IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEAFIVE PROPERTIES LLC a, a Washington Limited Liability company, Respondent, v. BETTY FORD, and all persons in possession, Appellant.	)	NO. 61196-8-I DIVISION ONE UNPUBLISHED OPINION FILED: April 20, 2009

LEACH, J. — Betty Ford appeals a judgment and order for writ of restitution entered in favor of Seafive Properties in a commercial unlawful detainer proceeding. Although Ford no longer has a claim to a right of possession, this case is not moot because Ford has asserted a claim for attorney fees under the lease contract, which gives her a continuing financial stake in these proceedings. The trial court did not err in failing to vacate the judgment because of a late-raised dispute about Seafive's ownership of the property, but the case must be remanded because the record does not contain the proof of Seafive's service of a notice of default on Ford necessary to establish subject matter jurisdiction. We accordingly reverse and remand for further proceedings.

FACTS

Ford leased business premises from Seafive Properties for a three-year term in May 2005. In June 2007 Seafive filed a summons and complaint for unlawful detainer, alleging that Ford had failed to pay rent for the months of March, April, and May 2007. A show cause hearing was initially scheduled for June 29. Ford never filed an answer but attempted to prevent eviction by repeatedly filing bankruptcies. A show cause hearing was eventually held on December 14, 2007, after all bankruptcy stays were lifted or dismissed.

Despite notice, Ford did not appear at the December 14 hearing. Counsel for Seafive sought entry of a judgment and order for writ of restitution for past due rent, costs, and attorney fees. When questioned by the court about the absence of a declaration from his client, counsel provided formal proof through the testimony of the property manager. The property manager testified that Ford had defaulted, and that he had served Ford with a 10-day notice to cure the defaults. The court ordered issuance of the writ of restitution and judgment.

On December 21, 2007, Ford brought a pro se motion to vacate the judgment and stay execution of the writ of restitution. The court denied both motions but, apparently because Ford represented that she had proof that the amount of the judgment should be reduced because of partial payments, authorized a further hearing on January 14, 2008, to determine whether Ford

was entitled to further credits.[1] The court's order required Ford to file and serve such proof by January 9.

Ford did not file or serve such proof but appeared on January 14, again pro se, with her brother, who made representations to the court as her witness. Ford's brother acknowledged that Ford had failed to make rent payments and that there had been an eviction notice, but nonetheless objected to the proceedings on various grounds, most of which were not clear. When Ford's brother raised the question of Seafive's continued ownership of the property, counsel for Seafive explained that there had been a sale but the purchase and sale agreement made Seafive the agent of the new purchaser with the authority and duty to complete the unlawful detainer proceeding. Neither Ford nor her brother disputed this, and, finding Ford's other contentions lacking merit, the court did not modify the earlier order other than ordering additional attorney fees in Seafive's favor.

Ford filed a notice of appeal. Several months later, Seafive filed a satisfaction of judgment indicating it had received a payment of $1,327.78 by garnishing Ford's bank account, and although more than $20,000 was still owing, it accepted the amount as full satisfaction because there was no hope of recovering any more money from Ford.

[1] No transcript of the December 21 hearing has been provided.

DISCUSSION

To the extent the parties' arguments are based on the written materials only, we stand in the same position as the trial court and review the record de novo.[2] We likewise review questions of law de novo.[3] Challenged findings of fact are reviewed for substantial evidence.[4]

Mootness

As a threshold matter, Seafive asserts this case is moot. Sea Five argues that Ford has no present claim of a right to possession under the lease and has no financial stake because Seafive ultimately satisfied its judgment against Ford for much less than the total amount of rent Ford acknowledged failing to pay.

"'A case is technically moot if the court cannot provide the basic relief originally sought, or can no longer provide effective relief.'"[5] Seafive is correct that the issue of possession is moot because Ford is not in possession and her only claim to a right of possession was under the lease that by its terms expired in April 2008.[6] But even when the issue of possession is moot, challenges to unlawful detainer proceedings are not moot if the tenant continues to possess a

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[2] Hous. Auth. v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005).

