

App. 1 (Appendix 0)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL G SZMANIA,,
Plaintiff,

v.

E-LOAN, INC., et al.,
Defendant(s).

JUDGMENT

CASE NUMBER:
C16-5644-RBL

(Filed Nov. 21, 2016)

XX Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Plaintiff's request for certification is **DENIED**.

Defendants' Motion to Dismiss is **GRANTED**.

Plaintiff's claims are **DISMISSED** with prejudice and without leave to amend.

DATED this 21st day of November, 2016

s/William M. McCool
William M. McCool, Clerk

s/Jean Boring
Jean Boring, Deputy Clerk

App. 2 (Appendix 1)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL G. SZMANIA,
Plaintiff - Appellant,
v.
E-LOAN, INC.; et al.,
Defendants - Appellees.

No. 16-36055
D.C. No.
3:16-cv-05644-RBL
U.S. District Court for
Western Washington,
Tacoma
MANDATE
(Filed Jul. 11, 2018)

The judgment of this Court, entered February 23, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica F. Flores
Poblano Deputy Clerk
Ninth Circuit Rule 27-7

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**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 19, 2019

Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Daniel G. Szmania
v. E-Loan, Inc., et al.
No. 18-734
(Your No. 16-36055)

Dear Clerk:

The Court today entered the following order in the
above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ Scott S. Harris

Scott S. Harris, Clerk

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HONORABLE JUDGE VELJACIC
DEPARTMENT #5

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

WELLS FARGO BANK,	)	Case No.
NA., AS TRUSTEE FOR	)	16-2-02606-4
BEAR STEARNS ARM	)	NOTICE TO CLERK
TRUST 2007-3,	)	OF REMOVAL TO
Plaintiff,	)	FEDERAL COURT
Vs.	)	(Filed May 18, 2017)
DANIEL G. SZMANIA,)	
Defendant.	)	<u>Noted for consideration:</u>
	)	N/A

TO: Clark County Superior Court Clerk;

AND TO: Wells Fargo Bank, N.A., as Trustee for Bear Stearns Arm Trust 2007-3, (Wells Fargo) Plaintiff,

NOTICE IS HERBEY GIVEN, pursuant to 28 U.S.C. §§ 1291, 1332(a), 1367(a) 1441(a)(b)(c) and 1446, that this instant case is a descendant of Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY that was properly removed on July 20, 2016 by the Plaintiff in this case, Wells Fargo, (Defendant in Case No. 16-2-01214-4 (Original Case)) to UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

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AT TACOMA, Case No. 3:16-CV-05644-RBL, (Federal Case). See Ex H Szmania's Motion to Dismiss.

Under 28 U.S.C. § 1291, the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT Case No. 16-36055, (Appeal Case) accepted Jurisdiction over all matters regarding the property located at: 17005 NE 164th Ave, Brush Prairie, WA 98606 as the Notice of Appeal was filed on 12/19/16 Dkt 67 in Federal Case. (*I ask the Court to Judicially Notice the above four (4) noted cases.)

28 U.S.C. § 1446(d) reads: “(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.— Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.” (Emphases added!)

The Original Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY has NEVER BEEN REMANDED!

Furthermore, “28 US. Code § 1367 - **Supplemental Jurisdiction** (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over

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all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.” (Emphases added!)

As Declared in DktEntry 17-2, Declaration of Daniel Szmania in the Appeal Case outlines the timeline of the four (4) cases and the clearly shows of the denial of the Motion to Remand to State Court in the Federal Case and is the original record per FRAP 30(f) show as material evidence:

(Appellant is Szmania, Appellee is Wells Fargo) and (Dkt Citings are Federal Case)

1. On June 27, 2016, Appellant files Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY See Dkt 2-2 Ex 4 pages 1-65.
2. On July 20, 2016 Appellees give up Jurisdiction in the IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY by moving Case No. 16-2-01214-4 to the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3: 16-CV-05644-RBL. See Dkt 1 pages 1-5, Dkt 2 pages 1-4 and Dkt 3 pages 1-3.
3. On July 22, 2016, Presiding Judge Stahnke cites 28 U.S.C. § 1446(d) and notes on the motion docket regarding Case No. 16-2-01214-4:

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"Motion for removal to Federal Court has been filed by the defendant. (Wells Fargo). Therefore, pursuant to federal status no action will be taken by the State Court until; when or if the case is remanded". See Dkt 20-3 Ex C.

4. *On 8/8/16 Dkt 23 pages 1-5, Appellant Motioned the Federal District Court to Remand back to the State Court.*
5. *On 8/29/16 Dkt 39 pages 1-5 Appellees filed their Opposition to Remand.*
6. *On 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: "The Motion to Remand [Dkt. #23] is **DENIED**" Thus denying the State Court Jurisdiction once again and maintaining original Jurisdiction in the U.S. District Court.*
7. *On 11/18/16 Dkt 64, in the US. Federal District Court Case No. 3:16-CV-05644-RBL, the Court Rules on Appellees Motion to Dismiss, Dkt 56.*
8. *On 11/21/16, Dkt 65 Is the Entry of judgment of originating court.*
9. *On 12/01/16, Dkt 66 is the Date of service of any motion made after judgment.*
10. *0,112/19/16, Dkt 68 is the Date of entry of order deciding motion.*
11. *On 12/19/16 Dkt 67, Appellant files in the U.S. Federal District Court Case No. 3:16-CV-05644-RBL, Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On 12/20/16 U.S. Court of Appeals for the Ninth Circuit*

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accepts the Appeal, Case No. 16-36055. (See DktEntry 1-3 Appeal Case).

12. *On 12/22/16 Appellees, Wells Fargo Bank N.A. and Benjamin D. Petiprin files a frivolous case in the Superior Court of the State of Washington for Clark County, Case No. 16-2-02606-4.*

The 12 items noted above clearly show that the Federal Court actions were initiated first with proceedings of substance on the merits and have occurred before the Plaintiff/Appellees filed their frivolous instant case, state action listed as number 12 on 12/22/16 **three (3) days, after** the Notice of Appeal was filed on 12/19/16, Dkt 67 in Federal Case.

Defendant in the instant case; Daniel G. Szmania enforces the prior removal and has removed this instant matter which is under the Appellate Jurisdiction of 28 U.S.C. § 1291, the Diversity Jurisdiction of 28 U.S.C. § 1332, the Supplemental Jurisdiction of 28 U.S.C. § 1367 and the Original Jurisdiction of 28 U.S.C. § 1441 and 28 U.S.C. § 1446. This case also is from the nucleus of the previous removed State Case No. 16-2-01214-4 that was removed on 20 July 2016, to the United States District Court for the Western District at Tacoma, Case No. 3:16-CV-05644-RBL, which has submitted Jurisdiction under 28 U.S.C. § 1291, to the U.S. Court of Appeals for the Ninth Circuit and it acceptance of the Appeal, Case No. 16-36055.

