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71634-4

Court of Appeals No.71634-4-1
Island County Cause No. 11-2-01044-3

COURT OF APPEALS

DIVISION I.

OF THE STATE OF WASHINGTON

MICHAEL HARKEY
Appellant

v.

U.S. BANK, NA, its successors in interest
Respondent

BRIEF OF APPELLANT

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…The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property….

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The following actions shall be commenced within three years:

…

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

- RCW 4.28.200 **14, 27, 31**

If the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 and 4.28.180, he or she or his or her representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his or her representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

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- RCW 4.72.030 **30, 31, 33, 42**

RCW 4.72.010 (2), (3), (4), (5), (6), and (7) shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made,

- RCW 4.72.060 **31, 35**

The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action.

- Laws of 1965, ch. 74, § 1. **18**

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(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

- 1998 Wash. Legis. Serv. Ch. 295 (S.S.B. 6191);Section 1 added to RCW 61.24 **39**

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

- RCW 61.24.005 **21**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

…

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

- RCW 61.24.127(2)(a) **31, 32**

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

- RCW 61.24.130(4) **14, 27, 31, 32**

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

Court Rules

- RAP 2.5(a)(1) **18**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction,

- CR 55(c) **27, 28, 29, 42**

(c) Setting Aside Default.
(1) *Generally*. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

CR 60(b)(7) and (11) **14, 27-29, 31, 41-43**

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
…

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

…

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

- CR 60(e) **17, 30, 31, 33, 42, 43**

(e) Procedure on Vacation of Judgment.

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

1. The Superior Court Lacked Subject Matter Jurisdiction: Trustee NWTS Was An Unconstitutional Creation Of The Deeds Of Trust Act

2. The Foreclosure By NWTS Was Unlawful and *void ab initio* Under The Deed Of Trust Act:

A. MERS Did Not Qualify As Beneficiary Under The Note Because It Never Held The Note

B. As MERS Was Not A Beneficiary, It Had No Authority To Appoint NWTS As Trustee

C. The Attempt To Appoint NWTS As Trustee Was Made By U.S. Bank Which Neither Held The Note Nor Was Trustee

D. Trustee NWTS Was Not An Impartial Officer Of The Court

E. The Foreclosure In Violation Of The Deed Of Trust Act Was Void, Not Just Voidable

3. Harkey Is Not Foreclosed From Arguing The Defects Of The Foreclosure Post-Default Judgment

A. CR 55(c)(1) Provides A "Good Cause" Basis Upon Which A Default May Be Set Aside

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PREFACE TO APPELLANT'S BRIEF

This Brief is a duplicate of Appellant's Brief in Court of Appeals No. 71635-2-1, an appeal from Island County Case No. 10-2-00558-1. This Brief, filed in case no. 71634-4-1, is an appeal from Island County Case No. 11-2-01044-3.

The citations to Clerk's Papers in this Brief refer to those Papers in Court of Appeals No. 71635-2-1, except where express reference is made to those Papers in Case no. 10-2-00558-1.

STATEMENT OF THE CASE

Harkey obtained a loan from plaintiff US BANK, NA (hereinafter "the Bank"), in September 2007, and gave the Bank a deed of trust ("DOT") on his home on Camano Island in Island County. Under the DOT, Routh, Crabtree Olsen-James Miersma ("RCO")(a law firm licensed to do business in Washington with a specialty of representing banks and loan servicers) was the named Trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS"), an entity located in Michigan, was the named beneficiary. CP.62, Ex.A; CP.74, p.13.

When Harkey failed to make the monthly payment due in January 2008 (CP.1, p. 3, ¶3.4), RCO issued a Notice of Trustee's Sale in favor of MERS. CP.20, Ex.A. In April 2008, the Bank, through its agent Northwest Trustee Services, Inc. ("NWTS"), found Harkey in default under his loan. The Notice of Default was signed by a Rebecca Baker of NWTS. CP.67, Ex. B.

As illustrated in a *pro se* pleading filed by Harkey in November 2012, Rebecca Baker worked out of the office of RCO. CP.67, Ex. 2. Thus, NWTS was related to RCO and they shared that employee.

In June 2008, MERS issued an Appointment of Successor Trustee, appointing NWTS as successor trustee, signed by a Kim Stewart in the capacity of "Assistant Secretary" of MERS, though the certification, issued in the state of Kentucky, indicated that Kim Stewart actually signed it in her capacity as "Asst. Secretary of US Bank, NA" (CP.47, Ex.B) (CP.74, p.13).

