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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RONALD C. LANDBERG, SR. and KATHLEEN L. LANDBERG,	)	**No. 29140-5-III**
Appellants,	)	**Division Three**
v.	)	
EQUITY TRUST COMPANY AND TRUSTEE BRIAN H. WOLFE,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Siddoway, J. — Kathleen and Ronald Landberg appeal the dismissal of their complaint challenging the foreclosure of a deed of trust after they defaulted in repaying a $367,000 promissory note. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

On May 17, 2007, Kathleen Landberg executed a deed of trust to property she owned in Newport, Washington in favor of Wind River Brokers LLC to secure a one-year promissory note in the principal amount of $367,000. The promissory note was signed by Ms. Landberg and co-signed by her brother, Ronald Landberg Sr. Shortly thereafter,

Wind River Brokers transferred its interest in the note and deed of trust to Equity Trust Company.

The Landbergs failed to make the balloon payment required by the note on May 15, 2008. In July, Pend Oreille Title Company, the trustee originally designated by the deed of trust, resigned and attorney Brian H. Wolfe was appointed successor trustee to commence nonjudicial foreclosure proceedings. Mr. Wolfe caused a notice of default to be sent to the Landbergs on July 29 and a notice of trustee's sale to be sent to them on September 11. A trustee's sale of the property was scheduled for December 19.

In early December 2008, the Landbergs commenced a lawsuit in the superior court for Pend Oreille County (hereafter the 2008 action) seeking to restrain the trustee's sale. They claimed they had not been provided with an adequate and complete accounting of the expenses and costs accrued in connection with final payment as required by statute and requested a hearing "to clarify the legitimate costs and fees demanded by the Trustee." Clerk's Papers (CP) at 103. They also alleged that Mr. Landberg had been hospitalized, preventing him from completing arrangements for financing the balloon payment, and requested an additional 60 days to get necessary information to potential investors.

The hearing on the motion for injunctive relief was originally scheduled for December 18. That morning, the Landbergs filed additional motion papers, alleging that

inclement weather was preventing Mr. Landberg from arranging for investors to see the property and participate in the trustee's sale. Based on the Landbergs' alleged inability to travel to Newport on December 18, they asked to reschedule the injunction hearing for January 8, 2009 and that the court restrain the trustee's sale until that time. The trial court refused to continue the hearing and entered an order denying the Landbergs' motion on December 18, finding that they had provided no authority for entry of the order.

Also on December 18, Mr. Wolfe was contacted by Barbara A. Kendall, who sent a letter to Mr. Wolfe by facsimile, stating she had known the Landbergs for over 30 years, wanted to "help them keep the property in the family," and "will assist in whatever way I can to coordinate the funding needed to refinance this property." CP at 14. After reviewing the letter, Mr. Wolfe telephoned Ms. Kendall and questioned her about her ability to make a purchase offer, alone or together with other investors. Upon learning that she did not have sufficient assets to pay the debt in full and was seeking time to find other financial support, Mr. Wolfe concluded that "she was not a viable source of sufficient funds to pay the creditors nor was there a plan of sufficient merit to justify postponing [the] Trustee sale." CP at 10-11.

Unusually heavy snow had fallen in Eastern Washington during the week of December 14, but by December 19 the courthouse in Newport was open, traffic in Newport was no longer hampered, and the sale took place. Equity Trust had authorized

Mr. Wolfe to bid in the amount of $460,792.65, which was the amount then owed by the Landbergs as principal, accrued interest, late charges, and costs. Equity Trust was the only offeror, so it acquired the property. Ten days later, Mr. Wolfe wrote to Ms. Landberg to reiterate that Equity Trust had no interest in developing the property, and that "[i]f you and your friend [referring to Ms. Kendall] can obtain financing and make a reasonable offer, I am sure that it will be considered by the beneficiaries." CP at 15.

Instead, Mr. Landberg filed a "Notice of Discretionary Review" of the trial court's December 18 order on January 20, 2009. It was docketed in this court as case number 277526. In an effort to pay the costs of appeal with public funds, Mr. Landberg obtained findings as to indigency from the trial court, which this court forwarded for consideration by the Supreme Court. The Supreme Court denied the motion for expenditure of public funds and Mr. Landberg was notified and given the opportunity to pay the filing fee. He thereafter notified this court that he had decided to pursue relief in the United States Supreme Court instead. On April 10, 2009, our commissioner filed an order dismissing the case for abandonment. Mr. Landberg did not challenge the dismissal. A certificate of finality was issued to the parties and to the trial court on May 26.