Defendant in this instant case, Daniel G. Szmania has removed this matter on May 18, 2017 to the United States District Court for the Western District at

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Tacoma, Case No. 3:16-CV05644-RBL, which has submitted its Jurisdiction under 28 U.S.C. § 1291, to the U.S. Court of Appeals for the Ninth Circuit and its acceptance of the Appeal, Case No. 16-36055. A true and correct copy of the Notice of Removal to Federal Court, without attachments is attached.

This removal terminates this Court's jurisdiction and all proceedings in this forum pursuant to 28 U.S.C. § 1291, 28 U.S.C. § 1332, 28 U.S.C. § 1367(a), 28 U.S.C. § 1441 and 28 U.S.C. § 1446(d)! "There is no discretion to ignore lack of jurisdiction." Joyce v. U.S. 474 2D 215.

Submitted by:

/s/ Daniel Szmania
Defendant, Daniel G. Szmania,
Pro Se' May 18, 2017

Presented: Daniel G. Szmania, Defendant, Pro Se'.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137.
17005 NE 164th Ave., Brush Prairie, WA 98606
360-260-2280, Email: dszmania@quixnet.net

CERTIFICATE OF SERVICE

Case No. 16-2-02606-4.

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 18th day of May, 2017, I served via:

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X First Class Mail, to the following persons, a true and correct copy of the Foregoing:

1) NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, NOTICE OF REMOVAL TO FEDERAL COURT, TO PLAINTIFF:

1) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3.
C/o Zieve, Brodnax & Steele, LLP, Benjamin D. Petiprin, Esq.
6100 219th St. SW #480, Mountlake Terrace, WA 98043
206-866-5345 bpetiprin@zievelaw.com

2) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3. C/o Dale W. Read
211 East McLoughlin Blvd, Vancouver, WA 98663
360-696-5976

I certify under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of May, 2017, at Brush Prairie, Washington.

/s/ Daniel G. Szmania

Daniel G. Szmania

Presented: Daniel G. Szmania, Defendant, Pro Se'.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137.
17005 NE 164th Ave., Brush Prairie, WA 98606
360-260-2280, Email: dszmania@quixnet.net

CERTIFICATE OF SERVICE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL G. SZMANIA,	) No. 16-36055
Plaintiff - Appellant,)
	) D.C. No.
Vs.	) 3:16-cv-05644-RBL U.S.
E-LOAN, INC.,	) District Court for Western
	) Washington, Tacoma
AND)
BEAR STEARNS ARM	) NOTICE OF REMOVAL
TRUST, MORTGAGE	) TO FEDERAL COURT
PASS-THROUGH)
CERTIFICATES,)
SERIES 2007-3,)
)
AND)
BENJAMIN D. PETIPRIN,)
)
AND)
WELLS FARGO BANK, N.A.)
)
AND	) <u>NOTE ON MOTION</u>
JOHN G. STUMPF,	) <u>CALENDAR:</u>
)
Defendants - Appellees.	) N/A

INTRODUCTION.

Pursuant to 28 U.S.C. §§ 1291, 1332(a), 1367(a), 1441(a) and 1446 Defendant/Appellant Daniel G. Szmania, (Szmania) respectfully gives notice of the removal of this action from Clark County Superior Court to this Court. Basis for removal is federal Jurisdiction on

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Appeals, Diversity Jurisdiction, Supplemental Jurisdiction, Original Jurisdiction and Subject Matter Jurisdiction.

BACKGROUND

On or about December 22, 2016, Plaintiff in State Action, WELLS FARGO BANK, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3, (Wells Fargo) filed this matter in state court under Clark County Superior Court Case No. 16-2-02606-4 (State Court). Pursuant to Local Rule 101(b), a true and correct copy of the operative Complaint is attached hereto with the accompanying Declaration of Daniel G. Szmania (Szmania Decl), Ex 1-Ex 4.

**BACKGROUND OF APPELLATE
JURISDICTION 28 U.S.C. 1291**

As Declared in DktEntry 17-2, Declaration of Daniel Szmania in the Appeal Case, outlines the timeline of the four (4) cases and the clearly shows of the denial of the Motion to Remand to State Court in the Federal Case and is the original record per FRAP 30(f) show as material evidence: (*Appellant is Szmania, Appellee is Wells Fargo*) and (*Dkt Citings are Federal Case*)

1. *On June 27, 2016, Appellant files Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY. See Dkt 2-2 Ex 4 pages 1-65.*

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2. *On July 20, 2016 Appellees give up Jurisdiction in the IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY, by moving Case No. 16-201214-4 to the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644-RBL. See Dkt 1 pages 1-5, Dkt 2 pages 1-4 and Dkt 3 pages 1-3.*
3. *On July 22, 2016, Presiding Judge Stahnke cites 28 U.S.C. § 1446(d) and notes on the motion docket regarding Case No. 16-2-01214-4: "Motion for removal to Federal Court has been filed by the defendant. (Wells Fargo). Therefore, pursuant to federal status no action will be taken by the State Court until; when or if the case is remanded". See Dkt 20-3 Ex C.*
4. *On 8/8/16 Dkt 23 pages 1-5, Appellant Motioned the Federal District Court to Remand back to the State Court.*
5. *On 8/29/16 Dkt 39 pages 1-5 Appellees filed their Opposition to Remand.*
6. *On 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: "The Motion to Remand [Dkt. #23] is **DENIED**" Thus denying the State Court Jurisdiction once again and maintaining original Jurisdiction in the U.S. District Court.*
7. *On 11/18/16 Dkt 64, in the U.S. Federal District Court Case No. 3:16-CV-0564-RBL, the*

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Court Rules on Appellees Motion to Dismiss, Dkt 56.

