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MAY 18 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 328163-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JAMES C. BLAIR, II,

Plaintiffs-Appellants

v.

NORTHWEST TRUSTEE SERVICES, INC., BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., FEDERAL HOME LOAN MORTGAGE CORPORATION and DOE DEFENDANTS 1 through 20,

Defendants-Respondents

ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT
(Hon. Lesley A. Allan)

RESPONDENTS' BRIEF

John S. Devlin III, WSBA No. 23988
Attorneys for Defendants-Respondents Bank of America, N.A., Mortgage Electronic Registration Systems, Inc., and Federal Home Loan Mortgage Corporation

Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

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I.

STATEMENT OF THE CASE

A. Factual History

1. Blair Executed A Promissory Note And Deed Of Trust.

In September 2008, James Blair obtained a $240,000 refinance mortgage loan from Countrywide Bank, FSB which was secured by a deed of trust on real property located at 1002 Okanagan Ave, Wenatchee, Washington 98801. (CP 624-48) The deed of trust identified Countrywide Bank, FSB[1] as the lender, Land America as the trustee, and MERS as the beneficiary, "as a nominee for Lender and Lender's successors and assigns." (CP 624-25) Blair admitted to signing the underlying note and deed of trust. (CP 607, 615-16) On or about September 25, 2008, Freddie Mac became the owner of the loan. (CP 852)

After loan origination, Countrywide endorsed the note in blank. (CP 1141) After Freddie Mac became the owner of the loan, the original note was placed in storage with Countrywide for the Benefit of Freddie Mac, in accordance with Freddie Mac guidelines. (CP 1142) Initially, Countrywide Home Loan Servicing, LP, serviced the loan and eventually

[1]Countrywide Bank FSB subsequently merged with Bank of America. (CP 851-52)

changed its name to BAC Home Loans Servicing, LP in April 2009. (CP 852) Bank of America's subsidiary ReconTrust Company, N.A., [CP 1137] has held the note as the document custodian for Bank of America since September 2008. (CP 1145) In July 2011, BAC Home Loans Servicing LP fka Countrywide Home Loans Servicing LP merged with Bank of America, N.A., which continued to service the loan on behalf of Freddie Mac. (CP 851-52) Since September 10, 2008 and through present, the original note has been held by Bank of America.[2] or its predecessors in interest, on behalf of Freddie Mac. (CP 852-55) In its role as servicer of the loan, Bank of America "was and is expressly authorized by Freddie Mac to take action necessary to enforce the loan including instituting foreclosure." (CP 1142)

2. Blair Defaulted On His Loan Payments.

Blair began to fall behind on his loan payments in early 2009 and it is undisputed that he completely stopped paying his monthly mortgage payments in the fall of 2010. (CP 616) Blair was sent six notices of intent to accelerate his loan from February 2009 through September 2010. (CP 617-18, 889-90)

[2]On July 1, 2011, BAC Home Loans Servicing, LP merged with Bank of America. (CP 909)

However, beginning in late 2010, Blair began the loan modification process with Bank of America.[3] Specifically, in November 2010, Bank of America mailed him a Home Affordable Modification Program (HAMP) letter advising him that he could apply for HAMP by submitting the requested documents. (CP 892-901) In December 2010, Bank of America mailed Blair another letter requesting that he submit the outstanding financial documents by January 28, 2011, or his HAMP application would be declined. (CP 903-07) On February 1, 2011, Bank of America sent Blair another follow up HAMP letter, informing him that financial documents were still outstanding, and advising him to submit the documents by February 16, 2011. (CP 909-13) Bank of America sent Blair a letter in April 2011 informing him that his HAMP application had been declined for failure to provide the requested documents. (CP 915-16)

3. Bank Of America Instituted Foreclosure Proceedings.

In August 2011, MERS executed an assignment of deed of trust transferring its interest in the deed of trust to Bank of America. (CP 918) This assignment did not change Freddie Mac's status as owner of the loan. Thereafter, Bank of America appointed Northwest Trustee Services, Inc.

