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No. 90285-2

SUPREME COURT
OF THE STATE OF WASHINGTON

THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW
YORK AS SUCCESSOR IN INTEREST TO JP MORGAN CHASE
BANK NA AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE
INVESTMENTS II INC. BEAR STERNS ATL-A TRUST 2005-5,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-5,

Plaintiff/Respondent

v.

DAVID MURESAN, MARIA MURESAN, and All Occupants of the
Premises located at
1496 South Crestview Drive, Camano Island, WA 98282,

Defendants/Petitioners

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

**RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR
REVIEW**

Ronald E. Beard, WSBA No. 24014
David C. Spellman, WSBA No. 15884
Abraham K. Lorber, WSBA No. 40668
Respondent The Bank of New York
Mellon

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, Washington 98101-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107

ORIGINAL

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I. INTRODUCTION

This pro se petition for review stems from a post-foreclosure unlawful detainer action brought by respondent The Bank of New York Mellon (BNY Mellon). The Court of Appeals correctly affirmed the trial court's issuance of a writ of restitution against petitioner David and Maria Muresan (collectively Muresan).¹

Muresan's claims under Home Affordable Modification Program (HAMP) were beyond the scope of the limited unlawful detainer proceeding.² An unlawful detainer proceeding is a limited proceeding resolving the right to possession (and related issues)³ -- not extending to other civil claims within the superior court's general jurisdiction, like the HAMP claims. Therefore, the trial court correctly declined to decide those claims and issued the writ.

An independent ground for the affirmance of the issuance of the writ is that Muresan was seeking a second bite at HAMP claims that the federal court had already dismissed with prejudice in a prior action.⁴

¹ *Bank of New York Mellon v. Muresan*, Nos. 70111-8-I, 7092-1-I, 2014 WL 1711677 (table) (2014).

² *Id.* at 1 (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985) (describing the narrow nature of an unlawful detainer action under discussing RCW 59.12.030)).

³ *Id.* at 1.

⁴ See Resp't's Am. Mot. to Affirm on the Merits at 8-12, 19-23.

The petition for discretionary review fails to make the showing required under RAP 13.4(b). Therefore, BNY Mellon respectfully answers that this Court must deny the petition for review.

II. CITATION TO COURT OF APPEALS DECISION

A true and correct copy of the Court of Appeals opinion affirming the issuance of the writ of restitution is attached hereto as Attachment A.

III. COUNTERSTATEMENT OF ISSUES

A. The superior court in an unlawful detainer proceeding has limited authority to decide possession and related issues. A federal court had previously dismissed the HAMP claims with prejudice. Were the HAMP claims outside the limited statutory authority of the superior court to decide in an unlawful detainer proceeding?

B. Are claim and issue preclusion and waiver alternative grounds for the affirming the denial of the challenges against the issuance of the writ of restitution?

C. Should the Court deny the petition where, under RAP 13.4(b), Issues A or B and the Court of Appeals' decision do not relate to conflicting Washington appellate decisions, do not invoke a significant constitutional issue, and do not raise an issue of substantial public interest?

IV. COUNTERSTATEMENT OF THE CASE

Muresan has not challenged any portion of the factual section of the Court of Appeals' decision. *See* Petition for Review. The factual section recounts how Muresan obtained a loan secured by a deed of trust encumbering his Camano Island property. Attachment A at *1.⁵ Muresan defaulted on his mortgage in 2010. *Id.*⁶ Muresan applied several times for a loan modification under the HAMP program but was denied. *Id.* The lender conveyed the loan and deed of trust to BNY Mellon, which appointed Wells Fargo as its attorney in fact. *Id.*

BNY Mellon caused a notice of trustee sale to be issued. *Id.*⁷ Seeking to postpone the sale, Muresan filed suit against America's Servicing Company (ASC), a division of Wells Fargo Bank, N.A., the servicer of his loan, alleging ASC improperly denied his HAMP modifications. *Id.*⁸ ASC removed the suit, and the federal court dismissed the HAMP-related suit with prejudice on April 25, 2013. *Id.*⁹

The trustee's sale went forward on April 6, 2012. *Id.*¹⁰ BNY Mellon purchased the property at the trustee's sale. *Id.*¹¹ BNY Mellon

⁵ CP 49-50; *id.* ¶ 2.