8. *On 11/21/16, Dkt 65 Is the Entry of judgment of originating court.*
9. *On 12/01/16, Dkt 66 is the Date of service of any motion made after judgment.*
10. *On 12/19/16, Dkt 68 is the Date of entry of order deciding motion.*
11. *On 12/19/16 Dkt 67, Appellant files in the U.S. Federal District Court Case No. 3:16-CV05644 -RBL, Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On 12/20/16 U.S. Court of Appeals for the Ninth Circuit accepts the Appeal, Case No. 16-36055. (See DktEntry 1-3 Appeal Case).*
12. *On 12/22/16 Appellees, Wells Fargo Bank N.A. and Benjamin D. Petiprin files a frivolous case in the Superior Court of the State of Washington for Clark County, Case No. 16-2-02606-4. Seeking relief of an Unlawful Detainer. This claim was never raised in the Federal Case, thus it can not be addressed on appeal per the doctrine of resjudicata and claim preclusion. However, the subject matter of the property known as: 17005 NE 164th Ave, Brush Prairie, WA 98606, is under Subject Matter Jurisdiction, Appellate Jurisdiction, Diversity Jurisdiction, Supplemental Jurisdiction and Original Jurisdiction of the Ninth Circuit Court of Appeals in Case No. 16-36055.*

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The 12 items noted above clearly show that the Federal Court actions were initiated first with proceedings of substance on the merits and have occurred before the Plaintiff/Appellees Wells Fargo filed their frivolous instant state case, in number 12 above and on 12/22/16 **three (3) days after** the Notice of Appeal was filed on 12/19/16, Dkt 67 in Federal Case.

DIVERSITY JURISDICTION

28 U.S.C. § 1332(a) provides in relevant part: “(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States.”

Szmania – Defendant Szmania is a resident of Clark County, Washington and is therefore a citizen of Washington for diversity purposes. *See* Dkt 2-2 Ex 4, page 11 #7.

Wells Fargo Bank, N.A. – Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo”) is a national bank headquartered in South Dakota and is therefore a citizen of South Dakota for diversity purposes. *See* Dkt 1, page 2 at 18-19.

Amount in Controversy – Plaintiff, Wells Fargo seeks possession of a home they say is valued at \$680,800.00, meeting the amount in controversy threshold and stated in good faith per LCR 101(a). *See* Enclosed Complaint of Plaintiff, Ex 3 of Wells Fargo, for Unlawful Detainer “Ex A, Trustee Deed page 2, #10”.

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Plaintiff, Wells Fargo is a citizen of the State of South Dakota. Defendant Szmania is a citizen of the State of Washington. The amount in controversy exceeds \$75,000.00. This Court therefore has original jurisdiction of this lawsuit pursuant to 28 U.S.C. § 1332(a), Diversity Jurisdiction. Which submitted itself to jurisdiction of the Ninth Circuit Court of Appeals, per 28 U.S.C. § 1291, which also has Supplemental Jurisdiction under 28 U.S.C. § 1367(a).

PROCEDURAL REQUIREMENTS

Removal Is Ascertained. This removal pursuant to "28 U.S.C. § 1446(a) *A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, (b)(3), from which it may first be ascertained that the case is one which is or has become removable (c)(1) provided that in the absence of bad faith, the removal is made within one year of commencement of the action.*"

Here, Defendant Szmania was never properly served with a Summons or a Compliant, making this removal timely due to the unaccompanied formal service and Defendant had to ascertain on his own out side of the Plaintiff's State Court Summons & Complaint that the case is removable.

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Intradistrict Assignment. Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant Szmania files this Notice of Removal in the United States District Court for the Western District of Washington at Tacoma, which is the federal district court embracing the state court where Plaintiff Wells Fargo has brought the State Court Lawsuit – Clark County, Washington. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and 28 U.S.C. §128(b). Filing of the Removal is proper in the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT Case No. 16-36055 per 28 U.S.C. § 1291 which accepted Jurisdiction on 12/20/17. See DktEntry 1-3. And it's Supplemental Jurisdiction under 28 U.S.C. § 1367(a).

State Court Pleadings. As required by 28 U.S.C. § 1446, a true and correct copy of all state court process, pleadings, or orders served on the removing party to date. Defendant Szmania was never properly served with a Summons and Complaint. However, Defendant Szmania does enclose a true and correct of the Summons and Complaint in compliance with Local Rule 101(6). See Szmania Decl. Ex 1, Ex 2, Ex 3 and Ex 4.

Consent. This matter is being removed by Defendant Szmania, who consents to the removal, even though he was not properly served with the Summons and Complaint, removes case under 28 U.S.C. §§ 1291, 1332(a) and (1), 1367(a), 1441(a) and 28 U.S.C. § 1446(a).

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No Waiver. By seeking removal, Defendant Szmania does not waive, and expressly reserve all rights, defenses, or objections of any nature that they may have to Plaintiff's claims. Specifically, Defendant does not waive any of its affirmative defenses as to sufficiency of process, sufficiency of service and/or of process, jurisdiction, venue, right to arbitration, failure to state a claim, failure to join a party, or any other affirmative defense in this matter.

Notice. A copy of this Notice of Removal and the Szmania Decl. is being served upon Plaintiff Wells Fargo and filed with the clerk of the Superior Court of Washington for Clark County pursuant to 28 U.S.C. § 1446(d).

Signature. This Notice of Removal is signed pursuant to FRCP 11. See 28 U.S.C. § 1446(a).

**Further Precedents for this removal of
Subject Matter Jurisdiction with the
Ninth Circuit on the property known as:
17005 NE 164th Ave, Brush Prairie, WA
98606:**

28 U.S.C. § 1291, 28 U.S.C. § 1332(a) 28 U.S.C. § 1367(a) and 28 U.S.C. § 1441 and 28 U.S.C. § 1446(a)(d) clearly gives the U.S. District Court and the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT Subject Matter Jurisdiction, Appellate Jurisdiction, Diversity Jurisdiction, Supplemental Jurisdiction and Original Jurisdiction as defined by Article III Section 2 of the U.S. Constitution. As does 28 U.S. Code § 1332 - Diversity of citizenship;

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amount in controversy; costs- also give Subject Matter Jurisdiction and Original Jurisdiction along with 28 U.S. Code § 1441 - Removal of civil actions as Appellees noted in their Notice of Removal Dkt 1 page 1 at 18.

The original State Case No. 16-2-01214-4 **has NEVER been remanded** as we see on 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: "*The Motion to Remand Mkt #231 is DENIED*" Thus denying the State Court Jurisdiction once again and maintaining Subject Matter Jurisdiction, Appellate Jurisdiction, Diversity Jurisdiction, Supplemental Jurisdiction and Original Jurisdiction in the U.S. District Court & the U.S. Court of Appeals for the Ninth Circuit until a Mandate is filed.

Any relief the Appellees want to seek needs to be done in this court that has Subject Matter Jurisdiction, Appellate Jurisdiction, Diversity Jurisdiction, Supplemental Jurisdiction and Original Jurisdiction under the motions chapter FRAP 27 and not court, forum or judge shop with gamesmanship. This will not prejudice the Appellees in any way. We see that 28 U.S.C. § 1446(d) clearly prohibits such actions after a removal to federal court. And the state court can not resolve the issues here on appeal which makes this case distinguishable from the state case.

