings a nullity and leave the parties as if the action had never been brought.” Id. at 861 (quoting Beckman v. Wilcox, 96 Wn.App. 355, 359, 979 P.2d 890 (1999)). It then noted that the statute specifically defined the “prevailing party” as the one who achieved a “final judgment.” This term, according to the court, was “facially unambiguous” and “refers to any court order having preclusive effect.” Id. at 860. A dismissal without prejudice “is not a final judgment because it is not a ‘formal decision or determination’ ‘leaving nothing further to be determined by

the court.” Id. at 861-62. Accordingly, where an action is dismissed without prejudice, there is no “prevailing party.”

Appellants have argued that they are entitled to fees pursuant to RCW 59.18.290(2), which provides as follows:

It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him, and the prevailing party may recover his costs of suit or arbitration and reasonable attorney’s fees.

Appellants have cited Soper v. Clibborn, 31 Wn.App. 767, 644 P.2d 738 (1982) as support, but in that case, unlike here, the defect in the proceeding resulted in a continued right to possess the property by the tenant. The landlord did not regain possession because he failed to provide proper notice. Here, a dismissal without prejudice will not cause Appellants to gain any right of possession.

The outcome here is instead controlled by the Supreme Court’s decision in Housing Authority of the City of Everett v. Terry, supra. There, an unlawful detainer action was dismissed for lack of subject matter jurisdiction. The tenant requested fees under RCW 59.18.290(2),

which were denied because the tenant did not meet the status of a prevailing party as defined in the statute:

In order to be awarded fees and costs as the prevailing party, a tenant must prove either that the lease was not terminated, or that the tenant held over under a valid court order. Although the Housing Authority failed to prove unlawful detainer, the question whether the lease was 'terminated' has neither been litigated by the parties nor briefed by appellant. Mr. Terry did not have a court order authorizing him to hold over in the premises. Therefore, he has not shown that an award of fees and costs is due him under RCW 59.18.290(2)....

Housing Authority of the City of Everett v. Terry, supra, 114 Wn.2d at 570-71.

The situation is even more dramatic here because both the Trial Court and Court of Appeals litigated Appellants' right to continue to occupy the property. Both confirmed that the lease had expired and that Appellants were not entitled to possession. There has been no determination that the lease was not terminated, or a valid order supporting a hold over. Appellants' request for fees and costs, should the judgment be vacated, is premature. They have not "prevailed" in any sense, but will have merely succeeded in prolonging the ultimate issues for another day.

Finally, even if either of the statutes could be applied to Appellants as a “prevailing party,” attorneys’ fees and costs should still be denied because they did not substantially prevail. Where, as here, there is no substantially prevailing party, attorneys’ fees should be denied. Peterson v. Koester, 122 Wn.App. 351, 364, 92 P.3d 780 (2004).

III. Claims to Title and Challenges to the Non-Judicial Foreclosure Sale Did Not Provide a Claim of Possession in the Unlawful Detainer Action.

Appellants’ attempt to challenge the non-judicial foreclosure sale to avoid the unlawful detainer action ignores the long-standing and well-recognized case law in this state. An unlawful detainer action is a summary proceeding to determine right of possession as between the parties. Mundeen v. Hazelrigg, 105 Wn.2d 39, 44, 711 P.2d 295 (1985). This Court has consistently concluded that counterclaims and other claims are not defenses, nor even available as claims in an unlawful detainer action. Id. (listing cases).

Appellants’ challenges to the procedures followed at the non-judicial foreclosure sale do not rise to a claim to possession, nor otherwise alter the conclusion that Torkild was entitled to possession as between these parties, for several reasons:

- First, even assuming that Appellants' title claims could constitute a defense, all of the claims have been dismissed by the Trial Court, as explained in Torkild's Response to Appellants' Petition for Discretionary Review, pp. 9-10.

- Second, even if the claims could be a basis to challenge possession, Appellants have waived the claims by failing to bring a pre-sale action to enjoin. In Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003), this Court accepted the numerous Court of Appeals cases that applied a waiver rule to post foreclosure challenges: "We agree that the waiver rule applied by the Court of Appeals in Country Express Stores, Steward, Krogel and like cases appropriately effectuates the statutory directive that any objection to the trustee's sale is waived where presale remedies are not pursued." Id. at 229. Waiver arises where the objecting party received notice of the right to enjoin the sale, had actual or constructive knowledge of a defense to foreclosure prior to the sale, and failed to bring an action to enjoin the sale. Id. at 227. Such waiver applies to all causes of action arising from the foreclosure proceeding. Brown v. Household Realty Corp. et. al., 146 Wn.App. 157, 189 P.3d 233 (2008).

Appellants raise a single challenge to the non-judicial foreclosure sale: the trustee, Pete Torkild, was married to Torkild, who was the sole

shareholder of First Capital, Inc., who was the holder of the underlying note and acquired the property based upon the value of the unpaid note. It is important to recognize the full scope of facts in relationship to this contention. The sequence of critical events commenced when Appellants fell behind on their promissory note to Horizon Bank. Horizon Bank therefore commenced a foreclosure proceeding. It was only after the foreclosure proceeding had been commenced that Appellants met Torkild. (CP 47-49). Torkild therefore had nothing to do with Appellants' failure to pay the underlying obligation, the occurrence of the foreclosure, or the commencement of the foreclosure proceeding. Equally important, as noted by the Court of Appeals in rejecting discretionary review of the dismissal of Appellants' title claims: "As far as the evidence shows, the Johnstons had no way to stop the foreclosure process and it would have occurred whether or not Peter and Julia played any part in it." Appendix C to Response of Respondent Julia Torkild to Appellants' Petition for Review, p. 7, n. 3.

More importantly, Appellants were aware of this relationship prior to the sale, CP 51-52, and received all notices required by the Washington Deed of Trust Act. Accordingly, they have waived the right to raise the claims in the unlawful detainer action.

- Third, even if not waived, the only post-sale challenge that has been recognized is one that includes two elements: (1) inappropriate action by the trustee; and (2) a grossly inadequate purchase price at the foreclosure sale; in other words, the actions caused a chilling of the sale. Cox v. Helenius, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985); see also, Country Express Stores, Inc. v. Sims, 87 Wn.App. 741, 749, 943 P.2d 374 (1997). Nowhere in this record have Appellants contended that the price paid at the foreclosure was inadequate, or there was a chilling of the sale. Accordingly, there is no basis raised to challenge the foreclosure proceeding.

DATED this 31st day of December, 2008.



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