Having received no proposal from the Landbergs by the time the certificate of finality was received, Equity Trust decided to accept an offer for the property from some of the Landbergs' neighbors. Its sale of the property closed on June 18, 2009.

Almost four months later, the Landbergs commenced this action against Equity Trust and Mr. Wolfe with a "Complaint to Set Aside Foreclosure Sale." CP at 1. In addition to repeating allegations made in the 2008 action, they asserted that Mr. Landberg had planned to file for bankruptcy protection on the morning of December 19, 2008 in an effort to prevent the trustee's sale but proved unable because the federal bankruptcy court was closed due to weather; he did file for chapter 7 bankruptcy protection when the federal courthouse reopened on December 22. They also alleged that before the trustee's sale they had commenced two lawsuits against neighbors and filed a notice of claim with the Washington State Department of Natural Resources seeking to resolve disputed access and easement rights that negatively impacted the property. They argued that because their right of access remained unresolved at the time of sale, the uncertainty depressed the price at which the property was sold.

Their complaint summarized the "issues" presented as follows:

> A. The primary issue in this case is whether Trustee Wolfe held a proper sale of the plaintiffs' property when it was virtually impossible for concerned parties to attend because of weather conditions.
>
> B. The hearing to determin[e] if the sale date could be continued, scheduled for January 9, 2009 and requiring specific financial documentation of what was owed, was never held because to [sic] defendants had improperly sold the property at a sale no one could attend.
>
> C. The sale price of the property, if the refinancing package could not be completed, was grossly lower than the market price of such a piece of property. Letting this property go before easements and accesses could be clarified lessened the over-all value of the property and the full potential of the property may never be realized.

CP at 5. The Landbergs asked that the court "set aside the [f]oreclosure sale and direct the defendants to provide the plaintiffs an [o]ption on the property or other documentation that they can take to lenders regarding a fair and equitable refinancing price for this property." CP at 6.

Equity Trust and Mr. Wolfe moved to dismiss the Landbergs' complaint under CR 12(b) and 56, challenging personal jurisdiction and service of process on behalf of Equity Trust, claiming that the final order in the 2008 action precluded some of the Landbergs' 2009 claims, and arguing that the complaint did not state a claim on which relief could be granted. The trial court granted the motion and dismissed the complaint. The Landbergs filed a motion for reconsideration, which was denied. They now appeal.

ANALYSIS

I

As a threshold matter, Equity Trust[1] contends that we should apply the Rules of Appellate Procedure to refuse consideration of arguments by the Landbergs that were not raised in response to its motion to dismiss, or at least not until the Landbergs moved for reconsideration. The Landbergs appeared pro se below and continue to represent

[1] Equity Trust and Mr. Wolfe jointly moved to dismiss the Landbergs' complaint. In discussing their litigation positions taken in the trial court, we refer to them collectively as "Equity Trust."

themselves on appeal. As with all pro se litigants, they are held to the same standard as an attorney and must comply with all procedural rules. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Generally we do not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for the rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Similarly, when a new theory is presented to the trial court for the first time in a motion for reconsideration, the trial court may refuse to consider it. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999). We review a trial court's denial of a motion for reconsideration for abuse of discretion. *Wilcox*, 130 Wn. App. at 241. A trial court does not abuse its discretion when it refuses to consider a new theory raised for the first time in a request for reconsideration.

The Landbergs' second assignment of error alleges that the "trial court erred in denying appellant Ronald C. Landberg, Sr.'s ownership/protectable interest in [the] property in question in Pend Oreille County." Br. of Appellant at 5. In their fifth assignment of error, the Landbergs make a related argument that Mr. Landberg's

bankruptcy filing should have delayed the sale of the property. In the Landbergs' 2008 action, Equity Trust raised the fact that title to the property was in Ms. Landberg's name alone and that Mr. Landberg had no standing. But in this action, Equity Trust never relied on Mr. Landberg's lack of standing as a basis for dismissal. Standing was not mentioned in Equity Trust's motion or argued in its supporting memorandum. It was not raised by the parties or mentioned by the court at the time the motion to dismiss was argued.

