ARIZONA COURT OF APPEALS

DIVISION TWO

Bank of New York Mellon, fka Bank of New York, as Trustee for the certificate holders of CWALT, Inc., Alternative Loan Trust 2005-63, Mortgage Pass Through Certificates Series 2005-63, Appellee/Plaintiff, v. Wendle V. Lehnerd, Appellant/Defendant.	No. 2-CA-CV 2014-0160 Pinal County Superior Court No. CV201402273

REPLACEMENT REPLY BRIEF

OF

APPELLANT/DEFENDANT WENDLE V. LEHNERD

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INTRODUCTION

Appellant Wendle V. Lehnerd ("Lehnerd") hereby files his Reply Brief. For the reasons set forth herein, the Answering Brief to the Replacement Opening Brief ("Answering Brief" or "AB") filed by The Bank of New York Mellon ("Mellon") fails to show that this Court lacks jurisdiction to hear the appeal. The Answering Brief also fails to show that the trial court was correct when it denied Lehnerd's motion to dismiss.

I. THE OCTOBER 31, 2014 MINUTE ENTRY DENYING THE MOTION TO DISMISS WAS NOT AN APPEALABLE ORDER.

In the Answering Brief, the Bank argues that the October 31, 2014 minute entry denying the motion to dismiss for lack of jurisdiction ("the October Ruling")(ROA 11) was an appealable order. (AB 1-2, 4, 7, 11, 12-14). The Bank further argues that Lehnerd's failure to file a notice of appeal within 30 days of the entry of that order precludes an appeal on the issues raised therein. (*Id.*) This argument is without merit.

A. The denial of a motion to dismiss is a nonappealable order.

The denial of a motion to dismiss for lack of jurisdiction is an interlocutory, nonappealable order. *Qwest Corp. v. Kelly*, 204 Ariz. 25, 27, ¶3

(App. 2002); A.R.S. §12-2101(A). The October Ruling was a motion to dismiss for lack of jurisdiction. Therefore, it is an interlocutory, nonappealable order.

B. Contrary to the Bank's argument, ARCP Rules 54 and 58 do not apply to the October Ruling and therefore cannot make that order appealable.

The Bank's argument that the trial court included language in the October Ruling making that ruling appealable under Arizona Rules of Civil Procedure ("ARCP") Rules 54 and 58 (AB 4, 13-14) is also without merit.

First, ARCP Rules 54 and 58 do not apply to this case. As set forth in the Opening Brief (OB 15-16, 18), the Rules of Procedure for Eviction Actions ("RPEA"), not the Arizona Rules of Civil Procedure, apply to this action.[1] The Rules of Civil Procedure apply only when specifically incorporated into the RPEA (RPEA Rule 1). Neither ARCP Rule 54 nor Rule 58 has been incorporated into the RPEA. (See RPEA generally) Further, there is no counterpart to Rules 54 and 58 in the RPEA that permits judgments on some but not all issues. (See RPEA generally). The Civil Procedure Rules cited by the Bank do not apply this this eviction action and do not transform the

[1] The Bank does not dispute the application of the RPEA to this case. (AB 15)

otherwise nonappealable, interlocutory October Ruling into an appealable order which Lehnerd was required to appeal within 30 days of its entry.

C. Even if ARCP Rules 54 and 58 Applied, the October Ruling does not contain the requisite language to make that order appealable.

Second, even if ARCP Rules 54 and 58 do apply, the October Ruling does not qualify under Rule 54 as an appealable order. It is undisputed that the October 31, 2014 minute entry did not dispose of all the issues and parties---indeed, the trial on the merits took place after the order's entry. (AB 4) Rule 54(b) provides that, "the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties **only upon** an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." A.R.C.P. Rule 54(b)(emphasis added) The October Ruling contains no determination that "there is no just reason for delay." (ROA 11) The October Ruling also does not contain "an express direction for the entry of judgment." (*Id.*)

Under Rule 54(b), without the determination of no just reason for delay and express direction for entry of judgment, an order "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and

the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." ARCP Rule 54(b). Under well-settled precedent, such orders are not appealable. *See, e.g., Craig v. Craig*, 227 Ariz. 105, 107 ¶13 (2011).

In the October Ruling, the requisite determination and direction are both absent, (ROA 11) and that ruling is therefore not appealable.

