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Case No. 92967-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SELENE RMOF II REO ACQUISITIONS, LLC

Petitioner,

v.

VANESSA WARD

Respondent.

**SUPPLEMENTAL BRIEFING OF PETITIONER
SELENE RMOF II REO ACQUISITIONS, LLC
PURSUANT TO R.A.P. 13.7(d)**

Submitted By:

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 ORIGINAL

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I. INTRODUCTION

Petitioner Selene RMOF II REO Acquisitions II, LLC (“Selene”) offers the following supplemental briefing for the Court’s consideration.

II. STATEMENT OF THE CASE

Ms. Ward is appealing the grant of a writ of restitution in Selene’s favor issued by the King County Superior Court. CP 87-91. On February 29, 2016, the Court of Appeals, Division One, reversed the decision below in an unpublished opinion. *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 192 Wn. App. 1050 (2016). On September 1, 2016, this Court accepted review.

III. SUPPLEMENTAL ARGUMENT

A. Statutory Rights Can be Transferred to a Subsequent Property Owner.

The Court of Appeals held that Selene was unable to pursue an unlawful detainer action because LaSalle Bank¹ was the trustee’s sale purchaser, and only a purchaser is authorized to bring an unlawful detainer action. *Ward, supra.* at *2. But this finding is contrary to precedent.

In *Udall v. T.D. Escrow Servs., Inc.*, this Court recognized that a trustee’s deed not only conveys existing property rights, but also those

¹ More specifically, LaSalle Bank National Association, as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-3. CP 2 at 3:4.

rights and interests which later accrue. 159 Wn.2d 903, 910, 154 P.3d 882 (2007), *citing* Rombauer, Washington Practice: Creditors' Remedies—Debtors' Relief § 3.68 (1998 & Supp. 2007).²

One such post-sale right is that a trustee's sale purchaser shall be entitled to possession twenty days after sale, and “also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.” RCW 61.24.060(1). This statute, however, does not make the purchaser's right exclusive or non-transferrable.

Case law establishes that statutory rights originally vested in one party can be transferred to a successor in interest. *See, e.g., BAC Home Loans Serv., LP v. Fulbright*, 180 Wn.2d 754, 757 n. 2, 328 P.3d 895 (2014) (merger transferred an “interest in statutory rights”); *Morcom v. Brunner*, 30 Wn. App. 532, 534, 635 P.2d 778 (1981) (allowing a subsequent owner to quiet title; “[e]ach successor is in privity with his predecessor in title.”); *accord Estate of Jordan by Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) (permitting enforcement of bond; “an assignee steps into the shoes of the assignor, and has all of the rights of the assignor. The assignee's cause of action is direct, not derivative.”) (citations omitted).

² Indeed, RCW 61.24.050(1) permits a trustee's sale purchaser to subsequently designate a different grantee, who equally obtains “all of the right, title, and interest in the real and personal property sold at the trustee's sale....”

Thus, an owner who acquires title from the trustee's sale purchaser is likewise able to expeditiously exercise its right to exclusive possession through a statutory unlawful detainer proceeding. *See Triangle Prop. Dev., LLC v. Barton*, 190 Wn. App. 1017 (2015) (unpublished), *citing Christensen v. Ellsworth*, 162 Wn.2d 365, 370-71, 173 P.3d 228 (2007) ("The purpose of an unlawful detainer action is to provide a speedy resolution of the right to possession of real property."); *accord Excelsior Mortg. Equity Fund II, LLC v. Schroeder*, 171 Wn. App. 333, 344, 287 P.3d 21 (2012), *citing City of Sunnyside v. Lopez*, 50 Wn. App. 786, 795 n. 7, 751 P.2d 313 (1988) ("The right to exclude others is an essential stick in the bundle of property rights."); *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) ("Washington courts have consistently recognized that 'the right to possess, to exclude others, or to dispose of property' are 'fundamental attribute[s] of property ownership.' ") (citation omitted).³

³ This principle has been accepted in other jurisdictions that allow summary eviction proceedings. *See, e.g., Fed. Home Loan Mortgage Corp. v. Petty*, 370 Mont. 551, 311 P.3d 442 (2013) ("Pursuant to § 71-1-319, MCA [which only references a purchaser], Freddie Mac was entitled to possession of the subject property as the successor to the purchaser at the trustee's sale."); *Newgard v. Freeland*, 196 Minn. 548, 549, 265 N.W. 425 (1936) (property conveyed via quitclaim to plaintiff after foreclosure was subject to scope of unlawful detainer); *Miller and Starr*, 5 Cal. Real Est. § 13:267 (4th ed.) ("any person who acquires the property from the purchaser" can obtain possession through unlawful detainer; like RCW 61.24.060(1), Cal. Civ. Proc. Code § 1161a does not expressly grant this right to a transferee).