⁶ CP 50 ¶ 4.

⁷ CP 81-82 (declarations of mailing).

⁸ CP 18-21 (federal court order); CP 18:20-24.

⁹ CP 18:24-21:1.

¹⁰ CP 52, ¶ 15.

filed an unlawful detainer suit on June 28, 2012. *Id.*¹² The superior court authorized a writ of restitution on March 25, 2013. *Id.* Muresan appealed from the issuance of the writ and from the denial of a stay of the proceeding.

BNY Mellon moved to affirm on the merits.¹³ The Court of Appeals affirmed the issuance of the writ under the attached decision and terminated review. Attachment A at 3. Muresan moved for reconsideration the next day. The Court of Appeals denied the motion for reconsideration, and Muresan petitioned this Court for discretionary review six days later.

V. ARGUMENT WHY THE PETITION SHOULD BE DENIED

Although Muresan has sought review in other cases,¹⁴ the petition in this case fails to comply with the content and style requirements imposed in RAP 13.4(c). Also, the petition fails to address the mandatory considerations governing acceptance of review set forth in RAP 13.4(b). RAP 13.4(b) provides:

(. . . continued)

¹¹ CP 92-94.

¹² CP 39:5-6 (service on May 20, 2012).

¹³ See Resp't's Am. Mot. to Affirm on the Merits.

¹⁴ *Muresan v. Dep't of Social and Health Services for State*, No. 78686-1, 158 Wn.2d 1029, 152 P.3d 347 (Table) (Jan. 3, 2007) (denying petition for review); *Muresan v. Dep't of Social and Health Services for State*, No. 75062-9, 152 Wn.2d 1006, 101 P.3d 865 (Table)(Sept. 8, 2004)(denying petition).

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Even if this Court were to comb the record, the case does not raise one of issues required under RAP 13.4(b). The Court of Appeals decision did not raise a constitutional issue or resolve an issue based on conflicting appellate decisions. Muresan merely contends that “If courts ruled against me that means those courts did an injustice and ignored a federal rule and shall not be considered. Moreover if courts ignored HAMP in other cases is even more an injustice and shall not be considered.” Petition.

Well settled law holds that a borrower has no private right of action under the HAMP loan modification program. Dismissing Muresan’s HAMP claims in the prior, federal court lawsuit, the District Court for the Western District of Washington held:

Plaintiff’s complaint rests on the notion that Defendant is required to modify his loan if he meets the requirements. However, as district courts around the country, including in this Circuit, have concluded, HAMP “does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even [for failing] to modify an eligible loan.”

Simon v. Bank of Am., N.A., Case No. C10-0300, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010); *see also Hoffman v. Bank of America, N.A.*, Case No. C10-2171, 2010 WL 2635773, at *4 (N.D. Cal. June 30, 2010) (finding that HAMP does not create enforceable rights to loan modification, even for qualified borrowers); *Escobedo v. Countrywide Home Loans, Inc.*, C09-1557, 2009 WL 4981618, at *3 (S.D. Cal. 2009) (finding that HAMP does not require lenders to modify all mortgages that meet eligibility requirements). Therefore, because Plaintiff does not have a right to loan modification even if he is eligible for that modification, he does not have a right to stop a trustee's sale of his property on the basis that his loan modification request was improperly denied.¹⁵

The federal district court's decision, quoted above denying the HAMP claims, results in claim and issue preclusion barring Muresan's relitigation of those claims and issues. *See* Resp't's Am. Mot. to Affirm on the Merits at 8-12, 19-23. Further, Muresan waived those claims by

