

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC, an Oregon limited liability company,)	No. 29633-4-III
)	
Respondent,)	Division Three
v.)	
)	UNPUBLISHED OPINION
STEVEN F. SCHROEDER, a married man, and ANTHONY BELL, an individual,)	
)	
Appellant.)	
)	

Brown, J. — Steven F. Schroeder appeals the trial court’s summary decision to grant possession of real property in Stevens County to Excelsior Mortgage Equity Fund, II, LLC, a purchaser at a trustee’s sale under RCW 61.24.060. Mr. Schroeder contends the trial court erred in (1) asserting jurisdiction, (2) improperly considering the trustee’s declaration, (3) failing to first address his affirmative defenses, and (4) awarding Excelsior its attorney fees. We reject his contentions, and affirm.

FACTS

This is the third time these parties and this dispute have reached this court. See *Schroeder v. Excelsior Mgmt. Group, LLC*, noted at 162 Wn. App. 1027, 2011 WL

No. 29633-4-III
Excelsior Mortgage v. Schroeder

2474337 (*Schroeder I*); *Schroeder v. Haberthur*, noted at ___ Wn. App. ___, 2011 WL 4599661 (*Schroeder II*).

In 2007, Mr. Schroeder borrowed money from Excelsior Management Group LLC,¹ which was secured by a deed of trust for the purchase of property in Stevens County. *Schroeder II*, 2011 WL 4599661, at *1. After Mr. Schroeder's default on the loan obligations, Excelsior nonjudicially foreclosed his interest in the property. Mr. Schroeder was notified of the trustee's sale and that his right to occupy the property would terminate on the 20th day following the sale if he failed to cure the defaults identified in the notice of default and notice of trustee's sale. The notice of trustee's sale states, "The purchaser at the Trustee's Sale shall be entitled to possession of the property on the 20th day following the sale, as against the borrower and grantor under the Commercial Deed of Trust and Assignment of Rents." Clerk's Papers (CP) at 35. The notice of trustee's sale further advised Mr. Schroeder "[a]fter the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW." CP at 35.

The notice of trustee's sale was recorded on November 12, 2009, with the Stevens County Assessor and posted at the property on November 17, 2009. Mr. Schroeder was personally served with notice on November 17, 2009. On February 19, Excelsior purchased the property at the trustee's sale.² Excelsior acquired title to the

¹ Excelsior Management Group LLC is the manager of the respondent Excelsior Mortgage Equity Fund II LLC.

property through a trustee's deed recorded on March 4, 2010.

Mr. Schroeder asked for a time extension to remain on the property through April 1, 2010. On March 16, 2010, Excelsior sent written notice to Mr. Schroeder confirming that Mr. Schroeder agreed to vacate the property on or before April 1, 2010. Mr. Schroeder refused to vacate the premises. Another notice was then mailed to Mr. Schroeder on April 28, 2010, stating the tenancy had terminated. Mr. Schroeder remained in possession of the property and refused to surrender it to Excelsior.

Excelsior sued for unlawful detainer, relying upon the declaration of Phillip Haberthur, the successor trustee of the nonjudicial foreclosure. Mr. Haberthur's declaration included several attachments, including the trustee's deed issued to Excelsior following the trustee's sale and the various notices sent to Mr. Schroeder.

Mr. Schroeder answered and eventually asserted multiple affirmative defenses. Excelsior requested summary judgment. On the day of the summary judgment hearing, Mr. Schroeder objected to Mr. Haberthur's declaration. The trial court granted Excelsior's summary judgment request and ordered Mr. Schroeder off the property. The court denied Mr. Schroeder's objection to Mr. Haberthur's declaration, stating in a letter, "Mr. Haberthur is a custodian or qualified witness as to the identity and mode of preparation of these documents. It is evident they were made in the regular course of

² This court has already determined, "Mr. Schroeder failed to restrain the trustee's sale as required under RCW 61.24.130 and necessarily waived any right he had to contest the sale after the fact." *Schroeder II*, 2011 WL 4599661, at *4.

his business at the time of their execution.” CP at 164. Mr. Schroeder appeals.

ANALYSIS

A. Jurisdiction

The issue is whether the trial court had subject matter jurisdiction over this matter. Mr. Schroeder contends he was not given adequate notice under the unlawful detainer act, chapter 59.12 RCW.

Determining subject matter jurisdiction is a question of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is the authority to hear and determine the class of action to which the case belongs. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 943, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010).

Generally, notice is a prerequisite to courts obtaining jurisdiction. But, “[t]he purchaser at a trustee’s sale may commence an unlawful detainer action to obtain possession under chapter 59.12 RCW without first providing notice.” *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008) (citing *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 208, 741 P.2d 1043 (1987)).

In *Mink*, the former owner refused to vacate the property after the trustee’s sale.

After waiting the required 20 days, the new owner sued for unlawful detainer under chapter 59.12 RCW. Mr. Mink claimed—exactly as Mr. Schroeder does here—that he was entitled to a separate notice of eviction under RCW 59.12.030(2)-(6). The court disagreed and ruled that the notice of trustee’s sale required under chapter 61.24 RCW was more than sufficient to provide the court jurisdiction. The *Mink* court specifically held that no additional notice was required as a prerequisite to the new owner suing for unlawful detainer. *Mink*, 49 Wn. App. at 208. Mr. Schroeder argues *Mink* was wrongly decided. We disagree. The legislature intended to preserve the summary nature of foreclosure actions permitted under chapter 61.24 RCW in referring purchasers to the unlawful detainer statutes. Chapter 61.24 RCW provides for detailed notices and provides opportunities to cure for the defaulting property owner. Any additional notice prior to an unlawful detainer action would be unnecessary.