Furthermore, Appellees **new claim** for an Unlawful Detainer is also barred by the res judicata and claim preclusion doctrines as well. That claim was

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NEVER PLEAD in the case until after the Notice of Appeal was filed on 12/19/16, Dkt 67.

Circuit Courts:

"Court must prove on the record, all jurisdiction facts related to the jurisdiction asserted." *Latana v. Hopper*, 102 F.2d 188; (5th Cir. 1939) *Chicago v. New York*, 37 F Supp. 150.

"The burden shifts to the court to prove jurisdiction." *Rosemond v. Lambert*, 469 F2d 416 (5th Cir. 1972)

"Where a court failed to observe safeguards, it amounts to denial of due process of law, court is deprived of juris." *Merritt v. Hunter*, C.A. Kansas 170 F2d 739. (10th Cir. 1948)

The U.S. Supreme Court has stayed state cases before and set precedence on jurisdiction:

"28 U.S.C. § 1343(3): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"" (Page 415 U. S. 536)- *Hagans v. Lavine* 415 US. 528 (1974)

"A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court". *OLD WAYNE MUT. L. ASSOC. v. McDONOUGH*, 204 U. S. 8, 27 S. Ct. 236 (1907).

"There is no discretion to ignore lack of jurisdiction." *Joyce v. US*. 474 2D 215.

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"The law provides that once State and Federal Jurisdiction has been challenged, it must be proven." Main v. Thiboutot, 100 S. Ct. 2502 (1980).

"A court has no jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and a court must have the authority to decide that question in the first instance." Rescue Army v. Municipal Court of Los Angeles, 171 P2d 8; 331 US 549, 91 L. ed. 1666, 67 S.Ct. 1409.

This Court has Subject Matter Jurisdiction, Appellate Jurisdiction, Diversity Jurisdiction, Supplemental Jurisdiction and Original Jurisdiction on matters of the Appellant's home, known as 17005 NE 164th Ave, Brush Prairie, WA 98606. Thus this Court has a responsibility to protect the Appellant's Due Process in this court without the interference of another state court action.

Accordingly, this action should proceed in the United States District Court for the Western District of Washington at Tacoma, which submitted itself to jurisdiction under appeal of 28 U.S.C. § 1291, 28 U.S.C. § 1332, 28 U.S.C. § 1367(a), 28 U.S.C. § 1441 and 28 U.S.C. § 1446, to the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Case No. 16-36055 and thus is an action properly removed thereto; **so this Court may properly dismiss the Appellees new claim for an Unlawful Detainer action that is plead post Notice of Appeal Dkt 67**

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dated 12/19/16, for it is moot and should be stricken with prejudice.

Presented by:

s/ Daniel G. Szmania

(Defendant) Plaintiff/Appellant, Daniel G.

Szmania, Pro Se' May 18, 2017

Presented: Daniel G. Szmania, (Defendant) Plaintiff/
Appellant, Pro Se'.

HM1 USNR Retired, U.S. Supreme Court No. 11-6137.

17005 NE 164* Ave., Brush Prairie, WA 98606

360-260-2280, Email: dszmania@quixnet.net

Case No. 16-36055

CERTIFICATE OF SERVICE

I certify that, on the date indicated below, I caused the foregoing document to be presented to the Clerks of the United States District Court Western District of Washington at Tacoma **and** the United States Court of Appeals for the Ninth Circuit for filing and uploading to the CM/ECF systems. In accordance with their ECF registration agreements and the Court's rules, the Clerks of the Courts will send email notification of such filing to all attorneys and parties of record. I affirm under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my personal knowledge. LCR 101(b) list:

(Defendant) Plaintiff - Appellant:

Daniel G. Szmania HM1 USNR-RET, U.S. Supreme Court 11-6137.

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360-260-2280 Email: dszmania@quixnet.net
17005 NE 164th Avenue, Brush Prairie, WA
98606

(Plaintiff) Defendants – Appellees:

John S. Devlin III, Lane Powell PC
206-223-7000 Email: devlinj@lanepowell.com
1420 Fifth Avenue, Suite 4100 (P.O. Box 91302),
Seattle, WA 98111-9402

Abraham K. Lorber, Lane Powell PC
206-223-7000 Email: lorbera@lanepowell.com
1420 Fifth Avenue, Suite 4100 (P.O. Box 91302),
Seattle, WA 98111-9402

Benjamin David Petiprin, Zieve, Brodnax &
Steele, LLP
206-866-5345 Email: bpetiprin@zievelaw.com &
bpetiprin@zievelaw.com
30 Corporate Park, Suite 450, Irvine, CA 92606

SIGNED May 18, 2017 at Brush Prairie, Washing-
ton.

s/ Daniel G. Szmania

Daniel G. Szmania

(Defendant) Plaintiff/Appellant, Daniel G.
Szmania, Pro Se' May 18, 2017
Presented: Daniel G. Szmania, (Defendant) Plaintiff/
Appellant, Pro Se'.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137.
17005 NE 164th Ave., Brush Prairie, WA 98606
360-260-2280, Email: dszmania@quixnet.net

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DANIEL SZMANIA - FILING PRO SE

April 13, 2021 - 2:52 PM

Transmittal Information

Filed with Court: Supreme Court

Appellate Court

Case Number: 99578-8

Appellate Court

Case Title: Wells Fargo Bank v.
Daniel G. Szmania

Superior Court

Case Number: 16-2-02606-4

The following documents have been uploaded:

- 995788_Affidavit_Declaration_20210413143614
SC279367_6033.pdf
This File Contains:
Affidavit/Declaration - Compliance
*The Original File Name was 4-13-21 DEC-
LARATION DANIEL G SZMANIA-SUPPORT
REPLY.pdf*
- 995788_Letters_Memos_20210413143614SC2
79367_5481.pdf
This File Contains:
Letters/Memos - Other
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- 995788_Motion_202104131436145C279367_5048.
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App. 25 (Appendix 3)

Motion 1 - Other

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- garrett.garfield@hklaw.com
- glenn.johnson@hklaw.com

Comments:

Appellant's Motion to File a Reply-Reply

Sender Name: Daniel Szmania - Email: dszmania@quixnet.net

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Brush Prairie, WA, 98606-0757

Phone: (360) 718-1402

Note: The Filing Id is 20210413143614SC279367

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

DIVISION II

WELLS FARGO BANK, N.A.,
AS TRUSTEE FOR
BEAR STEARNS ARM
TRUST 2007-3,

Respondent,

v.