¹⁵ CP 20:5-17 (Emphasis added). *See, e.g., Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, *7 (D. Minn. Nov. 9, 2009) (noting "the statute provides that loans may be modified 'where appropriate' – a phrase that limits the [Treasury] Secretary's obligation and evinces a Congressional intent to afford discretion in the decision whether to modify loans in certain circumstances Congress did not intend to mandate loan modifications."); *Chapel v. Mortgage Elec. Registration Sys., Inc.*, C10-1345BHS, 2010 WL 4622526, *4 (W.D. Wash. Nov. 2, 2010) (dismissing claims that defendants violated TARP by failing to modify the loan as no private right of action exists under TARP against private lenders); *Aleem v. Bank of Am.*, No. EDCV 09-01812-VAP, 2010 WL 532330, *4 (C.D. Cal. Feb. 9, 2010) ("There is no express or implied right to sue fund recipients . . . under TARP or HAMP."); *Gonzales v. First Franklin Loan Servs.*, No. 1:09-CV-00941, 2010 WL 144862, *18 (E.D. Cal. Jan. 11, 2010) (no private right of action under either EESA or TARP); *Mangosing v. Wells Fargo Bank, N.A.*, No. CV-09-0601, 2009 WL 1456783 (D. Ariz. May 22, 2009) (no private right of action under EESA); *Marks v. Bank of Am., N.A.*, No. 3:10-cv-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June 21, 2010) ("Plaintiff is precluded from asserting a private cause of action under HAMP, even disguised as a breach of contract claim ...").

failing to restrain the trustee's sale. *Id.* Therefore, the doctrines of preclusion and waiver are alternative grounds for affirming the denial of the claims challenging the issuance of the writ of restitution. RAP 2.5(a) (authorizing alternative grounds for affirmance).

RCW 61.24.060(1) grants the purchaser at a trustee's sale "a right to the summary proceedings to obtain possession of real property in chapter 59.12" -- the unlawful detainer statute. Attachment A at *2 n. 2. The summary unlawful detainer proceeding's scope is "limited to the question of possession and related issues such as restitution of the premises and rent." Attachment A at *1 (quoting *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985)). "To protect the proceeding's summary nature, 'other claims, including counterclaims are generally not allowed.'" *Id.* (quoting *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996)).

If the previously-dismissed HAMP claims granted Muresan no "right to stop a trustee's sale,"¹⁶ those HAMP claims cannot void the trustee's deed to BNY Mellon. Those same HAMP claims cannot be valid defenses to the unlawful detainer action brought by BNY Mellon under the trustee's deed. Instead, the HAMP claims are counterclaims which do not directly relate to possession – the HAMP claims were outside the

¹⁶ CP 20:5-17.

scope of the limited unlawful detainer proceeding, and were not properly before the Court of Appeals. *Id.* at 2 (citing *Sav. Bank of Puget Sound v. Mink*, 49 Wn.App. 204, 208-09, 741 P.2d 1043 (1987) (unlawful detainer defendant was not permitted to raise defenses or counterclaims alleging breach of the Truth in Lending Act, intentional infliction of emotional distress, defamation, slander of title, breach of contract, abuse of process, outrage, fraud, malicious prosecution, usury, or unjust enrichment)).

In short, the Court of Appeals decision correctly affirmed the issuance of the writ of restitution, and the petition fails to raise an issue of “substantial public interest.” RAP 13.4(b)(4).

VI. CONCLUSION

Muresan has failed to make the showing required under RAP 13.4(b). Therefore, BNY Mellon respectfully requests that the Court deny the petition for discretionary review.

RESPECTFULLY SUBMITTED this 6th day of June, 2014.

LANE POWELL PC



By _____

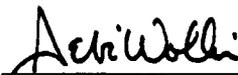
Ronald E. Beard, WSBA No. 24014
David C. Spellman, WSBA No. 15884
Abraham K. Lorber, WSBA No. 40668
Attorneys for Plaintiff/Respondent The Bank of
New York Mellon

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury and the laws of the United States and the State of Washington that on June 6, 2014, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

David Muresan
Maria Muresan
1578 South Crestview Drive
Camano Island, WA 98282

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**



Debi Wollin

105727.1442/6015599.1

ATTACHMENT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE BANK OF NEW YORK MELLON)
fka THE BANK OF NEW YORK as)
successor in interest to JP MORGAN)
CHASE BANK NA, as Trustee for)
Structured Asset MORTGAGE)
INVESTMENTS II INC., BEAR)
STEARNS ATL-A TRUST 2005-5,)
MORTGAGE PASS-THROUGH)
CERTIFICATES, SERIES 2005-5,)
Respondents,)

v.)