On October 17, 2008, Harkey filed a Chapter 13 Petition in the U.S. Bankruptcy Court for the Western District. CP.20, Ex.C. Under the automatic stay provision of 11 USC §362, the filing of the petition operated as a stay of creditors' collection activities. No request granting relief from the stay was presented to or granted by the federal court. That court entered an Order dismissing Harkey's case on November 24, 2008.

The Bank filed suit against Harkey to quiet title of his home in July 2010 in Cause number 10-2-00558-1 (CP.1) and, claiming it could not serve Harkey in person or by mail, served Harkey by publication. CP.5, 12. The Bank obtained a default judgment against Harkey in that case on May 3, 2011. CP.17.

On May 31, 2011, Harkey filed a motion through counsel to set aside the default judgment under CR 55(c) and CR 60(b)(7) and (11). The motion was founded on RCW 61.24.130(4), claiming that a trustee may not set a sale date less than 45 days after the date of dismissal of a bankruptcy, and must comply with the various notice and posting requirements of RCW 61.24.040 at least 30 days before the sale date.

The Bank stated that it postponed a sale date from October 20, 2008, to December 1, 2008, and from December 1, 2008, to December 5, 2008, when it sold Harkey's home. CP.1, ¶3.11).

Harkey also based his motion to set aside the default on RCW 4.28.200, which provides that a defendant who has not been served personally shall be permitted, within one year of the entry of judgment, to defend himself in the action, "on such terms as may be just." CP.19, p.4, ll.10-16.

Island County Superior Court denied Harkey's motion to set aside the default, ruling that Harkey (1) failed to enjoin the sale before it occurred; (2) failed to make a claim for damages within two years after the sale (by December 2010); and (3) that postponing or setting a sale

date within the 45 days does not violate the bankruptcy court rules. CP.27.

Harkey then filed, *pro se*, a number of motions and other pleadings in December 2011 and February 2012, and requested a hearing in March 2012 on the claims he stated in his two previous pleadings: that NWTS was not properly appointed, that MERS was not a lawful beneficiary, and that RCO acted collusively with MERS and NWTS. CP.33, 34, 35, 36, 37, 38, and 39.

In March 2012, Harkey noted up a "Special Hearing (CP.40), to which the Superior Court responded by a letter ruling informing Harkey that though his March request was not presented on the calendar, it would rule on it anyway, and found that his claims did not meet the criteria under CR 65(b). The court also noted the December and February filings and ruled that they had yet to be scheduled for a hearing. CP.41.

Harkey, through counsel, then filed a motion for various relief in April 2012, CP.45, 46 and 47, again raising MERS' qualifications under the DOT, who Kim Stewart is and what authority she had to assign trustee status to NWTS, and that the Bank's unlawful detainer action in Case

number 11-2-01044-3 (naming Harkey as a "John Doe" though it knew of Harkey) was unwarranted because the foreclosure was improper. CP.1 of that case.

At a hearing on April 24, 2012, the Superior Court denied Harkey's motion, though it also requested more briefing on the void *ab initio* issue. CP.78, Exhibit 6.

Harkey, *pro se,* then filed more motions in August and November, 2012, and in January 2013. None of these motions were noted to be heard.

In October 2013 Harkey filed a motion to Vacate Void Judgment, through counsel, raising again the issue of MERS' qualification as a beneficiary, the appointment of NWTS, the relationship between RCO and NWTS, that Kim Stewart had no authority to assign successor trustee status to NWTS, and that the default judgment was void. Harkey also claimed that RCO had committed a fraud upon the court. CP.74.

In December 2013 the Superior Court denied the motion to set aside the default, stating that it had reviewed all the files to date in both the quiet title case and the unlawful detainer case,

and ruled that Harkey failed to show cause under CR 60(e), failed to bring a claim for damages, that Harkey's claim of fraud was time barred, that the court had no authority to vacate the trustee's sale, and that "[t]he law does not permit piecemeal motions." CP.86.

In January 2014 Harkey filed a motion to reconsider, claiming the court lacked subject matter jurisdiction by reason that the creation of a Deeds of Trust Act ("DTA") trustee was unconstitutional and that the trustee, NWTS and their counsel RCO, were not neutral parties. CP.89. The Superior Court denied the motion without analysis in February 2014. CP.95. This appeal followed.