DANIEL G. SZMANIA, and
OCCUPANTS OF PREMISES,

Appellant.

No. 50523-1-II

UNPUBLISHED
OPINION

(Filed Jan. 3, 2019)

Lee, A.C.J. — Daniel G. Szmania appeals the superior court's denial of his motion to dismiss Wells Fargo's unlawful detainer complaint against him. Szmania argues that (1) the superior court did not have subject matter jurisdiction over Wells Fargo's unlawful detainer action because a prior lawsuit he initiated involving his property had been removed to federal court, (2) Wells Fargo failed to properly serve process on him because it failed to comply with the superior court's order for alternative service, (3) Wells Fargo's complaint failed to state a claim upon which relief could be granted under CR 12(b)(6), and (4) the superior court abused its discretion by entering orders in this case when it did not have jurisdiction. Because Wells Fargo failed to comply with the alternative

App. 27 (Appendix 4)

service statute and the trial court's order for alternative service, we reverse.

FACTS

In July 2016, Wells Fargo purchased a property located in Brush Prairie, Washington at a trustee's sale held pursuant to RCW 61.24.¹ Szmania, the former owner of the property, failed to vacate the property following sale. In December, Wells Fargo filed a complaint for unlawful detainer in order to remove Szmania from the premises and secure possession of its purchased property.

On January 23, 2017, Wells Fargo filed a motion for alternative service, requesting that the superior court allow alternative service by posting the unlawful detainer summons and complaint on the premises and by mailing a copy to Szmania. In support, Wells Fargo attached a declaration of non-service from the process server, who stated that he had attempted to serve Szmania, but could not because the gate was locked, a car blocked the driveway, and a banner on the premises indicated a threatening environment. The superior

¹ RCW 61.24.030(3) grants the power of sale when "a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell."

RCW 61.24.030 has also been amended since the events of this case transpired. These amendments also do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including the word "former" before RCW 61.24.030.

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court granted Wells Fargo's motion and entered an order for alternative service. This order stated that pursuant to RCW 59.12.040, service of process could be completed by posting a copy of the summons and complaint "in a conspicuous place on the subject [p]roperty" and by mailing a copy to Szmania by certified mail. Clerk's Papers (CP) at 22.

On February 2, Wells Fargo filed a declaration of service in which the process server stated that he served Szmania on January 30 "[My attaching in a secure manner to the main entrance of that portion of the premises of which the defendant has possession" the unlawful detainer summons and complaint. CP at 25. Wells Fargo also filed a certificate of mailing, which stated that a copy of the summons and complaint had been mailed to Szmania by first class mail on February 1.

On February 16, Szmania filed a motion to dismiss Wells Fargo's unlawful detainer action pursuant to CR 12(b)(1)-(6). Szmania argued that the superior court did not have subject matter jurisdiction or personal jurisdiction over the unlawful detainer action because a prior, separate lawsuit he initiated against Wells Fargo had since been removed to federal court and service of process was improper. Szmania supported his motion to dismiss with, among other documents, a declaration stating that a complaint he filed against Wells Fargo had been removed to federal court in July 2016.² The

² The details of this lawsuit are unclear from the record, but the declaration in support of removal shows that in addition to

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complaint in the removed case was filed on June 27, 2016 and included claims for (1) declaratory judgment, (2) permanent injunction, (3) forfeiture of deed, (4) satisfaction of mortgage, (5) other equitable relief, (6) quiet title, and (7) actions under the Criminal Profiteering Act and Consumer Protection Act.

The superior court denied Szmania's motion to dismiss in May 2017. The superior court also entered an order for default judgment on Wells Fargo's unlawful detainer complaint, and entered an order to issue writ of restitution without bond, which ordered possession of the premises restored in Wells Fargo. Szmania appeals.

ANALYSIS

A. SERVICE OF PROCESS

Szmania argues that service of process was improper because Wells Fargo failed to comply with the superior court's order for alternative service. Specifically, he argues that the summons and complaint were posted on his homeowner's association gate, not his property. Szmania also claims that he never received a copy of the summons and complaint in the mail. We agree that Wells Fargo failed to comply with the alternative service statute, and the superior court's order based on that statute, by failing to mail a copy of the summons and complaint by certified mail.

Wells Fargo, Szmania named E-Loan Inc., Bear Stearns, Benjamin D. Petiprin, and John G. Stumpf as defendants.

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1. Legal Principles

We review de novo whether service of process was proper. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). Proper service of the summons and complaint is essential to invoke personal jurisdiction over the defendant. *Id.* Proper service of process must satisfy both statutory and constitutional requirements. *Id.* The plaintiff bears the initial burden of proving a prima facie case of sufficient service. *Id.* The party challenging service of process must show by clear and convincing evidence that service was improper. *Id.*

2. Improper Service of Process

The dispute here is whether service of process was proper. The superior court authorized alternative service pursuant to RCW 59.12.085. This allowed alternative service of process by (1) posting the summons and complaint in a conspicuous place on the premises unlawfully held, and (2) by mailing a copy of the summons and complaint to the defendant's last known address by regular and certified mail. RCW 59.12.085(2)(a), (b).

To show service was sufficient, Wells Fargo filed an affidavit of the process server stating that service was carried out on January 30, 2017, "[My attaching in a secure manner to the main entrance of that portion of the premises of which the defendant has possession" the order for alternative service, the summons for unlawful detainer, and the complaint for unlawful detainer. CP at 23. Wells Fargo also produced a certificate

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of mailing stating that a copy of the summons and complaint were mailed to Szmania at his last known address by first class mail.

While this showed that Wells Fargo complied with the first statutory requirement to post the summons and complaint in a conspicuous place on the premises, it did not show that Wells Fargo complied with the second statutory requirement for alternative service. RCW 59.12.085(2)(b) requires Wells Fargo to mail a copy of the summons and complaint "by both regular mail *and certified mail*." (Emphasis added). The process server's affidavit showed that instead of mailing the summons and complaint by both regular mail and certified mail, he mailed the documents only by first class mail. Thus, Wells Fargo did not comply with the statutory requirement for alternative service, and it did not meet its initial burden of proving a prima facie case of sufficient service. The process server's affidavit also allowed Szmania to meet his burden of showing by clear and convincing evidence that service was improper because the process server's affidavit failed to establish compliance with the statute and court order. As a result, we reverse the superior court's denial of Szmania's motion to dismiss.

