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No. 64443-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

F. Christopher Pace,
Appellants

v.

JPMorgan Chase Bank, NA,
Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

- A. Whether the Paces waived their right to protest the foreclosure sale after the fact by failing to restrain the sale?
- B. Whether the trial court properly found that JPMorgan was entitled to possession of the property at issue?
- C. Whether JPMorgan Chase is entitled to its attorneys' fees and costs incurred in this appeal pursuant to RAP 18.1?

II. STATEMENT OF THE CASE

The Paces were the record owners of real property commonly known as 4948 Northwest Dr, Bellingham, WA 98226 (the "Property"). On or about February 2, 2005 the Paces executed a Fixed/Adjustable Rate Note in the amount of \$253,800.00 in favor of Long Beach Mortgage Company. *CP 104-106*. The Note goes on to state that "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." *Id.*

In connection with the Note, the Paces executed a Deed of Trust on February 2, 2005 concerning the Property. *CP 124-135*. The Deed of Trust was properly recorded with the Whatcom County Auditor on February 7, 2005 under Instrument No.

2050200919. *Id.* The beneficiary listed on the Deed of Trust was indicated as Long Beach Mortgage Company. The Deed of Trust also indicated at paragraph 19 “The Note or a partial interest in the Note (together with this security instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the “Loan Servicer”) that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.” *CP 129.*

Washington Mutual acquired Long Beach Mortgage and after the collapse of Washington Mutual, JPMorgan Chase Bank, NA acquired Washington Mutual. On or about October 10, 2008, JPMorgan Chase Bank, NA became the Note Holder and the Paces were notified in writing of the same as required by federal law. *CP 107-108.* Thus, the Paces were aware of JPMorgan Chase since at least October 10, 2008.

Also in October, 2008, the Paces ceased paying their mortgage. On or about March 16, 2009, JPMorgan Chase, through their agent Quality Loan Service Corp. issued a Notice of Default seeking payments from October 1, 2008 forward. *CP 109-111.*

After failing to cure the Notice of Default, JPMorgan Chase issued a Notice of Trustee's Sale and Notice of Foreclosure as required by RCW 61.24. *CP 112-120.* The Paces even took advantage of alternatives to foreclosure and applied for a loan modification on or about June 24, 2009, however, their paperwork was not complete by their own admission. *CP 142-144.*

On July 24, 2009, JPMorgan Chase foreclosed on the Property as a result of the Paces' non-payment of their mortgage. At the time of the sale, the Paces owed more than \$26,000.00 on their mortgage obligations. *CP 118.* The Trustee's Deed Upon Sale was issued on July 25, 2009 and recorded with the Whatcom County Auditor on August 4, 2009 under Instrument No. 2090800222. *CP 15-17.*

When the Paces failed to vacate the Property, a Notice to Vacate was issued on August 24, 2009. *CP 18-19.* When the Paces continued their refusal to vacate the Property, an unlawful detainer action was commenced on or about September 9, 2009 in

Whatcom County Superior Court. *CP 12-19*. The ruling in the unlawful detainer action is the basis for this appeal.

The Paces contested the unlawful detainer action and a show cause hearing was conducted on November 6, 2009. The Paces filed numerous documents with the trial court and made the same arguments as they make before this court at the hearing. However, the trial court issued the following ruling, to which counsel for the Paces agreed:

“The Court: The authority that you submit deals with a case where a person was suing on a note and the court acknowledges that the law is that the person who has standing to sue on a note is the holder of the note. And if a defendant in such a lawsuit claims that the plaintiff is not the beneficiary of that note, and not the valid holder, that that issue has to be resolved before any kind of a judgment can be entered.

This is not such a case. This is a case where there has been a foreclosure sale and there is a deed that’s granted at the time of the foreclosure. And the issue is who is entitled to possession of the property. Once a person buys at a foreclosure sale, then that purchaser is, as vis-à-vis an occupant of the property, entitled to possession unless the occupant has some other legal right like a lease that’s been filed and has priority to occupy the property.

If there was any claim that the plaintiff in the foreclosure sale or the beneficiary of the deed of trust didn’t have legal standing to go through the foreclosure sale, then the time to seek a stay of the sale is prior to the sale. An occupant of property is not entitled to come in after the sale has occurred and say that the sale shouldn’t have taken place.