ARGUMENT

Lack of Subject Matter Jurisdiction: NWTS Was An Unconstitutional Creation Of The DTA

The Superior Court lacked subject matter jurisdiction to acquiesce in trustee NWTS' nonjudicial foreclosure of Harkey's home and the eviction of Harkey from his home based on the wrongful foreclosure, both by reason that the court had no authority to approve the actions of an unconstitutionally appointed trustee.

It is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal. Deschenes v. King Cnty., 83 Wash. 2d 714, 716, 521 P.2d 1181, 1182 (1974).

Lack of subject matter jurisdiction may be raised for the first time on appeal. RAP 2.5(a)(1); In re Marriage of Scanlon, 110 Wash.App. 682, 685, 42 P.3d 447 (2002). Therefore, there is no merit to the Banks's claim that Harkey waived this issue by not raising it earlier than when he raised it, in his motion to reconsider filed in January 2013. CP.89.

Foreclosures were done judicially until 1965, when the DTA was enacted. The legislature enacted the DTA to allow a trustee to conduct nonjudicial foreclosure of deeds of trust. Laws of 1965, ch. 74, § 1. Washington Fed. Sav. & Loan Ass'n v. McNaughton, 325 P.3d 383, 387-88 (Wash. Ct. App. 2014). The constitutionality of nonjudicial foreclosures was raised in Klem v. Washington Mut. Bank, 176 Wash. 2d 771, 790, 295 P.3d 1179, 1189 (2013).

Const. art. IV. §6 provides, "The superior court shall have original jurisdiction in all cases at law which involve the title or

possession of real property…." Thus, when the constitution grants exclusive jurisdiction to the superior courts, the legislature cannot restrict it by statutorily creating a trustee to decide title to land through a nonjudicial foreclosure procedure; and legislation that has the purpose or effect of divesting those courts of that jurisdiction are void. Moore v. Perrot, 2 Wash. 1, 3, 25 P. 906, 906 (1891); State v. Posey, 174 Wash. 2d 131, 135, 272 P.3d 840, 842 (2012).

Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case. Buecking v. Buecking, 179 Wash. 2d 438, 448, 316 P.3d 999, 1003 (2013).

The Bank has argued that the Superior Court had subject matter jurisdiction because it had the ability to entertain the Trustee's request to quiet title following nonjudicial foreclosure.

However, the Superior Court lacked subject matter jurisdiction because it has no ability to approve an act of a statutorily created trustee acting in usurpation of authority given exclusively by the state's constitution to the superior court. By analogy, if a party requests relief in state court of a federal firearm law,

the state court will lack subject matter jurisdiction to hear the request.

Likewise, where a DTA trustee seeks relief in superior court over an issue of title to land, an issue over which that court undeniably has jurisdiction, that does not provide the court with subject matter jurisdiction to entertain the request of a party that has no authority to even bring the suit: the DTA trustee.

Subject matter jurisdiction is not something that can be invoked by what a DTA trustee does or fails to do, for as stated in Sprint Spectrum, LP v. State, Dep't of Revenue, 156 Wash. App. 949, 965, 235 P.3d 849, 856 (2010), that view undermines the fixed nature of a tribunal's power, which is that, "Jurisdiction exists because of a constitutional or statutory provision…." *Id.*

The Bank has also argued that because a borrower has a right of recourse to a superior court if a nonjudicial foreclosure is unlawful, that therefore there is no usurpation of the court's constitutionally granted exclusive jurisdiction. However, the fact that other parts of the DTA may preserve access to courts is

immaterial to the fact that the DTA unconstitutionally grants authority to a trustee over matters given exclusively to the superior court.

By reason that the DTA trustee was an unconstitutional creation of the legislature, per Const. art. IV. §6, the Superior Court had no subject matter jurisdiction to entertain the quiet title action brought against Harkey's home by that trustee; thus the nonjudicial foreclosure was void and the case should have been dismissed at the outset.

The Foreclosure Was *void ab initio*: MERS Did Not Qualify As Beneficiary As It Never Held The Promissory Note

Under the inherent power of the court, a void judgment can be attacked at any time. Metro. Fed. Sav. & Loan Ass'n of Seattle v. Greenacres Mem'l Ass'n, 7 Wash. App. 695, 699, 502 P.2d 476, 479 (1972). In the case at hand, MERS was identified in the DOT as the beneficiary. However, to be a beneficiary under the DTA, MERS must actually be a holder of the Note. Bain v. Metro. Mortgage Grp., Inc., 175 Wash. 2d 83, 98-99, 285 P.3d 34, 38-39 (2012); RCW 61.24.005(2).