DAVID MURESAN, MARIA MURESAN,)
AND ALL OCCUPANTS OF THE)
PREMISES LOCATED AT 1496 South)
Crestview Drive, Camano Island, WA)
98282,)
Appellants.)

NOS. 70111-8-I
70292-1-I
(Consolidated Cases)

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 28, 2014

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2014 APR 28 AH 10:45

LAU, J. — This pro se appeal arises from a postforeclosure unlawful detainer action brought by the trustee's sale purchaser, Bank of New York Mellon (BNY Mellon) against former homeowners David and Maria Muresan (Muresan).¹ Muresan assigns

¹ Pro se litigants are "bound by the same rules of procedure and substantive law as attorneys." Westberg v. All-Purpose Structures Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). We have "no obligation to grant special favors to . . . a pro se litigant." In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

no error to the trial court's order granting BNY Mellon's motion for a writ of restitution. He also assigns no error to the court's subsequent order denying his motion for a stay pending appeal. He instead challenges the merits of the underlying foreclosure and trustee's sale. Because chapter 59.12 RCW unlawful detainer proceedings do not provide a forum for litigating issues not directly related to the right of possession between the parties, we affirm the trial court's issuance of the writ of restitution.

FACTS

Muresan obtained a loan for approximately \$369,000, secured by a deed of trust encumbering his Camano Island property. After defaulting on the loan in 2010, he submitted applications for loan modification under the federal Home Affordable Modification Program (HAMP). The loan servicer denied the applications. In November 2011, the lender conveyed the note and deed of trust to BNY Mellon. BNY Mellon appointed Wells Fargo Bank, N.A. (Wells Fargo), as its attorney-in-fact.

In December 2011, BNY Mellon issued a notice of trustee's sale. Seeking to postpone the sale, Muresan sued America's Servicing Company (ASC), a division of Wells Fargo, alleging ASC improperly denied his HAMP applications. ASC removed the suit to federal court and moved to dismiss for failure to state a claim.

The trustee's sale occurred on April 6, 2012. BNY Mellon purchased the property at the trustee's sale. On April 25, 2012, the federal court dismissed Muresan's HAMP-related suit with prejudice. On June 28, 2012, BNY Mellon filed an unlawful detainer complaint and a motion for a writ of restitution. The trial court authorized the writ on March 25, 2013. Muresan appealed the order authorizing the writ and moved to

stay the unlawful detainer proceeding. After the trial court denied the motion, Muresan filed a second notice of appeal. We consolidated the appeals.

ANALYSIS

The issue is whether the trial court properly authorized the writ of restitution. Rather than explain why the court erroneously awarded BNY Mellon possession of the property, Muresan challenges the trustee's sale and the presale foreclosure process. Because these challenges fall outside the scope of the proceeding, which focused narrowly on the right of possession, we hold the court properly authorized the writ.

An unlawful detainer action is a narrow proceeding, "limited to the question of possession and related issues such as restitution of the premises and rent." Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). Its purpose is "to preserve the peace by providing an expedited method for resolving the right to possession of property." Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996). To protect the proceeding's summary nature, "other claims, including counterclaims, are generally not allowed." Heaverlo, 80 Wn. App. at 728; see also Angelo Prop. Co. v. Hafiz, 167 Wn. App. 789, 809, 274 P.3d 1075 (2012) (unlawful detainer court "sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute"). Unlawful detainer proceedings thus "do not provide a forum for litigating claims to title." Puget Sound Inv. Grp., Inc. v. Bridges, 92 Wn. App. 523, 526, 963 P.2d 944 (1998).

Here, Muresan tried to use the unlawful detainer action as a forum to challenge the trustee's sale. He acknowledges, "The relief I sought is to vacate the sale of my house at 1496 S. Crestview Dr. Camano Island WA 98282 to allow the first bank to do a

loan modification as provided by federal program HAMP.” Br. of Appellant at 3 (boldface and emphasis omitted). Given the summary nature of the proceeding, such relief was not available. The trial court thus committed no error in declining to set aside the sale.