So, if there’s some right of action or cause of action that your client has in damages, that’s one thing. But your client, as I see it, as I understand the law, clearly is not entitled to

possession of the property at this point. The owner by deed is entitled to possession.

Mr. Sturdevant: I understand, Your Honor. I understand you can't file a counter-claim for fraud or something like that. It is clear to me the bank is entitled to possession because they're a purchaser at a trustee sale."

Transcript, Pages 4-5.

The trial court issued Findings of Fact, Conclusions of Law and Judgment on November 6, 2009. *CP 2-4*. Additionally, a Writ of Restitution was issued. *CP 5-6*. No motion to stay enforcement of the Writ was filed and the Paces voluntarily vacated the Property after the Whatcom County Sheriff served them with the Writ of Restitution.

The Paces appeal the November 6, 2009 Judgment issued by the trial court awarding possession of the Property to JPMorgan Chase. The foundation of the Paces' argument is that JPMorgan Chase has no contractual privity with them and that the foreclosure sale was improper. Further, the Paces assert that this lack of contractual privity entitled them to a trial on the merits and that the November 6, 2009 Judgment was improperly issued by the trial court.

It is undisputed that the Paces failed to file any action prior to the foreclosure sale contesting the standing of JPMorgan Chase

to foreclose despite receiving numerous documents indicating that the foreclosing entity was, in fact, JPMorgan Chase.¹

III. ARGUMENT

The Paces urge this Court to engage in an inquiry concerning the proper holder of the note—an argument that was rejected by the trial court. Further, the Paces seek to have this Court void a trustee’s sale in a post-sale challenge. JPMorgan Chase argues that nothing before this Court warrants this Court to grant such extraordinary relief in derogation of the statute. There are no facts or circumstances before this Court which would undermine the trial court’s ruling in this matter. The July 24, 2009 foreclosure sale is valid and the November 9, 2009 Judgment issued by the trial court should stand.

The Washington Deed of Trust Act (RCW 61.24 et. seq.) sets out the following foundation for analysis of any foreclosure sale: “1) that the non-judicial foreclosure process should be efficient and inexpensive, 2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and 3) that the process should promote stability of land titles.”

¹ The October 10, 2008 correspondence referenced JPMorgan Chase. The March 16, 2009 Notice of Default referenced JPMorgan Chase. The April 22, 2009 Notice of Trustee’s Sale referenced JPMorgan Chase. The April 22, 2009 Notice of Foreclosure referenced JPMorgan Chase.

Cox v. Helenius, 103 Wn. 2d 383, 387, 693 P. 2d 682 (1985);
Plein v. Lackey, 149 Wn. 2d 214, 255, 67 P. 3d 1061 (2003).
Further, to preserve and foster these goals, the courts need to be cautious about voiding sales after the fact: “[u]ndermining public confidence in the finality of foreclosure sales is contrary to the Act’s goals of promoting efficient, inexpensive and procedurally sound foreclosures and the stability of land titles.” *Udall v. TD Escrow Services, Inc.*, 159 Wn. 2d 903, 916, 154 P. 3d 882 (2007).

The grantor must have the opportunity to cure and prevent foreclosure. *Cox v. Helenius*, 103 Wn. 2d 383, 387, 693 P. 2d 683 (1985). There are three ways to prevent a foreclosure: 1) the grantor can cure the default prior to the 11th day of the sale by paying the entire amount then due under the terms of the deed of trust pursuant to RCW 61.24.090(1)(a)(2) the grantor can stop the sale by paying, before the sale, the total principal balance plus accrued interest, costs and advances pursuant to RCW 61.24.040(1)(f)(IX); and 3) the grantor may file suit to restrain the trustee’s sale on any proper ground pursuant to RCW 61.24.130(1).

A proper foreclosure action extinguishes the debt and transfers title to the property to be beneficiary of the deed of trust or to the

successful bidder at a public foreclosure sale. *In re Marriage of Kaseburg*, 126 Wash. App. 546, 588, 108 P. 3d 1278 (2005).