B. SUBJECT MATTER JURISDICTION AND VENUE

Szmania argues that the superior court did not have subject matter jurisdiction over Wells Fargo's unlawful detainer action because a prior lawsuit he initiated against Wells Fargo had been removed to federal

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court. Szmania argues that because the federal court never remanded this other case to the State court, “subject matter jurisdiction was never restored” to the State court. Br. of Appellant at 24. He also argues that venue was improper because “no [v]enue exists with no jurisdiction.” Br. of Appellant at 24. We disagree.

1. Standard of Review

Whether a court has subject matter jurisdiction over a claim is a question of law that we review de novo. *Outsource Servs. Mgmt, LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 276, 333 P.3d 380 (2014). Also, the question of whether venue is proper is a legal question that we review de novo. *Eubanks v. Brown*, 170 Wn. App. 768, 771, 285 P.3d 901 (2012), *aff’d*, 180 Wn.2d 590, 327 P.2d. 635 (2014).

2. The Superior Court had Subject Matter Jurisdiction

“There are very few limitations on the subject matter jurisdiction of superior courts in Washington.” *Outsource Servs Mgmt*, 181 Wn.2d at 276. Under the Washington State Constitution, superior courts have original jurisdiction “in all cases at law which involve the title or possession of real property” and “actions of forcible entry and detainer” as well as in “all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” WASH. CONST. art. IV, § 6. RCW 59.12.050 vests the superior court of the county in which the property or

App. 33 (Appendix 4)

some part of it is situated with jurisdiction in unlawful detainer proceedings.

An unlawful detainer action is a summary proceeding limited to determining the right to possession of property. *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 624, 45 P.3d 627 (2002). It is a narrow action, and the court's jurisdiction is limited to determining the right of possession. *Id.* "[I]ssues unrelated to possession are not properly part of an unlawful detainer action." *Heaverlo v. Keico Indus., Inc.* 80 Wn. App. 724, 728, 911 P.2d 406 (1996).

Szmania appears to argue that the superior court did not have subject matter jurisdiction over Wells Fargo's unlawful detainer action because a separate lawsuit he initiated involving his property had been removed to federal court. His sole support for this argument is 28 U.S.C. § 1446(d), which states that once a civil action has been removed from state court, "the State court shall proceed no further unless and until the case is remanded."

However, the record shows that the state court did not proceed further in the case removed to federal court. The case Szmania references as being removed to federal court was a June 2016 complaint that he brought against several parties, including Wells Fargo, for declaratory judgment, permanent injunction, forfeiture of deed, satisfaction of mortgage, quiet title, and claims under the Criminal Profiteering Act and Consumer Protection Act. Conversely, the civil action at issue here is an unlawful detainer action Wells Fargo

App. 34 (Appendix 4)

brought in December 2016. Szmania does not argue that the state court proceeded in the case he initiated against Wells Fargo following removal to federal court. And Szmania provides no authority to support his argument that removal of a separate lawsuit to federal court strips the state court of subject matter jurisdiction over any subsequent litigation between the parties.

Szmania relies on a Ninth Circuit Court of Appeals opinion, which held that once a state or federal court obtains jurisdiction over property, the property “is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign.” *Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) (internal quotation marks omitted) (quoting *State Eng’r v. S. Fork Band of TeMoak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)). In other words, when “one court is exercising *in rem* jurisdiction over a res, a second court will not assume *in rem* jurisdiction over the same res.” *Id.* (quoting *Chapman v. Deutsche Bank Nat’l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011)). However, here, nothing in the record shows that the federal court exercised *in rem* jurisdiction over Szmania’s property, and thus, *Sexton* does not apply. Accordingly, we reject Szmania’s argument on this basis.

RCW 59.12.050 vests the superior court of the county in which the property or some part of it is situated with jurisdiction in unlawful detainer proceedings. Therefore, Szmania’s challenge to the superior

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court's subject matter jurisdiction in Wells Fargo's unlawful detainer action fails.

3. Szmania Fails to Show Venue was Improper

Szmania also argues that the superior court should have granted his motion to dismiss Wells Fargo's unlawful detainer action based on improper venue. His sole argument on this basis is that "[v]enue exists with no jurisdiction." Br. of Appellant at 24.

As explained above, Szmania fails to show that the superior court did not have subject matter jurisdiction over Wells Fargo's unlawful detainer action. And even if Szmania could make this showing, "[v]enue and jurisdiction are distinct concepts." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003). While jurisdiction connotes the power of the court to decide a case on its merits, venue connotes locality. *Id.* at 316. "Venue is a procedural, rather than jurisdictional, issue." *Id.* (quoting 92A C.J.S. *Venue* § 2, at 241-42 (2000)). Therefore, we reject Szmania's argument that subject matter jurisdiction somehow influences whether venue was proper here. Because Szmania provides no other argument that venue was improper, we hold that his claim on this basis fails.

C. ABUSE OF DISCRETION

Finally, Szmania appears to re-argue his challenge to the superior court's subject matter jurisdiction,

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except under an abuse of discretion standard. Again, he claims that removal of a separate case to federal court precluded the superior court from entering any order on Wells Fargo's unlawful detainer action. As explained above, we review de novo whether a court had subject matter jurisdiction over a claim. *Outsource Servs. Mgmt, LLC*, 181 Wn.2d at 276. And Szmania still fails to provide any legal authority holding that a superior court does not have subject matter jurisdiction over an unlawful detainer action based on a separate case being removed to federal court. Szmania also fails to provide citation to any legal authority to support his claim that the superior court judge should be "personally and equally liable" for damages Szmania sustained in relocating from the property at issue in this unlawful detainer action. Br. of Appellant at 33. Accordingly, we hold that these arguments fail.

We reversed based on Wells Fargo's improper service of process.³

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

/s/ Lee, A.C.J.

Lee, A.C.J.

³ Because we reverse based on improper service of process, we do not address the merits of Szmania's CR 12(b)(6) claim.

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We concur:

/s/ Bjorga, J.
Bjorga, J.

/s/ Sutton, J.
Sutton, J.

App. 38 (Appendix 5)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

WELLS FARGO BANK,
N.A., AS TRUSTEE FOR
BEAR STEARNS ARM
TRUST 2007-3,
Respondent,

v.

DANIEL G. SZMANIA,
and OCCUPANTS
OF PREMISES,
Appellant.

No. 50523-1-II

MANDATE

Clark County Cause No.
16-2-02606-4

The State of Washington to:

The Superior Court of the State of Washington
in and for Clark County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 3, 2019 became the decision terminating review of this court of the above entitled case on February 5, 2019. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

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[SEAL] IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed
the seal of said Court at Tacoma,
this 14th day of February 2019.