[3] Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

[4] Dickson v. Kates, 132 Wn. App. 724, 730, 133 P.3d 498 (2006).

[5] Josephinium Assocs. v. Kahli, 111 Wn. App. 617, 622, 45 P.3d 627 (2002) (quoting Snohomish County v. State, 69 Wn. App. 655, 660, 850 P.2d 546 (1993)).

[6] IBF, LLC v. Heuft, 141 Wn. App. 624, 631, 174 P.3d 95 (2007).

monetary stake in the outcome of the case.[7] While the single garnishment payment Seafive received from Ford is less than even one month of the delinquent rent that Ford does not dispute is owed, Seafive fails to consider Ford's claim for attorney fees under the lease. Because the lease provides for fees to the prevailing party in any action for nonpayment of rent, Ford has a monetary stake in the final outcome of this litigation.[8] We accordingly consider the merits of Ford's contentions that the trial court erred in issuing the writ of restitution because Seafive was not the actual owner of the property and because Seafive failed to prove that it gave notice to Ford of her default in paying rent in the required manner.[9]

Ownership

Ford contends that because it was clear by the conclusion of the proceedings in the trial court that Seafive was no longer the owner of the subject property, the court erred by failing to vacate the judgment. We review a trial court's denial of a motion to vacate for an abuse of discretion.[10] For at least three alternative reasons, we find no abuse of discretion here.

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[7] IBF, 141 Wn. App. at 631.

[8] See Truly v. Heuft, 138 Wn. App. 913, 917, 158 P.3d 1276 (2007).

[9] Other claims raised by Ford, which go only to the amount of the judgment and attorney fees awarded to Seafive, are moot, however, because Ford acknowledged in the trial court and does not dispute on appeal that she failed to make required rent payments that necessarily exceed the amount for which the judgment was satisfied. We therefore do not further discuss these issues in this opinion and deny Seafive's motion under RAP 9.11 to present additional evidence on appeal related to the issue of mootness.

[10] Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000).

First, the record contains no showing that Ford raised the ownership issue before issuance of the writ or even at the December 21 motion to vacate the judgment and stay the writ of restitution. The trial court's order setting the January hearing reserved only the issue of whether Ford was entitled to additional credits against the judgment amount and required Ford to file and serve any pleadings or proof by January 9, which Ford failed to do. The court could properly reject any contention regarding ownership as untimely and beyond the scope of the limited issues reserved for that hearing.

Second, even considering the January 14 argument, the record does not support Ford's contention that Seafive was not the owner when the writ of restitution issued.[11]

Third, while Ford relies on Seafive's counsel's acknowledgment at the January 14 hearing that ownership had changed hands at some point, she fails to credit counsel's contemporaneous explanation that Seafive remained the correct party to the proceedings because they were assigned the right and duty to complete the unlawful detainer action by the new owner under the purchase

[11] Implicitly acknowledging this problem, Ford asserts in her brief that a video recording shows that her brother actually informed the court that ownership had changed hands on August 24, even though the transcript does not contain this date. We reject this improper attempt to supplement the trial record. See RAP 9.9 and 9.10 (establishing proper methods for correcting or supplementing the record). We also note that a commissioner of this court previously denied Ford's motion under RAP 9.11 to take additional evidence related to this issue.

and sale agreement.[12] The trial court clearly considered this representation as an offer of proof, just as it had the factual claims by Ford's brother. Ford did not dispute this offer of proof, attempting instead only to revisit issues that had been resolved against her in the earlier motion to vacate. Accordingly, notwithstanding the change of ownership, the trial court could reasonably conclude that Seafive maintained its right of possession "as against" Ford.[13]

For the above reasons, we cannot find the trial court abused its discretion by declining to vacate the order.

Proof of Notice of Default to Establish Subject Matter Jurisdiction

Ford further contends that the judgment against her is void because the trial court lacked subject matter jurisdiction. While the unlawful detainer statute is designed to provide expeditious proceedings, a landlord seeking relief under the statute must comply with all statutory requirements and a failure to do so deprives the court of subject matter jurisdiction to proceed.[14] Ford argues that the judgment is void because the record contains no proof that Seafive provided her notice of her default in writing by certified mail as required by the lease. We agree that remand is required for this reason.