Contrary to the characterization by the Bank (AB at 13), the October Ruling does not meet the Rule 54(b) requirements. The trial court's statement that it was intended as a Rule 58 "formal order" neither states that there is no just cause for delay nor expressly enters judgment. The Bank's representation to this Court (AB 13) that "[t]he October Ruling specifically states that it is a final order, not subject to revision or change" is simply not true. (ROA 11) These words appear nowhere in the October Ruling. (ROA 11 generally). Even if such words were included, they would still be insufficient to meet the Rule 54(b) requirements.

The October Ruling was not an appealable order. Lehnerd did not waive his right to appeal that ruling by failing to file a notice of appeal within 30 days. [2]

II. THE NOTICE OF APPEAL WAS NOT PREMATURE.

The Bank also argues that Lehnerd's notice of appeal was premature. (AB 2-3, 9, 22-24) The Bank asserts that the December 2, 2014 Ruling ("the December 2 Ruling") (ROA 13) did not address attorney's fees, and therefore was not a final judgment under the cases interpreting ARCP Rules 54 and 58. The Bank cites no authority for the assumption that ARCP Rules 54 and 58 apply to this eviction action.

In fact, ARCP Rules 54 and 58 do not apply this is eviction action. As set forth above, it is undisputed that the Arizona Rules of Procedure for Eviction Actions ("RPEA") apply to this action (AB 15). RPEA Rule 1 states that "[t]he Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules…." ARCP Rules 54 and 58 are not incorporated by reference. Thus, as argued in the Opening Brief (OB 20-21), ARCP Rule

[2] Contrary to the Bank's suggestion (AB 5) there is nothing "notable" about Lehnerd including a specific reference to the October Ruling in his notice of appeal. All interlocutory rulings are subsumed in the judgment for purposes of appeal. *Decola v. Fryer*, 198 Ariz. 28, 30 ¶5, n.2 (App. 2000).

58(g)'s requirement that "except as provided for in Rule 54(b), a judgment shall not be entered until claims for attorney's fees have been resolved and are addressed in the judgment" is not incorporated into the RPEA. Likewise, no other provision of the RPEA requires that attorney's fees be resolved and addressed in the judgment. Nor are there any parallel provisions and therefore have no application.

Moreover, the Bank fails to address Lehnerd's argument (OB 20-24) that before ARCP Rule 54(b) and Rule 58(g) were adopted, Arizona courts held that the judgments were final and appealable even where unresolved attorney's fees issues were not included in the judgment. *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588, 590-91 (App. 1982). Since the RPEA neither incorporates by reference Rules 54(b) and 58(g) nor contains any analogous provision, under *Trebilcox* the failure to award attorney's fees does not preclude the entry of judgment. The Bank's argument, which relies upon cases interpreting rules that do not apply here, fails.[3]

The Bank also fails to counter Lehnerd's argument that the December

[3] The Bank also fails to address Lehnerd's argument (OB 23-24) that Lehnerd's timely notice of appeal deprived the trial court of jurisdiction to award attorney's fees in the December 23 Judgment.

2 Ruling could be anything other than a judgment since it contained an order that the Bank be given immediate possession. (OB 19) As set forth in the Opening Brief, the only provision for awarding possession under the RPEA and the eviction statutes is by judgment. *See* RPEA 13(c)(1); A.R.S. § 12-1178(A). The Bank concedes that the December 2 Ruling conveyed possession to the Bank, but contends that the trial court had authority to order immediate possession of the Property to the Bank other than by a judgment under A.R.S. § 12-1178(A). (AB 23, n.18) The Bank cites no authority for this contention. The only means under the RPEA to order immediate possession is by judgment. REPA 13(c); A.R.S. § 12-1178(A). The Bank's argument fails on this issue as well.

III. THE BANK FAILS TO SHOW THAT THE DECEMBER 23 JUDGMENT WAS FINAL.

In the argument portion of its brief, the Bank also fails to address Lehnerd's contention (OB 25-26) that if the Arizona Rules of Civil Procedure do apply, the December 23 Judgment was not final because it lacked the requisite ARCP Rule 54(c) language. The only reference to this issue is in a footnote in the Answering Brief's Statement of Facts (AB 9, n13) where the Bank asserts that the judgment contains a "typographical error" in referring

to ARCP Rule 54(b) and admits that no reference is made to ARCP Rule 54(c). The Bank further contends in the footnote, however, that "the Judgment does [include] all the necessary verbiage to consider it a final judgment" under Rule 54(c). This statement is incorrect. Rule 54(c) requires that the court state "that no further matters remain pending and that judgement is entered pursuant to Rule 54(c)." No such language appears in the December 23 Judgment. If the Rules of Civil Procedure apply, the December 23 Judgment is not final under Rule 54(c).