Muresan's arguments related to the presale foreclosure process are likewise unavailing. He contends (1) the loan servicer improperly refused his applications for HAMP loan modification, (2) the loan servicer improperly removed his HAMP-related suit to federal court, and (3) the federal court improperly allowed the trustee's sale to proceed during the pendency of the HAMP-related suit. Without citing the record, he also notes that he “could pay the mortgage at the present market interest rate,” that he “paid 10 years mortgage and the last 5 years interest only,” that he is “68 years of age and . . . cannot buy another house,” that “to keep this house is possible if a modification will be made,” and that he uses the house for the “David Muresan Scientific Research Foundation.” Br. of Appellant at 3. These arguments and unsupported factual assertions “do not directly relate to the ‘question of possession’” and thus are not properly before us. Sav. Bank of Puget Sound v. Mink, 49 Wn. App. 204, 209, 741 P.2d 1043 (1987) (unlawful detainer defendant was not permitted to raise defenses or counterclaims alleging breach of the Truth in Lending Act, intentional infliction of emotional distress, defamation, slander of title, breach of contract, abuse of process, outrage, fraud, malicious prosecution, usury, or unjust enrichment).

Nothing in the record suggests the trial court improperly resolved the question of possession. “The burden is upon the plaintiff in an unlawful detainer action to prove, by a preponderance of the evidence, the right to possession.” Hous. Auth. v. Pleasant,

126 Wn. App. 382, 392, 109 P.3d 422 (2005). The right of possession revolves around statutory requirements. "By the terms of the [deed of trust] act it is clear the legislature did not contemplate that after the trustee's sale further lengthy proceedings would be required to obtain possession." Peoples Nat'l Bank of WA v. Ostrander, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971). Accordingly, the act allows the trustee's deed purchaser to bring a chapter 59.12 RCW unlawful detainer suit on the "twentieth day following the sale." RCW 61.24.060(1).² The suit provides the purchaser "a means to gain possession" of the purchased property. Puget Sound Inv. Grp., 92 Wn. App. at 526; see 27 MARJORIE DICK ROMBAUER, WASHINGTON PRACTICE: CREDITORS' REMEDIES – DEBTORS' RELIEF § 3.70, at 213 (2d ed. 1998) (purchaser initiates suit "to gain possession of the property").

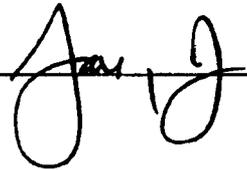
Here, it is undisputed that BNY Mellon purchased the property at the April 6, 2012 sale. The trustee's deed, recorded in Island County on April 16, 2012, conveyed title in the property to BNY Mellon. RCW 61.24.050(1); Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 910, 154 P.3d 882 (2007) (trustee's deed purchaser acquires "the rights, title, and interests possessed by the grantor (hereinafter borrower) when the borrower originally executed the deed of trust to the grantee . . . , as well as all rights, title, and interests acquired by the borrower subsequently (e.g., accrued rents)."). It is likewise undisputed that well over 20 days passed before BNY

² The deed of trust act provides, "The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not 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 61.24.060(1).

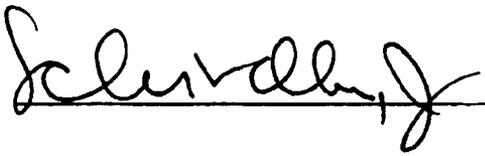
70111-8-1, 70292-1-1/6

Mellon initiated the present action. Muresan does not challenge BNY Mellon's compliance with any of chapter 59.12 RCW's procedures. On this record, the trial court did not err in resolving the question of possession in BNY Mellon's favor.

We affirm the issuance of the writ of restitution.



WE CONCUR:



Cox, J.

OFFICE RECEPTIONIST, CLERK

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Subject: The Bank of New York Mellon, et al. v. Muresan, et ux. - No. 90285-2 - Respondent's Answer to Appellant's Petition for Review

Clerk,

Attached please find Respondent's Answer to Appellant's Petition for Review in case no. 90285-2, The Bank of New York Mellon, et al. v. David Muresan, et ux. I am filing this on behalf of attorney Abraham K. Lorber, WSBA no. 40668, Lane Powell PC, 1420 Fifth Avenue, Suite 4200, Seattle, WA 98111, phone # 206-223-7434, email address lorbera@lanepowell.com.

Thank you.

Debi Wollin
Legal Assistant
Lane Powell PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Direct: 206.223.7409
<http://www.lanepowell.com>

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