It was the Landbergs who mentioned standing for the first time in this action, and not until moving for reconsideration. At that point, Ms. Landberg argued by declaration that the trial court's decision in the first case "unduly influenced the decision in this case" and that it "prevented the Court from recognizing Mr. Landberg's bankruptcy filing as a proper way for delaying the foreclosure sale." CP at 49. In denying the motion for reconsideration, the trial court noted that "this issue was not raised when [the Landbergs] were before the court on the 8th of April of this year. So it's just not something that can be reconsidered." Report of Proceedings (May 13, 2010) at 5. Because the trial court had no obligation and refused to consider the argument, we decline to consider it as well.

The Landbergs also argue for the first time on appeal that their due process rights were violated because the denial of a hearing on this case "effectively cut-off [their] access to their remaining property." Br. of Appellant at 12. Here too, however, the

argument was not made at the trial court and is not explained on appeal. We will not speculate on the basis for a due process challenge or entertain an argument that was not presented to the trial court. RAP 2.5, 10.3(a)(6).

II

The Landbergs assign error to the trial court's refusal to grant their requested continuance of the hearing on the motion to dismiss, arguing that they were in the process of "following up on discovery that pertained to the sale of the property and possible collusion between Trustee Wolfe and the Landberg neighbors who ultimately purchased the property." Br. of Appellant at 6. Their declarations requesting a continuance represented that they "had an initial consultation with legal counsel that has opened the door to further discovery, which we have not had time to pursue." CP at 36; *see also* CP at 33. They also stated that each of them had been ill and occupied with school and had not had time to respond to Equity Trust's motion.

CR 56(f) allows the court to grant a continuance if a party shows there are facts essential to justify his or her opposition to the motion and good reasons why the party is unable to present those facts. We review the trial court's denial of a continuance for abuse of discretion. A court does not abuse its discretion where "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional

discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

At the outset of the hearing on the motion, the court invited Ms. Landberg to speak to her request for a continuance. She provided no further explanation of the evidence she expected to obtain through discovery or why it had not been obtained earlier. The trial court noted that the Landbergs had been timely served with the motion. Given the Landbergs' insufficient showing under CR 56(f), the trial court was well within its discretion in denying a continuance.

III

While the trial court relied on an absence of jurisdiction, failure of service of process, and failure to state a claim upon which relief could be granted as bases for dismissing the Landbergs' complaint, it also relied on res judicata insofar as the complaint alleged that the Landbergs had not been served with a statutorily-required compilation of costs. The Landbergs challenge res judicata as a basis for the trial court's decision, arguing on appeal that the trial court "failed to realize that the plaintiffs[ ] and the issues were not the same." Br. of Appellant at 7. They argue that Kathleen Landberg was added as a party to this proceeding and that while the first action was about delaying or restraining the property sale, the sale was not delayed or restrained and the issues were therefore not heard.

We review decisions dismissing a claim for failure to state a claim on which relief can be granted and decisions granting summary judgment de novo, performing the same inquiry as the trial court. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (dismissals pursuant to CR 12(b)(6)); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (summary judgment). Summary judgment will be upheld if the pleadings, affidavits, answers to interrogatories, admissions, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). We review all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Res judicata, or claim preclusion, is an affirmative defense that bars relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). It ensures the finality of past decisions and prevents piecemeal litigation. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). Res judicata requires a final judgment on the merits in the original matter. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). The court should dismiss a subsequent case if it is identical with the first action in the following respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is

made. *Spokane Research & Def. Fund*, 155 Wn.2d at 99; *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 174, 963 P.2d 911 (1998).

In the 2008 action, the trial court denied the motion to restrain the trustee's sale because there was no authority for entry of such an order. In substance, the order was one for judgment on the pleadings and therefore a final judgment with respect to the Landbergs' challenge to the conduct of the sale.

The parties to the claims at issue in the 2008 action and this action are the same. In each case, Ms. and Mr. Landberg were the named plaintiffs and Mr. Wolfe was a defendant. Both actions involved the trustee's sale that took place on December 19, 2008. The quality of the persons for and against whom the claims were made is the same because in both cases the Landbergs asserted their individual property interests against Mr. Wolfe in his capacity as trustee. The only issue that requires further examination is whether the cause of action is the same.

There is no single test for determining whether two causes of action are the same, but courts have considered the following criteria: "(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts." *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999); *Yakima County v. Yakima County Law*

Enforcement Officers Guild, 157 Wn. App. 304, 328, 237 P.3d 316 (2010).