In sum, additional notices after the foreclosure sale, and upon or after the 20th day following it, simply would not make sense. Excelsior was not required to provide Mr. Schroeder with any further notice to quit in order to vest the trial court with jurisdiction or to obtain possession of the property. Excelsior was entitled to summary judgment on its claim for unlawful detainer when Mr. Schroeder refused to vacate the property; Mr. Schroeder has been foreclosed, has no right or interest in the property, and he must vacate the premises.

B. Trustee's Declaration

The issue is whether the trial court erred by abusing its discretion in denying Mr. Schroeder's objection to Mr. Haberthur's declaration and attachments. Mr. Schroeder contends the attachments were not based on Mr. Haberthur's personal knowledge.

Initially, Excelsior argues the objection was untimely. All evidentiary objections must be timely and specific. ER 103(1). Generally, "the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. While Mr. Schroeder's objection should have been made earlier, the trial court did address the issue and filed a letter opinion to support its ruling. Therefore, this issue has been sufficiently preserved for our review.

A trial court's ruling on a motion to strike is within the trial court's sound discretion. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Declarations offered in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Mr. Schroeder does not challenge the trustee's sale itself. Instead, he challenges the notice of trustee's sale signed by Mr. Haberthur; the March 16, 2010 letter signed by Mr. Haberthur; the notice to occupants signed by Mr. Haberthur; and the trustee's deed signed by Mr. Haberthur. A person executing a document would certainly have personal knowledge of the documents as contemplated by CR 56(e). Moreover, it is evident these documents were made during the regular

course of business; thus, justifying their admissibility under the business records exception. See ER 803(a)(6) (records of regularly conducted business activity are not inadmissible as hearsay).

Given the above, the court had tenable grounds to admit Mr. Haberthur's declaration and the attached documents.

C. Affirmative Defenses

The issue is whether the trial court erred by not first considering Mr. Schroeder's affirmative defenses when granting summary judgment in favor of Excelsior.

We review a trial court's summary judgment grant de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is proper where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c).

The complaint requested unlawful detainer based on Mr. Schroeder's failure to vacate the property 20 days after the trustee's sale. The same basis was presented for summary judgment. Mr. Schroeder answered and raised several affirmative defenses the day before the summary judgment hearing and approximately one month after the summary judgment motion. Even so, the trial court noted in its summary judgment order it had considered Mr. Schroeder's answer.

Mr. Schroeder attempts to place the burden of proof on Excelsior by arguing it was required to request summary judgment on all of Mr. Schroeder's affirmative defenses. In other words, Mr. Schroeder claims no burden or obligation for proving his own affirmative defenses. In reliance on this novel theory, Mr. Schroeder cites two federal cases, *Gould, Inc. v. Continental Cas. Co.*, 822 F. Supp. 1172 (E.D. Pa. 1993); *Koch Indus., Inc. v. United Gas Pipe Line Co.*, 700 F. Supp. 865 (M.D. La. 1988). But these cases allow a party to move on summary judgment against an affirmative defense—they do not hold that a party must make such motion or that failure to do so means that the requesting party is not entitled to summary judgment. *Gould*, 822 F. Supp. at 1177; *Koch Indus.*, 700 F. Supp. at 867. Moreover, in Washington the party raising an affirmative defense has the burden of proving the defense elements. *August v. U.S. Bancorp*, 146 Wn. App. 328, 343, 190 P.3d 86 (2008). The court's summary judgment order shows Mr. Schroeder's defenses were considered; the trial court did not err. In short, Mr. Schroeder did not meet his affirmative defense burden.

D. Capacity and Attorney Fees

Mr. Schroeder contends the judgment was incorrectly entered because it does not identify him as a married man "in his separate capacity." Appellant's Br. at 30. While the trial court pleadings identify Mr. Schroeder as a married man, it is clear he is the sole individual involved. None of the pleadings refer to his wife. And, this court's record identifies Mr. Schroeder as a married man dealing with his sole and separate

property. Given all, Mr. Schroeder fails to raise an error that would warrant reversal.

Mr. Schroeder contends the trial court erred in its attorney fee award to Excelsior because no breach of contract is shown; thus, the trial court could not award attorney fees under the deed of trust. We have decided otherwise. The deed of trust provides for reasonable attorney fees in any “suit or action . . . instituted to enforce or interpret any of the terms” of the deed of trust. CP at 191. RCW 4.84.330 provides that in “any action on a contract,” the prevailing party shall be entitled to reasonable attorney fees. Based on this statute, this court has held when a grantee successfully defends an action based on a deed of trust, the grantee is entitled to attorney fees. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140-41, 157 P.3d 415 (2007). Accordingly, Excelsior was entitled to attorney fees for the unlawful detainer action.

Excelsior requests fees on appeal under RAP 18.1 and the deed of trust. RAP 18.1 permits recovery if applicable law grants to a party the right to recover. A contract provision for attorney fees is a recognized right to recover in Washington. The deed of trust includes a provision awarding attorney fees to the prevailing party. As the prevailing party on appeal, Excelsior is entitled to its fees and costs.

Affirmed.

A majority of the panel has determined 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.

No. 29633-4-III
Excelsior Mortgage v. Schroeder

Brown, J.

WE CONCUR:

Sweeney, J.

Siddoway, J.