A. Whether the Paces waived their right to protest the foreclosure sale after the fact by failing to restrain the sale?²

RCW 61.24.130 states in pertinent part that a person waives the right to contest underlying obligations on property in foreclosure proceedings when there is no attempt to employ pre-sale remedies. Waiver occurs, so as to preclude action by a party to set aside a completed trustee's sale, whenever a party: 1) received notice of their right to enjoin a trustee's sale; 2) had actual or constructive knowledge of a defense to foreclosure prior to sale; and 3) failed to bring an action to enjoin the sale. *In re Marriage of Kaseburg*, 108 P. 3d 1278 (2005); *Country Exp. Stores, Inc. v. Sims*, 943 P. 2d 374 (1997); *CHD, Inc. v. Boyles*, 138 Wash. App. 131, 157 P. 3d 415 (2007), review denied, 162 Wn. 2d 1022, 178 P. 3d 1033. This statutory procedure is the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. *Cox*, 103 Wn. 2d at 388.

Any objection to the trustee's sale is waived where presale remedies are not pursued. *Plein v. Lackey*, 149 Wn. 2d 214, 229,

² The foreclosure sale at issue in this matter occurred on July 24, 2009 which was prior to the changes concerning waiver to RCW 61.24.130.

67 P. 3rd 1061 (2003). Failure to seek presale remedies under the Act bars a borrower's claim arising out of any underlying obligation secured by the foreclosed deed of trust. *Brown v. Household Realty Corp.*, 146 Wash. App. 157, 167, 189 P. 3d 233 (2008), citing *Hallas v. Ameriquest Mortgage Co.*, 406 F. Supp. 2d 1176 (D.Or. 2005).

In *Peoples National Bank v. Ostrander*, the plaintiff brought an unlawful detainer action to obtain possession of property purchased at a trustee's sale. The defendants alleged that the plaintiff had obtained the deed of trust by fraud, by representing that the document defendants signed was a mortgage, not a trust deed. However, the evidence showed that the defendants knew several months before the trustee's sale that the document they had signed was a trust deed, not a mortgage. Because the defendants knew the facts that formed the basis for their fraud claim but failed to bring an action to restrain the sale, they could not assert fraud as a defense. The court held that to allow such a claim after the sale would be to defeat the spirit and intent of the trust deed act. *Peoples National Bank of Washington v. Ostrander*, 6 Wash App. 28, 30-32, 491 P. 2d 1058 (1971).

In the alternative, if the Court finds that there was a technical defect with the foreclosure sale because the foreclosing entity was JPMorgan Chase, the Paces must show that the circumstances surrounding the sale unfairly harmed or prejudiced them. *Albice v. Premier Mortgage Services of Wash., Inc.*, 239 P. 3d 1148, 1158-9 (2010), citing *Steward v. Good*, 51 Wash. App. 509, 515, 754 P. 2d 150 (1988).

The Paces do not contest that they received notice of the sale. The Paces do not contest that they received information about how to restrain the sale. The Paces do not contest that the foreclosure sale was conducted in compliance with the statutory requirements. Rather, the Paces argue the lack of contractual privity of JPMorgan Chase when they had ample knowledge prior to the sale of JPMorgan Chase's involvement in the foreclosure as well as their claim to be the beneficiary under the note and deed of trust.

B. Whether the trial court properly found that JPMorgan was entitled to possession of the property at issue?

RCW 61.24.060 states in pertinent part the purchaser at a trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust and anyone having an interest junior to the deed of

trust, including occupants and 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.

RCW 59.12.060 states in pertinent part that “[n]o person other than the tenant of the premises, and subtenant, if there be one, in the actual occupants of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him.” While RCW 59.12 is designed to provide expeditious, summary proceedings, it is in derogation of the common law and must be strictly construed in favor of the tenant. *Hous. Auth. Of Everett v. Terry*, 114 Wn. 2d 558, 563, 789 P. 2d 745 (1990). To take advantage of these summary proceedings, the purchaser must comply with all statutory requirements. *Id.* at 564; *see also Laffranchi v. Lim*, 146 Wash. App. 376, 383-4, 190 P. 3d 97 (2008).