The Landbergs' 2008 action and their claim in this action that the trustee's sale was improperly conducted satisfy all of the foregoing criteria. To examine in this action whether the trustee's sale should have taken place would impair Equity Trust's right to proceed with the sale that was established in the 2008 action. Both actions raised the alleged impropriety of going forward with the sale, relying on an asserted failure by Equity Trust to provide the statutorily-required computation of costs and problems for attending the sale presented by the weather. They therefore involved the same evidence, arising out of the same nucleus of facts, and an asserted infringement of the same right.

Given the duplicative nature of those claims in this action, the trial court could properly have dismissed the Landbergs' insufficient accounting and inclement weather claims on res judicata grounds. But it relied on res judicata only to dismiss the claim of an insufficient accounting. In dismissing the weather-related claim it elected to rely on the Landbergs' failure to state a claim. Its summary judgment on the basis of res judicata was proper.

IV

Finally, the Landbergs assign error to the trial court's dismissal of their remaining theories of liability for failure to state a claim. They insist on appeal that the court erred in rejecting their arguments that weather prevented attendance at the sale, that its denial

of a continuance prevented them from resolving issues encumbering title, and that the trustee's refusal of accommodations resulted in an unreasonably low sale price. With respect to each of these arguments, the trial court noted that the trustee is not required to postpone a properly-noticed sale unless, in his discretion, postponement is advantageous.

The deeds of trust act prescribes the procedures by which to properly foreclose a debt secured by a deed of trust. Ch. 61.24 RCW. All foreclosure sales must comply with the timing and notice obligations of RCW 61.24.040. RCW 61.24.040(6) unambiguously states:

> The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days.

The borrower is entitled to cure the default set forth in the notice at any time prior to the 11th day before the sale. RCW 61.24.090(1). Upon receipt of the borrower's payment, the trustee must discontinue the sale and reinstate the deed of trust. RCW 61.24.090(3). Where such payment has not been received, the statute provides the trustee with "unfettered discretion" to continue a foreclosure sale. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wn. App. 912, 927, 239 P.3d 1148 (2010), *review granted*, 170 Wn.2d 1029 (2011).

A trustee of a deed of trust is nonetheless a fiduciary for both the mortgagee and mortgagor and must act impartially between them. *Cox v. Helenius*, 103 Wn.2d 383, 389,

693 P.2d 683 (1985). The trustee must present every possible advantage to the debtor as well as the creditor. *Id.* In doing so, the trustee must use good faith and "'every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike.'" *Id*. (quoting *Swindell v. Overton*, 310 N.C. 707, 712, 314 S.E.2d 512 (1984)).

In this case, Mr. Wolfe presented evidence that he checked with his representative in Newport to confirm that traffic was not hampered by the weather on the day of the trustee's sale. The trial court had refused to restrain the sale on the day before it was scheduled to take place, knowing the weather experienced in Pend Oreille County during the prior week. In response to these facts, the Landbergs offered only speculation that the weather interfered with a reasonable sale.[2] Equity Trust offered $460,792.65 for the property, well more than the $367,000 that the Landbergs had been able to borrow against it the year before, and despite the Landbergs' admission that the property was embroiled in litigation over needed access. The Landbergs offer no evidence suggesting that anyone would have offered more.

Whether to grant the Landbergs more time to find financial support to pay the

[2] The Landbergs rely for legal authority on two unpublished Court of Appeals' decisions that make passing mention of delays in trial court proceedings attributable to inclement weather. Not only is the Landbergs' citation of unpublished decisions improper, *see* GR 14.1, but neither decision purports to address whether, when, or why proceedings should be continued for weather-related reasons.

defaulted note was a matter that clearly fell within Mr. Wolfe's discretion. The Landbergs had proved unable to pay the note when due or even in the seven months thereafter. In fulfilling his obligation to both parties, Mr. Wolfe remained open to a proposal for purchase by the Landbergs but reasonably required a proposal that had viable investors in place. He understandably questioned Ms. Kendall about her level of interest and ability to perform and just as understandably concluded, in light of her responses, that he should proceed with the sale as scheduled. As Equity Trust points out, Mr. Wolfe did not dismiss Ms. Kendall's offer of assistance out of hand, but wrote Ms. Landberg shortly after the trustee's sale to express Equity Trust's continued willingness to accept an offer. Even with the passage of an additional five and a half months before the property was sold to others, the record contains no evidence that the Landbergs ever had any prospect of being able to purchase the property.

The Landbergs were unable to articulate any cause of action or any duty owed by Equity Trust or Mr. Wolfe that was breached. The trial court properly dismissed their complaint.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

_____
Sweeney, J.

_____
Brown, J.