The DOT described MERS as the "nominee" trustee for the Bank, that is, MERS acted as a contractually agreed upon beneficiary for the Bank. However, this limited MERS to an administrative role, as it has no rights to payments under the DOT and the Note. This role of MERS has been criticized because it makes it difficult, if not impossible, to identify the current holder of a particular loan (Bain, at p.97), and has given rise to much litigation and concern about possible errors in foreclosures, misrepresentations, and fraud. Id.

As MERS did not hold the Note, it was not a beneficiary under the DTA. Hence, any action taken by MERS following the creation of the DOT, such as the subsequent judgment in favor of the Bank, was void *ab initio*.

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The Foreclosure Was *void ab initio*:
As MERS Was Not A Beneficiary It Had
No Authority To Appoint Trustee NWTS

Because MERS was never a beneficiary, it could not assign trustee status to NWTS. Bavand v. OneWest Bank, F.S.B., 176 Wash. App. 475, 487, 309 P.3d 636, 642 (2013) concluded that a reasonable reading of former RCW 61.24.010(2) (as amended in 2012) is that a successor trustee must be properly appointed to have the powers of the original trustee. Bavand at p. 510.

Without MERS having the authority to appoint NWTS as a successor trustee, the latter was not vested with any of the powers of the original trustee under the DOT. Specifically, NWTS had no authority to conduct the foreclosure and trustee's sale of Harkey's home. See, Bavand at p. 488.

The consequence of the unlawfulness of MERS's attempt to appoint NWTS as trustee is that the foreclosure and subsequent sale of Harkey's home is void. See, Bavand at p. 492, relying upon Cox v. Helenius, 103 Wash. 2d 383, 388-89, 693 P.2d 683, 686 (1985).

The Foreclosure Was *void ab initio*: The Appointment Of NWTS Was Made By The Bank, Which Neither Held The Note Nor Was Trustee

MERS' appointment of NWTS as Successor Trustee was done by a document signed by Kim Stewart. While Kim Stewart purportedly signed as an officer of MERS, the notary certification described Kim Stewart as signing the document as "Asst. Secretary of US Bank, NA."

For Kim Stewart's signature to be effective, the Bank must have been the trustee; however, there is no evidence the Bank was a trustee with a power of appointment, or was a beneficiary that held the Note. To the contrary, according Harkey's sworn statement, The Federal Home Loan Mortgage Corporation (FHLMC), Freddie Mac, was the owner of the Note and the Bank was just the servicer of the Note. CP.65, p.3, ll.14-17.

Therefore, NWTS not only was being assigned successor trusteeship by MERS when the latter had no authority to assign that to NWTS, but was also appointed through a document signed by a person on behalf of the Bank, which was not a beneficiary or a trustee. This failure to comply with the DTA is likewise an example of why the foreclosure and later sale of Harkey's home by NWTS was void. See, Bavand at p. 490.

The Foreclosure Was *void ab initio*: NWTS Was Not An Impartial Officer Of The Court

The law firm RCO, the original trustee under the DOT, (a) represented successor trustee NWTS (b) had the same employee in common (Rebecca Baker) with NWTS when the latter issued the Notice of Default under Harkey's loan, (c) conducted the sale of Harkey's home through NWTS, (d) represented the Bank in its suit against Harkey in the quiet title action in Cause number 10-2-00558-1, and (e) represented the Bank in the unlawful detainer action it filed against Harkey in Cause number 11-2-01044-3 (CP.1 of that case).

In a nonjudicial foreclosure, *the trustee undertakes the role of the judge as an impartial third party* who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. Klem at p. 790. Further, the trustee must be neutral, which excludes an entity that has an economic interest in the outcome. Klem at 789.

Klem also stated at p. 790 (footnote omitted): "An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a

minimum to satisfy the statute, the constitution, and equity." Klem warns that neither due process nor equity will permit the mechanism for nonjudicial sales to become "a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure." Id. Were that the case, it would be "…at the risk of having the sale voided, title quieted in the original homeowner…." Id.

Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high. Cox at pp. 388-89.