Here, LaSalle Bank's Special Warranty Deed conveyed the subject real property to Selene in fee simple. RCW 64.04.040; CP 6-7. As a result, Selene acquired all of LaSalle Bank's rights, title, and interest in the property. *See, e.g., Libby v. Clark*, 118 U.S. 250, 255, 6 S. Ct. 1045, 30 L. Ed. 133 (1886) (an estate in fee simple is the entire interest in the property and land). This conveyance included use of the unlawful detainer process and protection from Ms. Ward's allegations which are beyond the scope of determining possession. *See Fed. Nat. Mortg. Ass'n v. Ndiaye*, 188 Wn. App. 376, 353 P.3d 644 (2015) (limiting issues).

The Court of Appeals should be reversed on this basis alone.

B. Ms. Ward Did Not Possess Color of Title.

Even if the statutory right in RCW 61.24.060(1) to pursue an unlawful detainer was found to be exclusive and non-transferrable, the Court of Appeals nonetheless erred in determining that RCW 59.12.030(6) does not apply because an unrecorded quitclaim deed "provides Ward color of title." *Ward, supra.* at *2.

An unlawful detainer action can be brought against:

[a] person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040.

RCW 59.12.030(6).⁴

The Court of Appeals primarily relied on *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (1998) for its conclusion that Selene could not rely on RCW 59.12.030(6) to pursue an eviction.

In *Bridges*, an investment group purchased property at a tax sale. *Id.* at 525. The *Bridges* Court found that the purchaser could not proceed under RCW 59.12.030(6) because the occupant possessed a statutory warranty deed giving him color of title. *Id.* at 527-528.⁵

But here, Ms. Ward did not have color of title. The Court of Appeals has noted that “RCW 59.12.030(6) does not define color of title, and the Washington cases that appear to define the term do so in the context of adverse possession.” *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.*, 124 Wn. App. 238, 245-46, 98 P.3d 498 (2004).

“Color of title” is therefore defined as “that which is a semblance or appearance of title, but is not title in fact nor in law. A claim to property under the terms of some conveyance, however incompetent to

⁴ Selene was the Property’s owner after the trustee’s sale regardless of whether RCW 61.24.060(1) afforded an independent basis to initiate an unlawful detainer action.

⁵ It is significant that the unlawful detainer statute is simply not available to a tax sale purchaser. *See* 17 Wash. Prac., Real Estate § 6.80 (2d ed.). Therefore, such purchaser lacks this statutory right, which would otherwise be subject to transfer upon conveying fee simple title. By contrast, as discussed above, Selene attained LaSalle Bank’s ability to invoke RCW 59.12 *et. seq.* by virtue of RCW 61.24.060(1).

carry or pass the title, is strictly color of title.” *Id.* at 502-503, *citing Bassett v. City of Spokane*, 98 Wash. 654, 656, 168 P. 478 (1917); *accord Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 53, 767 P.2d 1382 (1989) (“Title to real property can only be conveyed by a valid, acknowledged deed and *the conveyance must be recorded* in the county where the property is situated.”) (Emphasis added; citation omitted).

“The *Bassett* court also suggested that one must act in good faith in order to have color of title.” *Id.* at 503; *see also Petticrew v. Greenshields*, 61 Wash. 614, 621, 112 P. 749 (1911) (“[w]hen... the parties claiming by adverse possession have actual notice that there is an adverse claim to the property, or an interest therein, and that such claim is superior and paramount to the claim or interest which they acquire under their paper title, their possession is not ‘under claim and color of title, made in good faith.’ ”) (citations omitted).

In this case, Ms. Ward suddenly produced a 2004 unrecorded quitclaim deed in connection with a procedurally defective motion to dismiss Selene’s unlawful detainer action. *See* Amended Verbatim Report of Proceedings, 10:1-11:24; *see also* CP 28-34. The trial court did not consider Ms. Ward’s motion. *Id.* at 12:1-12:16.

However, even assuming Ms. Ward's quitclaim deed was properly placed in evidence, she could not attack Selene's record title during the unlawful detainer proceeding for two reasons.