/s/ Derek M. Byrne
Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

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App. 40 (Appendix 7)

[SEAL] Washington State Court of Appeals

Division Two

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CASE #: 50523-1-II
Wells Fargo Bank, Respondent v. Daniel G. Szmania,
Appellant

Counsel:

On the above date, this court entered the following
notation ruling:

A RULING BY COMMISSIONER BEARSE:

Daniel Szmania moves to recall the mandate in
COA No. 50523-1-II, which reversed superior court

App. 41 (Appendix 7)

orders entered in an unlawful detainer action because Wells Fargo Bank did not properly serve Szmania. Slip op. at 10 (Jan. 3, 2019). He argues that the superior court denied him due process. The motion is denied.

It appears from the recall motion that the superior court entered additional orders in August 2019, which Szmania plans to appeal. RAP 12.9 permits this court to recall a mandate to determine if the superior court complied with its earlier decision. But the rule also allows for this court's review of later superior court actions by "initiating a separate review of the lower court decision entered after issuance of the mandate." RAP 12.9. Because Szmania states he intends to file a new notice of appeal, this court need not recall the mandate.

Very truly yours,

/s/ Derek M. Byrne
Derek M. Byrne
Court Clerk

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

WELLS FARGO BANK, N.A.,
AS TRUSTEE FOR
BEAR STEARNS ARM
TRUST 2007-3,

Respondent,

v.

DANIEL G. SZMANIA,

Appellant.

No. 53743-5-II

UNPUBLISHED
OPINION

(Filed Jan. 5, 2021)

SUTTON, J. — Wells Fargo purchased real property at a trustee's sale, which was formerly owned by Daniel Szmania. After Szmania failed to vacate the property, Wells Fargo filed an unlawful detainer action. Szmania filed a motion to dismiss based in part on insufficient service, which the superior court denied and then entered a writ of restitution. Szmania appealed. We reversed the superior court's denial of his motion to dismiss based on insufficient service and remanded for further proceedings. On remand, Szmania filed a motion for possession and damages. At a hearing on this motion, Wells Fargo orally moved to dismiss under CR 41(a)(1)(B). The superior court entered orders denying Szmania's motion and granting Wells Fargo's motion. Szmania appeals these orders.

Szmania argues that he is entitled to possess the real property and be awarded damages under RCW

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59.18.290(1)¹ because he is a “tenant” and based on this court’s reversal of the superior court’s denial of his motion to dismiss. Szmania also argues that the superior court erred by granting Wells Fargo’s oral motion to dismiss under CR 41(a)(1)(B). He requests appellate attorney fees and costs.

We hold that (1) RCW 59.18.290(1) does not support Szmania’s claim for possession and damages, (2) this court’s prior opinion provides no basis for his motion for possession and damages, and (3) the superior court did not err by granting Wells Fargo’s oral motion to dismiss the case. We deny Szmania’s request for an award of appellate attorney fees and costs. We affirm the superior court’s order denying Szmania’s motion for possession and damages and granting Wells Fargo’s motion to dismiss.

FACTS²

In July 2016, Wells Fargo purchased property located in Brush Prairie, Washington at a trustee’s sale held pursuant to RCW 61.24. Szmania, the former owner of the property, failed to vacate the property following sale. In December 2016, Wells Fargo filed a complaint for unlawful detainer to remove Szmania from

¹ The legislature amended RCW 59.18.290 in 2020. LAWS OF 2020, ch. 315 § 7. Because the amendments are not relevant here, we cite to the current version of the statute.

² Unless otherwise indicated, the following facts derive from *Wells Fargo Bank v. Szmania*, noted at 7 Wn. App. 2d 1003 (2019).

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the premises and secure possession of its purchased property.

On January 23, 2017, Wells Fargo filed a motion for alternative service, requesting that the superior court allow alternative service by posting the unlawful detainer summons and complaint on the premises and by mailing a copy to Szmania. In support of this motion, Wells Fargo attached a declaration of non-service from the process server, who stated that he had attempted to serve Szmania, but could not because the gate was locked, a car blocked the driveway, and a banner on the premises indicated a threatening environment. The superior court granted Wells Fargo's motion and entered an order for alternative service. This order stated that pursuant to RCW 59.12.040, service of process could be completed by posting a copy of the summons and complaint "in a conspicuous place on the subject [p]roperty" and by mailing a copy to Szmania by certified mail. *Wells Fargo*, slip op. at 2 (internal quotation marks omitted).

On February 2, Wells Fargo filed a declaration of service in which the process server stated that he served Szmania on January 30 "[My attaching in a secure manner to the main entrance of that portion of the premises of which the defendant has possession" the unlawful detainer summons and complaint. *Wells Fargo*, slip op. at 3 (internal quotation marks omitted). Wells Fargo also filed a certificate of mailing, which stated that a copy of the summons and complaint had been mailed to Szmania by first class mail on February 1.

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On February 16, Szmania filed a motion to dismiss Wells Fargo's unlawful detainer action pursuant to CR 12(b)(1)-(6). Szmania argued that the superior court did not have subject matter jurisdiction or personal jurisdiction over the unlawful detainer action because a prior, separate lawsuit he initiated against Wells Fargo had since been removed to federal court and service of process was improper.

The superior court denied Szmania's motion to dismiss in May 2017. The superior court also entered an order for default judgment on Wells Fargo's unlawful detainer complaint, and entered an order to issue writ of restitution without bond, which ordered possession of the premises restored in Wells Fargo. Szmania appealed.

We held that "Wells Fargo did not comply with the statutory requirement for alternative service, and it did not meet its initial burden of proving a prima facie case of sufficient service" because Wells Fargo did not show proof of service by certified mail. Clerk's Papers (CP) at 9. However, we rejected Szmania's arguments that the superior court lacked jurisdiction or that venue was improper and declined to address the merits of Szmania's CR 12(b)(6) arguments.

After this case was remanded to the superior court for further proceedings, Szmania filed a motion entitled "Motion for Possession and Damages." Wells Fargo opposed the motion.

On August 9, 2019, the superior court heard arguments on the motion. Wells Fargo orally moved for

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dismissal of the case under CR 41(a)(1)(B). The superior court subsequently entered an order denying Szmania's motion for possession and damages³ and an order granting Wells Fargo's motion to dismiss.⁴ Szmania appeals these orders.