The Bank also fails to address Lehnerd's arguments regarding treating this case as a special action (OB 27-28) or to suspend the rules and revest jurisdiction with the trial court. [4]

[4] The Bank argues that the *Barassi v. Matison*, 130 Ariz. 418 (1981) exception does not apply in this case. Lehnerd has not argued to the contrary. (AB 23-24). Indeed, the *Barassi* exception does not apply to extend the appeal date of the October 2015 ruling because that ruling was not appealable. It does not apply to the December Ruling because the *Barassi* exception arises under the Arizona Rules of Civil Procedure, and has no application to the RPEA.

IV. RULE 9(c), ARCAP, SHOULD BE INTERPRETED TO SAVE EARLY APPEALS.

The Bank cites *Camasura v. Camasura*, 238 Ariz. 179 (App. 2005) and this Court's memorandum decision *In re Marriage of Crusenberry & Grant,* 2 CA-CV 2014-0141, 2015 WL 745045 (App. Nov. 24 2015) for the proposition that ARCAP Rule 9(c) does not save a premature notice of appeal where the attorney's fees issues have not been decided. However, the Bank does not address the arguments set forth in the Opening Brief as to why the decision in *Camasura* should be reconsidered. For the reasons set forth in the Opening Brief (OB 23-42), the interpretation of ARCAP Rule 9(c) suggested in *Lopez v. Food City*, 234 Ariz. 349, 351 ¶¶ 6,7 (App. 2014) should be adopted by this Court instead of the *Camasura*, interpretation.

V. THE BANK FAILS TO DEMONSTRATE THAT THE PRIOR EXCLUSIVE JURISDICTION DOCTRINE DOES NOT APPLY.

With respect to the merits, the Bank, citing *Chapman v. Deutsche Bank Nat. Trust Co*, 651 F.3d 1039, 1043 (9th Cir. 2011)(the same authority Lehnerd cited to in the OB) agrees that prior exclusive jurisdiction applies "[i]n particular, where there are parallel state and federal proceedings which seek to determine interests in specific property as against the whole world (*in*

rem), or where the parties' interests in the property serve as the basis of the jurisdiction for the parallel proceedings (*quasi in rem*)…." (AB 18-19, quoting *Chapman*, 651 F.3d at 1044.)

Nevertheless, the Bank makes three arguments as to why the prior exclusive jurisdiction doctrine should not apply in this case: 1) that Lehnerd fails to show that a forcible detainer action is *in rem* or *quasi in rem* under Arizona law; 2) that the federal court did not "remove" jurisdiction from the state court on the issue of possession; and 3) that there is a quiet title/declaratory judgment exception to the prior exclusive jurisdiction doctrine. None of these arguments is availing. To analyze the Bank's arguments, it is helpful to review Ninth Circuit's *Chapman* case, relied upon by both parties.

A. *Chapman v. Deutsche Bank*, cited by both parties, shows the applicability of the prior exclusive jurisdiction doctrine to this case.

In *Chapman*, as in the present case, the action pending in state court was an unlawful detainer action, while the action pending in federal court was a quiet title action. 651 F.3d 1041-42. The Ninth Circuit held that whether the prior exclusive jurisdiction doctrine applied depended upon whether, under applicable Nevada state law, quiet title actions and forcible

detainer actions were characterized as *in rem* or *quasi in rem* as opposed to *in personam. Id.* at 1048. The Ninth Circuit noted that courts had historically issued conflicting statements regarding the characterization of quiet title actions and forcible detainer actions as *in rem, in personam* or *quasi in rem. Id.* at 1047. The Ninth Circuit held that the proper focus for purposes of whether the prior exclusive jurisdiction doctrine applies, is how applicable state law characterized the proceedings involved. *Id.* at 1048.

The Ninth Circuit certified to the Nevada Supreme Court the questions of whether quiet title actions and unlawful detainer actions were classified as *in rem*, *in personam,* or *quasi-in rem. Id.* The Nevada Supreme Court ultimately determined that both quiet title and forcible detainer actions were *in rem* under Nevada law. *Chapman v. Deutsche Bank Nat. Trust Co.,* 302 P.3d 1103 (Nev. 2013). As a result, the Ninth Circuit held that the prior exclusive jurisdiction doctrine applied. *Chapman v. Deutsche Bank Nat. Trust Co.,* 531 Fed. Appx., 832 (9th Cir. June 24, 2013).