RCO was the Trustee in the DOT at hand, but it also represented NWTS, the entity that conducted the sale of Harkey's home; Rebecca Baker of NWTS worked out of RCO's office and signed off on the Notice of Default of the loan; RCO was the law office that filed the complaint to foreclose upon Harkey's home, opposed Harkey's allegations regarding the assignment to NWTS from MERS, and filed the unlawful detainer action against Harkey to remove him from his home.

NWTS and its counsel were not neutral, impartial, officers of the court; neither did it assure that MERS was a qualified beneficiary; and both RCO and NWTS had an economic interest in the outcome based on their undisputed involvement at every level of the foreclosure. For these reasons the nonjudicial foreclosure undertaken by RCO and NWTS was void from the outset.

Harkey Is Not Foreclosed From Arguing The Defects Of The Foreclosure Post-Default Judgment

CR 55(c)(1) Provides A "Good Cause" Basis Upon Which A Default May Be Set Aside

29 days after the court entered a default judgment against Harkey, he filed his May 2011 motion to set aside the default. The motion was based on two rules: CR 55(c) and CR 60(b)(7) (by reason of the service by publication).

The motion to set aside the default was based on RCW 61.24.130(4), which states that following a dismissal of a bankruptcy proceeding a trustee may not set a sale date within 45 days of the dismissal (the federal court entered its dismissal on November 24, 2008, and the sale date was set nine days later, on December 5, 2008); and was based on: RCW 4.28.200, which allows a

defendant who has not been served personally one year to defend himself in the action, "on such terms as may be just." Here, Harkey filed his motion 29 days after the entry of the default judgment.

Critically, Harkey's motion stated (at CP.19, p.6), "If … given an opportunity to defend against the Complaint, he would be able to … have the Complaint at hand decided on its merits." Considering he had been defaulted in the case by being served by publication, he was requesting the court determine his case on its merits.

The Superior Court denied the motion in a letter ruling (CP.27), on the basis that a motion under CR 55(c) "may be set aside in accordance with CR 60(b)," citing the four-part test in Morin v. Burris, 160 Wash. 2d 745, 755, 161 P.3d 956, 961 (2007).

CR 55(c)(1) states, "*Generally*. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)."

55(c)(1) provides two "avenues" by which a default may be set aside: (1) for good cause shown and upon terms that are just; and (2) in accordance with CR 60(b). Thus, to set aside a default, a party need not to comply with 60(b) in every instance; it simply permits a party under "avenue (2)" the additional ability to obtain relief under 60(b) from a judgment that is one of default. The bottom line is that there are two ways to set aside a default, and 60(b) does not limit or control "avenue (1)" of 55(c)(1).

In Harkey's case, he provided good cause – his automatic stay argument, the argument that he had a year to defend himself, as well as his general request to remove the default so he may be permitted to address the merits of the case. These three arguments should be been sufficient to satisfy "avenue (1)" of CR 55(c)(1), and the Superior Court erred by requiring that in all instances 60(b) governs 55(c)(1).

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CR 60(e)(1) Does Not Require All Potential Defenses To Be Raised Or Be Deemed Waived

When the Superior Court denied Harkey's May 2011 motion to set aside the default, it ruled that Harkey failed to: (1) seek a restraining order prior to the sale, constituting a waiver of the right to challenge the foreclosure after the sale; (2) assert a timely claim for damages under RCW 61.24.127(2)(a); and (3) present evidence of a defense to the bank's claims in this case. (CP.27, pp.3, 4).

Essentially, the Court applied CR 60(e)(1), which requires a motion to be filed that states the grounds upon which relief is sought, and an affidavit setting forth, for a defendant, "…the facts constituting a defense to the action…." This is consistent with RCW 4.72.030, which requires a verified petition that sets out among others, for a defendant, "…the facts constituting a defense to the action…."

Both §.030 and 60(e)(1) require setting out facts that constitute "a defense to the action;" they do not mandate that a defendant set out *all* defenses he may possibly have to set aside a default. See, State v. Wells, 7 Wash. App. 553,

556, 500 P.2d 1012, 1014 (1972), which refers to the singular form of setting out "a defense."

Further, under RCW 4.72.060 a court may first determine whether to vacate a judgment and later try the underlying issues in the case, which is an approach consistent with not needing to address all issues that could possibly be raised in a motion to set aside/vacate a default.