ANALYSIS

I. STANDARD OF REVIEW

RCW 59.18.290 is part of Washington's Residential Landlord-Tenant Act of 1973⁵ and it contains provisions allowing a tenant to recover possession of real property or damages from a landlord. RCW 59.18.290(1). Reviewing whether this statute applies outside of the landlord-tenant context is a question of law and questions of law are reviewed de novo. *End Prison Indus. Complex v. King County*, 192 Wn.2d 560, 566, 431 P.3d 998 (2018). We also review de novo whether this court's prior reversal of the superior court's denial of Szmania's CR 12(b)(6) motion to dismiss grants him possession and damages. *End Prison Indus. Complex*, 192 Wn.2d at 566.

³ CP at 181 (order denying motion for possession and damages, filed Aug. 9, 2020).

⁴ CP at 179 (order dismissing action, filed Aug. 9, 2020).

⁵ Ch. 59.18 RCW.

II. RCW 59.18.290(1)

Szmania argues that RCW 59.18.290(1) entitles him to possession of the real property at issue in this case and to actual damages sustained.⁶ We disagree.

Under RCW 59.18.290(1),

It is unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing. Any *tenant* so removed or excluded in violation of this section *may recover possession of the property* or terminate the rental agreement and, in either case, *may recover the actual damages sustained*. The prevailing party may recover the costs of suit or arbitration and reasonable attorneys' fees.

(Emphasis added.)

The term "tenant" is defined as "any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW

⁶ Szmania claims that he is a "tenant in sufferance" under RCW 59.04.050. Appellant's Opening Br. at 23. Under RCW 59.04.050, "Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he or she shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he or she occupied the premises. . . ." Szmania's claim fails because this statute, even if applicable, did not convey to Szmania any rights, nor does it entitle him to rights as a tenant under any portion of the Residential Landlord Tenant Act. It instead provides property owners the right to recover reasonable rent from any person wrongfully occupying the property. Accordingly, this argument fails.

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59.18.030(32).⁷ Szmania was not a tenant of Wells Fargo, was not entitled to occupy the real property in question at any relevant time, and did not have a rental agreement with Wells Fargo.

Szmania's motion for possession and damages referred to CR 7(b), but this rule provides certain standards for written motions in Washington State courts and does not provide a basis for any substantive relief. Szmania's motion referred to RAP 12.8 as well, but this rule references restoration of property taken from a party as a result of a trial court decision modified on appeal. This rule is inapplicable here because Szmania has not established a property interest or right to occupy the property at issue in this case when the case was filed or any time thereafter.

Accordingly, we hold that the superior court correctly denied Szmania's motion for possession and damages because the motion was based upon an inapplicable statute and Szmania did not cite any other potentially applicable authorities.

III. OUR EARLIER OPINION

Szmania argues that our earlier opinion regarding this matter entitles him to possession of the real property at issue and damages. We disagree.

⁷ The legislature amended RCW 59.18.030 in 2019. LAWS OF 2019, ch. 356 § 5. Because the amendments are not relevant here, we cite to the current version of the statute.

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In Szmania's first appeal, we rejected his substantive arguments that the superior court lacked subject matter jurisdiction and that venue was improper. We held that service had not been properly completed and reversed the denial of Szmania's CR 12(b)(6) motion to dismiss on that ground alone. Szmania assumes that this reversal meant that he had a right to continue to occupy the real property at issue.

However, our earlier opinion simply reversed the denial of the motion to dismiss and left further proceedings to the superior court. We did not instruct that the motion would be granted below or granted with prejudice. Our earlier opinion did not determine or suggest that Szmania had any rights in the real property. The earlier opinion simply held that Wells Fargo had improperly served Szmania.

Accordingly, we hold that the superior correctly denied Szmania's motion for possession and damages because the motion lacked any legal basis upon which the superior court could have granted any relief.

IV. WELLS FARGO'S ORAL MOTION TO DISMISS

Szmania argues that the superior court erred by granting Wells Fargo's oral motion to dismiss under CR 41(a)(1)(B). We disagree.

We review a decision to grant a voluntary dismissal under CR 41 for an abuse of discretion. *Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 553, 394 P.3d 413 (2017). CR 41(a)(1)(B) provides the plaintiff in a

App. 50 (Appendix 8)

Washington action with an absolute right to dismiss the action before resting at the close of its case in chief. *Gutierrez*, 198 Wn. App. at 553. Here, Wells Fargo, the plaintiff in the unlawful detainer case, orally moved for dismissal of the case under CR 41(a)(1)(B) before it rested. The superior court subsequently granted the motion.

Accordingly, we hold that the superior court did not err by granting Wells Fargo's oral motion to dismiss under CR 41(a)(1)(B).

ATTORNEY FEES

Szmania requests an award of appellate attorney fees and costs under RAP 18.1. Because Szmania is self-represented, he is not entitled to attorney fees or costs. *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011). Thus, we deny Szmania's request for an award of appellate fees and costs.

CONCLUSION

We hold that (1) RCW 59.18.290(1) does not support Szmania's claim for possession and damages, (2) this court's prior opinion provides no basis for his motion for possession and damages, and (3) the superior court did not err by granting Wells Fargo's oral motion to dismiss the case. We deny Szmania's request for an award of appellate attorney fees and costs. We affirm the superior court's order denying Szmania's

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motion for possession and damages and order granting Wells Fargo's motion to dismiss.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

/s/ Sutton, J.
SUTTON, J..

We concur:

/s/ Lee, C.J.
LEE, C.J.

/s/ Glasgow, J.
GLASGOW, J.

THE SUPREME COURT OF WASHINGTON

WELLS FARGO BANK,	) No. 99578-8
Respondent,	) ORDER
v.	) Court of Appeals
DANIEL G. SZMANIA,	) No. 53743-5-II
Petitioner.	) (Filed Jun. 30, 2021)

Department I of the Court, composed of Chief Justice Gonzalez and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its June 29, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied. The Petitioner's request for oral argument is denied as moot.

DATED at Olympia, Washington, this 30th day of June, 2021.

For the Court

/s/ González, C.J.
CHIEF JUSTICE

App. 53 (Appendix 9A)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

WELLS FARGO BANK,
N.A., AS TRUSTEE FOR
BEAR STEARNS ARM
TRUST 2007-3,
Respondent,

v.

DANIEL G. SZMANIA,
Appellant.

No. 53743-5-II

MANDATE

Clark County Cause No.
16-2-02606-4

The State of Washington to:

The Superior Court of the State of Washington
in and for Clark County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 5, 2021 became the decision terminating review of this court of the above entitled case on June 30, 2021. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

App. 54 (Appendix 9A)

[SEAL] IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed
the seal of said Court at Tacoma,
this 9th day of August 2021.

/s/ Derek M. Byrne
Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

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