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[12] See Estate of Jordan v. Hartford Accident & Indem. Co., 120 Wn.2d 490, 495, 844 P.2d 403 (1993) ("An assignee steps into the shoes of the assignor, and has all of the rights of the assignor.").

[13] MacRae v. Way, 64 Wn.2d 544, 547, 392 P.2d 827 (1964).

[14] Laffranchi v. Lim,146 Wn. App. 376, 383, 190 P.3d 97 (2008).

Proper notice of a default in payment of rent as required by RCW 59.12.030 is a "jurisdictional condition precedent" to an unlawful detainer action.[15] Without competent proof of compliance with the necessary notice requirements, a writ of restitution is improperly entered.[16] Case law distinguishes between "time and manner" requirements for service of an unlawful detainer notice of default and the "form and content" of the notice.[17] With respect to the former, strict compliance is necessary.[18] And when parties contract for a specific time or manner of notice, compliance with such a condition is a jurisdictional prerequisite to relief in an unlawful detainer proceeding to the same extent as compliance with the statutory requirements is necessary.[19]

Here, the lease required notice to the tenant of any demand or claim of default "required or permitted by law" to be sent by "certified United States Mail" to a specified address.[20] But the only proof of service offered by Seafive was the property manager's conclusory testimony that the notice was "served" on Ford.[21]

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[15] Hous. Auth. v. Terry, 114 Wn.2d 558, 564-65, 789 P.2d 745 (1990).

[16] Pleasant, 126 Wn. App. at 392.

[17] Marsh-McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636, 640, n.1, 980 P.2d 311 (1999).

[18] Cmty. Invs., Ltd. v. Safeway Stores, Inc., 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983).

[19] Cmty. Invs., 36 Wn. App. at 37-38.

[20] The lease has been provided to this court pursuant to a commissioner's ruling granting supplementation of the record under RAP 9.11.

[21] Seafive also points to Ford's brother's acknowledgment at the January 14 hearing that there had been an eviction notice, but he made no admission or statement that went to the timing or manner of service of such notice, or even to its contents.

Because the record contains no substantial evidence that the notice was served in the manner specifically required by the lease, the writ of restitution was improperly entered.[22]

This does not mean, however, that the proper remedy on appeal is dismissal of Seafive's unlawful detainer action. "It is the fact of service that confers jurisdiction, not the return."[23] Unlike the cases Ford cites, this record does not establish that notice was given in an improper manner; it merely fails to establish that the manner of service was proper.[24] Under these circumstances, the appropriate remedy is a remand for further proceedings in which Seafive will have the opportunity to provide the requisite proof that service occurred as required by the lease.[25]

And because the ultimate determination of whether the judgment against Ford was proper must abide resolution of this issue, Ford's claim for attorney fees on appeal is premature. Under the lease, the prevailing party in "the action"

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[22] Pleasant, 126 Wn. App. at 392; Cf. CR 4(g)(7). We reject Ford's contention, however, that the contract called for 30 days notice under these circumstances. The plain language of the lease provided for 10 days notice for a failure to pay rent.

[23] In re Estate of Palucci, 61 Wn. App. 412, 416, 810 P.2d 970 (1991).

[24] We disagree with Ford's contention that the only permissible means of proving the required service is through filing an affidavit. While that is the customary and prevailing practice, RCW 59.12.040 provides that proof of service "may be made by . . . affidavit," not that filing an affidavit is the exclusive way to provide such proof.

[25] Cf. CR 4(g)(7) (While affidavit of service of summons must state "time, place, and manner of service," "[f]ailure to make proof of service does not affect the validity of the service.").

is entitled to fees. The prevailing party in this unlawful detainer action will depend on the final determination of whether notice was accomplished in the required manner.[26]

We accordingly reverse and remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Dwyer, A.C.J.

Appelwick, J.

[26] Perry v. Moran, 109 Wn.2d 691, 748 P.2d 224 (1987), as modified by 111 Wn.2d 885, 888, 766 P.2d 1096 (1989).