Harkey presented two defenses (RCW 4.28.200 and RCW 61.24.130(4)) as part of his motion to set aside the default; Harkey also requested the default be set aside so the merits of the case may be addressed. This complied with the requirements of both §.030 and 60(e)(1); thus the Court's denial of Harkey's May 2011 motion to set aside the default, to the extent it was based on CR 60(b)(7), was in error.

Further, the Court was in error for denying Harkey's motion based on grounds of waiver, ruling that Harkey did not make a timely claim for damages under RCW 61.24.127(2)(a). As waiver is an equitable defense, in order to allow that defense to the Bank, it must come to court with clean hands. J. L. Cooper & Co. v. Anchor Sec. Co., 9 Wash. 2d 45, 71, 113 P.2d 845, 857 (1941).

Based on the numerous defects related to the conduct of the foreclosure described in this brief to this point, the Bank did not qualify to raise waiver as a defense.

Bavand addressed at p. 490-91 a similar claim of waiver under RCW 61.24.130 and RCW 61.24.127, and reiterated Klem (at p.783) stating that waiver will be applied only where it is equitable under the circumstances and where it serves the goals of the DTA.

Bavand also ruled at p. 492 that a waiver cannot occur in any event where the trustee acts unlawfully in a nonjudicial foreclosure under RCW 61.24.130, and the sale is void. In such cases, there is no waiver of the right to seek and obtain relief.

In Frizzell v. Murray, 170 Wash. App. 420, 427, 283 P.3d 1139, 1142-43 (2012), as amended (Sept. 25, 2012), review granted, 176 Wash. 2d 1011, 297 P.3d 707 (2013) and rev'd in part, 179 Wash. 2d 301, 313 P.3d 1171 (2013), that court stated, with Bavand's approval (at p. 494), that a waiver will be applied "only where it is equitable under the circumstances and serves the WDTA's goals."

Considering that in the case at hand the DTA was not complied with by either the Bank, by MERS, or by NWTS, the defense of waiver may not be equitably applied against Harkey on the basis that he did not assert a claim of damages, and thus prevent him from raising his numerous claims over how the foreclosure was conducted.

In December 2013, the Superior Court denied Harkey's October 2013 motion to Vacate Void Judgment, which motion raised issues of MERS' qualification, appointment of NWTS, relationship between RCO and NWTS, Kim Stewart's authority to assign NWTS, and that RCO had committed a fraud upon the court.

In denying the October 2013 motion, the Superior Court again ruled that Harkey failed to comply with CR 60(e) (CP.86). Harkey reiterates his arguments as to that ruling. However, at ¶14 of its ruling the Court also stated that, "Harkey was required to assert <u>any argument</u> in favor of vacating the default judgment when he first moved to set it aside in May 2011" (emphasis added). That is the very point that Harkey opposes in his argument: *both* RCW 4.72.030 and 60(e)(1) require a defendant to set out "a defense to the action;" not *any and all* defenses potentially available.

Harkey May Argue Fraud, Post-Default Defects

In its ruling in December 2013 the Superior Court ruled that Harkey's claims of fraud are time barred; However, under RCW 4.16.080(4), Harkey had three years from "the discovery by the aggrieved party of the facts constituting the fraud" to file his claim.

The first evidence of record referencing the allegation of fraud was Harkey's motion filed December 1, 2011, but that motion contains no indication when he discovered the fraud, hence there is no fact of record to indicate that he discovered it more than three years before at least December 1, 2011, hence there is no fact of record to support the finding that Harkey violated that statute of limitations.

Finally, in its December 2013 ruling, the Superior Court also ruled at ¶14, upon no citation to authority, that, "The law does not permit piecemeal motions…." In fact, that is not a correct statement; rather, it is that piecemeal litigation "should be avoided." Lenk v. Dep't of Labor & Indus., 3 Wash. App. 977, 986, 478 P.2d 761, 767 (1970).

Further, whether a course of litigation is to be considered "piecemeal" depends on the circumstances of a case. See, Beels v. Dep't of Labor & Indus. of State of Washington, 178 Wash. 301, 308-09, 34 P.2d 917, 920 (1934) (where the "spirit and purpose" of a statutory scheme is to be considered.)

In the case at hand there was a finding of a default, followed by a motion to set aside the default so the merits of the case may be heard, followed by a slew of motions from Harkey in which he clearly illustrated the numerous defects of the underlying foreclosure of his home. Then there is RCW 4.72.060, which permits a court to first determine whether to vacate a judgment, and later try the underlying issues. Under these circumstances, Harkey is not to be faulted by raising his issues when he raised them.