Similar to the facts in *Chapman*, the present case involves a quite title action and an unlawful detainer action. Where, as here, both claims are either *in rem or quasi in rem* and dealing with the same *res*, the prior exclusive jurisdiction doctrine applies.

B. The Bank does not dispute that a quiet title action is *in rem* under Arizona law, and the authorities cited in the Opening Brief demonstrate that a forcible detainer action also falls under the category.

The Bank does not dispute that a quiet title action is *in rem* under Arizona law, as set forth in *Snow v. Kennedy*, 36 Ariz. 475, 486 (1930). However, the Bank appears to challenge whether forcible detainer actions under Arizona law are *in rem* or *quasi in rem.* (AB 19)

While the Bank accurately states that no reported Arizona decisions characterize an unlawful detainer action as *in rem* or *quasi in rem* (AB 19), the Bank's statement that "Lehnerd offers no legal support for his claim that an unlawful detainer action is an *in rem* or *quasi in rem* proceeding" (AB 19) is simply incorrect. (See OB 45) In the Opening Brief, Lehnerd set forth legal support, including citations to the Restatement, which Arizona recognizes in the absence of Arizona law (*Bank of America v. J. & S. Auto Repairs,* 143 Ariz. 416, 418, (1985)) to the contrary, for the position that unlawful detainer actions are *in rem* or *quasi in rem.* The Bank fails to dispute or in any way address Lehnerd's argument in this regard. (See AB, generally)

Furthermore, the Bank fails to support any authority from any source for the proposition that Arizona would deem an unlawful detainer action to

be *in personam* rather than *in rem* or *quasi in rem.* (*Id.*) The authorities set forth in the Opening Brief demonstrate that under Arizona law, an unlawful detainer action is either *in rem* or *quasi in rem.*

C. The prior jurisdiction doctrine does not require the federal court to have "removed" jurisdiction of the possession issue from the state court in order to be in effect.

The Bank incorrectly asserts that Lehnerd "was unable to support his claim as the U.S. District Court had not removed jurisdiction of the issue of possession for consideration in the Quiet Title Action, and the state's superior court was the appropriate venue to consider issues related to possession under the RPEA." (AB 16-17). The Bank cites no case supporting its contention that the application of the prior exclusive jurisdiction doctrine turns on what issues the U.S. District Court has "removed jurisdiction" upon. Rather, the application of this doctrine turns on whether the respective federal and state courts have either *in rem* or *quasi in rem* jurisdiction over the same *res. See Chapman*, 651 F.3d 1039. No challenge has been raised in this case to the federal court's jurisdiction to determine the quiet title action.

Fed. Nat. Mortg. Ass'n v. Watkins, CV-12-577-PHX-GMS, 2012 WL 983680 (D. Ariz. March 22, 2012) is inapplicable. In that case, the U.S. District

Court remanded to state court an eviction action the defendants had removed to federal court without a jurisdictional basis. In the present case, to the contrary, a quiet title action was pending in federal court (over which the record contains no jurisdictional challenge), at the time this eviction action was filed. *Watkins* has no application here.

Fed. Nat. Mortg. Ass'n v. Sparlin, 2011 WL 5054305 (Ariz. App. Oct. 25, 2011), cited by the Bank (AB at 22) is an unpublished memorandum decision issued before January 1, 2015, and should not have been cited as precedent. Rule 111(c), Ariz. R. S. Ct.

D. **The Court should not recognize a general exclusion for quiet title cases.**

The Bank also relies upon the unpublished memorandum decision, *Town of Colorado City v. United Effort Plan Trust*, CV11-08037-PHX-DGC, 2012 WL 12542, at *5 (D. Ariz. Jan. 4, 2012) for the proposition that there is a general exception to the prior exclusive jurisdiction doctrine which excludes cases involving quiet title declaratory judgment actions. In *Town of Colorado City*, the court first determined that the cases pending in state court and the case pending before the federal court were both *in rem* or *quasi in rem* and the prior exclusive jurisdiction doctrine would therefore apply. The court then

states that "[t]he Supreme Court has held that prior exclusive jurisdiction 'has no application to a case in federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right of interest as a basis of a claim against a fund in the possession of a state court.'" *Town of Colorado City*, ¶5 (quoting *Princess Lida of Thurn and Taxis v Thompson*, 305 U.S. 456, 466-67 (1939). The District Court concluded that a general exception exists for declaratory judgments involving quiet title issues. *Id.*

Lehnerd respectfully submits that *Town of Colorado City* is inconsistent with *Chapman* and interprets the U.S. Supreme Court precedents more broadly than it was intended.