First, Ms. Ward was precluded from such challenge under *Fed. Nat. Mortg. Ass'n v. Ndiaye, supra*. The rule that possession is the core issue to be decided under RCW 59.12 *et. seq.* makes sense for a subsequent owner like Selene, because Selene would be unable to reasonably defend against an occupant's claims pertaining to the foreclosing beneficiary's authority. Claims unrelated to possession must be raised in a different forum. *See also, e.g., Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113-114, 725 P.2d 385 (1988).

Second, Ms. Ward knew that Chester Dorsey held title even after 2004 because Mr. Dorsey obtained loans secured by deeds of trust which encumbered said title – and Ms. Ward made payments on those loans until a default occurred. CP 29 at 11:16.

Ms. Ward also failed to appropriately prevent the trustee's sale and raise a challenge to LaSalle Bank's enforcement of its mortgage lien before the sale occurred. *See Ward, supra* at *1 (“Ward acknowledges receiving the notice of the trustee's sale.”); CP 29-30 (Ms. Ward filed suit on the date of sale; it was later dismissed); *see also Crodle v. Dodge*, 99 Wash. 121, 132, 168 P. 986 (1917) (doctrine of laches is a “delay that

works a disadvantage to another.”); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007) (“The sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130.”).

The record shows Ms. Ward had actual notice of Mr. Dorsey’s title interest, which was later conveyed to Fred and Grace Brooks and then to James Dreier, yet she made no attempt to deny the same until it became apparent that Selene was about to evict her. Ms. Ward’s knowledge constitutes a lack of good faith and defeats her claimed color of title. *See Bassett, supra.; Petticrew, supra.*⁶

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⁶ But even if Mr. Dorsey had conveyed the Property back to Ms. Ward in 2004, she would have taken title subject to any existing liens and she could not challenge the same. *See State Finance Co. v. Moore*, 103 Wash. 298, 302, 174 P. 22 (1918) (the general rule in Washington is that a party who acquires mortgaged property takes it “subject to” an encumbrance and cannot dispute its validity.) LaSalle Bank was then entitled to take superior title to the Property by virtue of the trustee’s sale because Ms. Ward contends that the subsequent loans were refinances of the existing obligation. CP 29:12; *see also, e.g., Worden v. Smith*, 178 Wn. App. 309, 330, 314 P.3d 1125 (2013) (LaSalle Bank would have been equitably subrogated to the position of a priority interest holder).

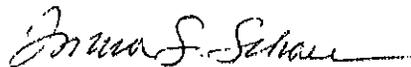
In sum, LaSalle Bank owned the Property after the trustee's sale and Ms. Ward did not have color of title when Selene, as successor owner, sought to evict her via an unlawful detainer action.⁷

IV. CONCLUSION

Based on the foregoing supplemental briefing, Selene requests that the Supreme Court reverse the Court of Appeals' decision and reinstate the writ of restitution.

DATED this 28th day of September, 2016.

RCO LEGAL, P.S.



By: /s/ Joshua S. Schaer
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Attorneys for Petitioner Selene
RMOF II REO Acquisitions II, LLC

⁷ From a policy standpoint, the occupant of foreclosed property should not be permitted to unexpectedly divulge an unrecorded title interest as a means of defeating a record owner's right to prosecute an unlawful detainer. To hold otherwise would incentivize individuals facing a lawful eviction to produce dubious records at the eleventh hour as "color of title" and compel the owner to undertake a lengthy, costly civil action in order to defeat the very type of claim which unlawful detainers are supposed to disallow.

Declaration of Service

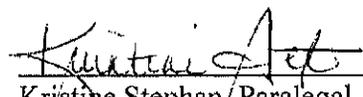
The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.
2. On September 28, 2016 I caused a copy of the **Supplemental Briefing of Petitioner Selene RMOF II REO Acquisitions II, LLC Pursuant to R.A.P. 13.7(d)** to be served to the following in the manner noted below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 28th day of September, 2016.



Kristine Stephan, Paralegal

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Selene RMOF II REO Acquisitions, LLC v. Vanessa Ward

Supreme Court No. 92967-0

Court of Appeals Div. I No. 72504-1-I

Filed by: Joshua Schaer

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Please file the attached **Supplemental Briefing of Petitioner Selene RMOF II REO Acquisitions, LLC Pursuant to R.A.P. 13.7(d)**.

If there are any questions, please contact us. Thank you.

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