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U.S. Bank's Unlawful Detainer Action Was Improper Because The Foreclosure Was Unlawful

The Bank's Unlawful Detainer action in Cause number 11-2-01044-3 was unwarranted because the foreclosure was improper. Further, naming the defendant "John Doe" though it knew Harkey's name and interest, was unreasonable on its face. See, Bresina v. Ace Paving Co., 89 Wash. App. 277, 282, 948 P.2d 870, 872 (1997).

As NWTS improperly conducted the foreclosure sale, for the various reasons set forth in this brief, the Bank's unlawful detainer action was an unlawful action and was therefore void and of no effect.

The Cases Ruling On The DTA And Foreclosure Practices Of MERS And NWTS Apply To This Case

No Res Judicata; This Is An Open Case

Harkey requested the court to vacate the default because at the time the default was entered, the Superior Court did not have the benefit of decisions issued during the pendency of this case in Superior Court, in particular, Bain (2012) and Bavand, (2013).

The Bank claims those decisions may not be considered by reason of the doctrine of *res judicata*. CP.82, p.9, ll.17-19. That doctrine does not apply to those cases; for the doctrine to apply, the prior cases must have a concurrence of identity with this case in (1) subject matter, (2) cause of action, *and* (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Loveridge v. Fred Meyer, Inc., 125 Wash. 2d 759, 763, 887 P.2d 898, 900 (1995). Clearly, the third element is missing.

The Bank also relies upon Columbia Rentals, Inc. v. State, 89 Wash. 2d 819, 576 P.2d 62 (1978), a case in which a trial court was reversed after it applied a 1967 decision to a number of boundary issues from prior cases resolved in 1961. However here, Harkey's "prior case," the case at hand, was not yet resolved - litigation in the trial court matter was still active when Bain and Bavand were ruled upon.

As this case was still being litigated in the Superior Court when Bain and Bavand were decided, the rulings in those cases may be freely applied to the case at hand.

The Post-Foreclosure Disqualification Of MERS As A Beneficiary Relates Back To The Enactment Of The DTA

In Bain at pp. 98-99, the court ruled that to be a beneficiary under the DTA, MERS must actually be a holder of the Note. Notwithstanding that this ruling in 2012 post-dated the 2008 foreclosure in Harkey's case, the Bain ruling applies to the foreclosure in Harkey's case.

The rationale to support that conclusion originates from the separation of powers that created division of functions among each branch. The fundamental function of the judicial branch is judicial review, which includes the authority to interpret the law. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

The principle of separation of powers was incorporated into the Constitution of Washington State in 1889. Consistent with the federal courts, "[i]t is emphatically the province and duty of the judicial department to say what the law is." (quoting Marbury, 5 U.S. (1 Cranch) at 177 (quoting United States v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

With that background, the court in Hale v. Wellpinit Sch. Dist. No. 49, 165 Wash. 2d 494, 506, 198 P.3d 1021, 1026 (2009), stated, "We have also said that '[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it.'"

The Hale court continued by stating, "In other words, it is within this court's 'appropriate sphere of activity' to determine what a particular statute means, and that determination relates back to the time of the statute's enactment. (Emphasis added.)

Therefore, the construction of "Beneficiary" in the DTA in effect at the 2008 foreclosure, which was the 1998 version of the DTA, includes the requirement that the beneficiary actually hold the DOT. The Bank may not avoid that construction by being the nominee for the Bank, by being defined under an agreement between the parties to the DOT, or otherwise through consent of the borrower. That is, the construction determined in the 2012 case of Bain relates back to the 1998 version of the DTA that governed the 2008 foreclosure.

CONCLUSION

Michael Harkey was served by publication in a suit brought by the Bank to foreclose upon his home; a default judgment was entered against him. 29 days later he moved to set aside the default on arguments based on his bankruptcy proceeding, that he had a year to defend himself in the action, and that he wanted to have the court determine his case on its merits.

The merits of his case would have revealed significant irregularities: RCO, the trustee on the DOT, was the law office that represented the Bank against him, was associated with trustee NWTS that later conducted the sale of his home, and had an employee in common with NWTS. In short, RCO was not an impartial, neutral, officer of the court as to the task of conducting a nonjudicial foreclosure.