The U.S. District Court *Town of Colorado City* is inconsistent with the Ninth Circuit opinion in *Chapman* which, between the two, is controlling. In *Chapman*--which involved a quiet title action and a wrongful detainer action—the Ninth Circuit ultimately held that the prior exclusive jurisdiction doctrine applied and precluded the subsequent case from proceeding. If the prior exclusive jurisdiction doctrine is subject to an exception which excludes all cases where quiet title actions are involved, the result in *Chapman* would have been the reverse. There would have been no need for the Ninth Circuit to certify to the Supreme Court of Nevada, the question of

whether quiet title and wrongful detainer actions are *in rem, quasi in rem* or *in personam* under Nevada law. That one of the cases was a quiet title case would, under this theory, have been sufficient to determine that the federal court was not precluded from proceeding.

Neither the Bank in this case, nor the court in *Town of Colorado City*, distinguish the contrary holding in *Chapman*. As a Ninth Circuit case is controlling with respect to the U.S. District Court decision in *Town of Colorado City*.

Lehnerd also respectfully submits that *Town of Colorado City*, reads the language of *Princess Lida* too broadly to create a general exception where none exists. The language quoted from the *Princess Lida* to support the finding of an exception was not the holding in that case. Rather, the quoted language was the characterization of a different U.S. Supreme Court case, *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 619 (1936) in a situation which the Court in *Princess Lida* specifically held did not apply to the case before it. Indeed, in *Princess Lida*, the U.S. Supreme Court held that the prior exclusive jurisdiction doctrine did apply and precluded the federal court from exercising jurisdiction. *Id.* at 467-68. The specific language cited to in *Princess Lida*, is dicta.

The case to which the *Princess Lida* opinion referred in the quoted language, *Commonwealth Trust v. Bradford*, 297 U.S. 613 (1936), addressed the rights of a receiver of a national bank—a situation entirely different than that before this Court. There, the Supreme Court held that "only a judgment in personam was rendered" which did not interfere with *res* at issue. 297 U.S. at 602. This was not, as suggested in the *Town of Colorado City* memorandum decision, an exception to the prior exclusive jurisdiction doctrine. Rather, the doctrine did not apply because under the law and circumstances of that case, the relief sought was deemed to be *in personam*. Further, in that case the Court stated "Congress has empowered receivers of national banks to sue in federal courts; the obvious importance of permitting them freely to do so cannot be disregarded." *Id*, at 619. The case before this Court is not a receivership of a national bank where the receiver is seeking the right to participate in a portion of the trust assets under the jurisdiction of a state court.

It is also significant that *Chapman* cited to the United States Supreme Court case of *Princess Lida* in its analysis, (651 F.3d 1043) the same case relied upon by *Town of Colorado City* for the proposition that a general exception exists for declaratory judgment/quiet title actions. The Ninth Circuit did

not interpret that case to create an exception to the declaratory judgment/quiet title action before it.

For the foregoing reason, Lehnerd submits that a general exception for quiet title actions does not exist under the prior exclusive jurisdiction doctrine. That doctrine precluded the trial court from maintaining jurisdiction over this action, and Lehnerd's motion to dismiss on that issue should have been granted.

CONCLUSION

Based upon the foregoing, Lehnerd requests that this Court grant the relief requested in Lehnerd's Replacement Opening Brief.

RESPECTFULLY SUBMITTED this 8th day of February, 2016.

MARK J. DEPASQUALE, P.C.

_____/s/ Mark J. DePasquale_____

Mark J. DePasquale

CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns a brief, and is submitted under Rule 14(a)(5). The undersigned certifies that the brief to which this certificate is attached uses type of at least 14 points, is double-spaced and contains 4,225 words. The document to which this certificate is attached does not exceed the word limit that is set by Rule 14, A.R.C.A.P.

___/s/ Mark J. DePasquale_____

Mark J. DePasquale