An unlawful detainer brought under RCW 59.12.030 is a narrow proceeding, limited to possession and related issues such as rent and restitution. *Munden v. Hazelrigg*, 105 Wn. 2d 39, 45, 711 P. 2d 295 (1985); *Kelly v. Powell*, 55 Wn. App. 143, 150, 776 P. 2d 996 (1989). In order to protect the summary nature of the proceeding, other claims are generally not allowed. *Munden* 105 Wn. 2d at 45; *Kelly*, 55 Wn. App. at 150. An exception applies when the counter-claim, affirmative equitable defense or set-off is based on facts which excuse a tenant's breach. *Munden*, 105 Wn. 2d at 45 quoting *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 854, 679 P. 2d 936 (1984). The exception properly applies when resolution of the counter-claim is necessary to determine the right of possession. *Kelly*, 55 Wn. App. at 150 citing *First Union*, 36 Wn. App. at 854.

A landlord commences an unlawful detainer action by servicing a summons. RCW 59.12.070; *Big Bend Land Co. v. Huston*, 98 Wn. 640, 645, 168 P. 470 (1917). A landlord may request a show cause hearing to regain possession of the property. RCW 59.18.370. At the show cause hearing, the landlord has the burden of proving their right to possession by a preponderance of the evidence. *Hous. Auth. Of City of Pasco & Franklin County v. Pleasant*, 126 Wn. App. 382, 392, 109 P. 3d 422 (2005); citing

Duprey v. Dona hoe, 52 Wn. 2d 129, 135, 323 P. 2d 903 (1958). The tenant may assert any legal or equitable defense or set-off arising out of the tenancy. RCW 59.18.380. An unlawful detainer show cause hearing is a summary proceeding. *Pleasant*, 126 Wn. App. at 392; citing *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P. 2d 986 (2000). The court's jurisdiction in an unlawful detainer action is limited to determining the right to possession of the property. *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P. 2d 406 (1996). If it appears that the landlord has the right to be restored to immediate possession of the property, the court must issue a writ of restitution. RCW 59.18.380. However, if the tenant's answer raises an issue of material fact, the court must set the case for trial. RCW 59.12.130; *Pleasant*, 126 Wn. App. at 392-3; citing *Meadow Park Garden Assocs. V. Canley*, 54 Wn. App. 371, 372, 773 P. 2d 875 (1989).

Because title affects the right to possession, defenses related to title can be heard. However, by failing to seek the remedies afforded by RCW 61.24, et. seq., the Paces waived their right to assert this defense pursuant to RCW 61.24.040(1)(f)(IX). *Plein v. Lackey*, 149 Wn. 2d at 227-29; *Country Express*, 87 Wn. App. at 749-52; *People's National Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32-33, 491 P. 2d 1058 (1971).

The Paces failed to present a valid defense to an unlawful detainer action. The trial court lacks jurisdiction to resolve competing claims to title. *Puget Sound Inv. Group, Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998). Thus, even if JPMorgan Chase was not entitled to immediate entry of judgment, they would not be entitled to a full trial on the merits because they failed to present a cognizable defense to the unlawful detainer action.

C. Whether JPMorgan Chase is entitled to its attorneys' fees and costs?

JPMorgan Chase requests its attorneys' fees on appeal under RAP 18.1. RCW 59.18.290(2) allows an award of attorneys' fees and costs to a landlord who prevails in an unlawful detainer action. *Tippie v. Delisle*, 55 Wn. App. 417, 419-20 n.3, 777 P. 2d 1080 (1989); *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P. 2d 929 (1997). JPMorgan Chase is entitled to an award of attorneys' fees and costs.

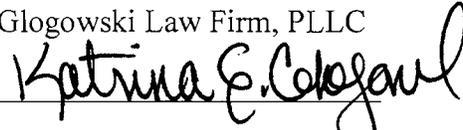
IV. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's entry of Judgment in favor of JPMorgan Chase.

Submitted this ___ day of December, 2010.

Respectfully submitted,

Glogowski Law Firm, PLLC

A handwritten signature in black ink that reads "Katrina E. Glogowski". The signature is written in a cursive style and is positioned over a horizontal line.

Katrina E. Glogowski, WSBA
#27483 Attorneys for Respondent