MERS, the named and supposed beneficiary under the DOT, was in fact not a qualified beneficiary, and thus had nothing to assign to NWTS that could make NWTS a legitimate successor trustee under the DOT, and the individual who assigned the trusteeship from MERS to NWTS did so

in her capacity of yet another entity, the Bank, when the Bank was simply the servicer of the loan to Harkey. In short, the merits of the case - containing numerous violations of the DTA - were firmly on the side of Harkey.

The court denied Harkey's initial motion, and several subsequent motions by Harkey, some with counsel but most with Harkey trying to right the wrong *pro se*, on the basis that Harkey failed to present the court with his DTA violations in his initial motion based upon the court's rulings based on CR 60(b). The irony of this disposition of Harkey's request is two-fold.

First, in 2012 and 2013, two significant cases (Bain, by the Supreme Court, and Bavand, by this court) were issued that revealed the unlawfulness of MERS' participation as a beneficiary under the DTA, which thus undermined the authority of NWTS to serve as a trustee. This finding, while applicable to Harkey's case as it was still being litigated, could not have been known when Harkey brought his first motion to the court.

Second, the Superior Court's application of CR60(b) was incorrect, for it ruled that a default under CR 55(c)(1) is controlled in all respects by CR 60(b). However, if that were the case, there would be no reason to have 55(c)(1). A correct and harmonious reading of both 55(c)(1) and 60(b), is that all defaults may be set aside for good cause shown and upon just terms, and, so as not to foreclose a party that may want to rely upon 60(b), also permits a judgment for default to be set aside in accordance with the requirements of that rule.

When the Superior Court ruled for a second time to deny Harkey's motion to vacate the default, the court presented an additional ruling that was likewise in error: it ruled that under CR 60(e), Harkey was required to present in his initial motion <u>all</u> defenses he had to the Bank's case against him. However, both the wording of the court rule and an associated statute (RCW 4.72.030) require the presentation of, at least, a singular defense. Thus, it not fatal to Harkey's case to have raised just the three defenses he raised in his initial motion.

The Bank's response was predictable: faced with Bain and Bavand, the Bank placed its hope in this case on preventing any court from ruling on the merits of the foreclosure of Harkey's home. Thus the emphasis on the initial motion Harkey filed, the reliance upon CR 60(b) and 60(e)(1), and the attempt to avoid the application of Bain and Bavand (through an imperfect claim of *res judicata*) to the foreclosure at hand.

In his motion for reconsideration, Harkey brings up an issue not addressed directly by any court, though it was alluded to in Klem (at p.790), which is whether it is constitutional for the legislature to create under the DTA a trustee to conduct nonjudicial foreclosures.

As art. IV. §6 grants exclusive jurisdiction to the superior courts in all cases at law that involve the title or possession of real property, the legislation that created the DTA trustee conflicted with that grant of jurisdiction.

Even if the DTA trustee may substitute for a superior court judge, the trustee must still be independent, owes a duty to act in good faith, exercise a fiduciary duty, and act impartially to both the lender and debtor. Id.

No trustee in Harkey's case satisfied that requirement. Under the Superior Court's equity powers, this alone supported Harkey's claim that the Bank's action to foreclose upon the loan through NWTS was void from the outset.

Finally, because the foreclosure of Harkey's home was void *ab initio*, the Bank's later action to evict Harkey from it was likewise flawed. For the reasons presented, Harkey respectfully requests this court to reverse the denials of Harkey's motions by the Superior Court and remand the case for further proceedings.

Dated this 10th day of October, 2014.

Lawrence Curt Delay
WSBA #20339

Court of Appeals No.71634-4-1
Island County Cause No. 11-2-01044-3

COURT OF APPEALS

DIVISION I.

OF THE STATE OF WASHINGTON

MICHAEL HARKEY
Appellant

v.

U.S. BANK, NA, its successors in interest
Respondent

CERTIFICATE OF MAILING

I hereby certify that on this day I caused a copy of the documents listed below, concerning the above captioned matter, to be mailed by U.S. mail, postage prepaid, to the following person at the following address:

Mr. Sean Holland, Bishop Marshall & Weibel, P.S., 720 Olive Way, Seattle, WA 98101-1301

DOCUMENT:

- BRIEF OF APPELLANT
- NOTICE OF WITHDRAWAL

Dated this 10 day of October, 2014.

Lawrence Curt Delay, WSBA #20339