[3]The Appellees herein, Bank of America, N.A., Freddie Mac, and MERS, will be referred to collectively as "Bank of America" solely for the convenience of the Court. The parties will be individually identified when necessary.

as successor trustee under the deed of trust by virtue of an appointment of successor trustee recorded in October 2011. (CP 920) On March 19, 2012, Northwest Trustee mailed Blair a notice of default indicating that he was $37,531.26 in arrears as of that date, with an ongoing default since August 2010. (CP 922-25) It is undisputed that Blair failed to cure that default, and Northwest Trustee recorded a Notice of Trustee's Sale in April 2012, which set a foreclosure sale date for August 3, 2012 as a result of Blair's failure to cure. (CP 927-32) At that time, Blair's principal balance under the loan was $234,947.77. (*Id.*) No foreclosure has been held to date.

B. Procedural History

1. Blair Filed A Complaint And Motion For Temporary Restraining Order.

In August 2012, Blair initiated this action against Bank of America and Northwest Trustee. (CP 1) That same day, Blair also filed a motion for temporary restraining order and preliminary injunction. (CP 20) In his complaint, Blair asserted four causes of action for: (1) temporary restraining order and preliminary injunction; (2) violation of the Consumer Protection Act (CPA); (3) breach of duties under the deed of trust act against Northwest Trustee; and (4) intentional and/or negligent misrepresentation. (CP 14-18) Blair asserted that he was entitled to a

TRO and preliminary injunction because he was misled and deceived by all of the defendants. (CP 14) He also contended that there were numerous defects with the pending foreclosure sale. (*Id.*) He asserted that the sale needed to be restrained to prevent irreparable harm resulting from the foreclosure. (*Id.*)

Blair asserted that Bank of America and Freddie Mac made misrepresentations regarding the ownership of Blair's note and the identity of the beneficiary as defined by the deed of trust act. (CP 15) He also argued that Northwest Trustee did not comply with the requirements of the deed of trust act. (CP 16) He contended that Northwest Trustee breached its duties under the deed of trust act because Bank of America appointed it as the successor trustee and not Freddie Mac, who Blair claimed was the true beneficiary under the deed of trust act. (CP 17) Blair asserted that all of the defendants made either negligent or intentional misrepresentations to him regarding the identity of the note holder and the foreclosing trustee. (CP 18)

Blair asserted that he was entitled to a TRO because: (1) Bank of America was not the owner of his loan; (2) Northwest Trustee was not properly appointed by the foreclosing entity; and (3) he was prevented from the opportunity to avoid foreclosure by the misrepresentations of the defendants. (CP 28-29) Blair asserted that he was entitled to the

requested relief because he was likely to prevail on the merits of his claims. (CP 31) He claimed that this was so because the foreclosure was instituted by the loan servicer which he contended was not the note holder or the beneficiary under the deed of trust act. (CP 31-32)

Blair also contended that he was likely to prevail on his CPA claims because he alleged that all of the defendants engaged in numerous unfair and deceptive acts and practices relating to the foreclosure. (*Id.*) He also averred that he was likely to prevail on his claims against Northwest Trustee for breach of duties under the deed of trust act. (CP 32) Blair averred that he was likely to prevail on the merits of his cause of action for intentional and negligent misrepresentations. (CP 33)

On August 2, 2012, Northwest Trustee filed a motion to dismiss Blair's complaint for failure to state a claim upon which relief could be granted. (CP 72-86)

On August 10, 2012, the court granted a TRO to prevent the foreclosure sale of the Property and issued an order to show cause why a preliminary injunction should not issue. (CP 69-70)

2. Blair Filed A Motion For Preliminary Injunction.

On September 21, 2012, Blair filed a motion for preliminary injunction to prevent the foreclosure sale. (CP 121) Blair made the same arguments that he previously made in support of his motion for TRO. (CP

121-37) On September 25, 2012, Bank of America filed its opposition to Blair's motion for preliminary injunction. (CP 172) It argued that Blair did not plausibly allege a right to injunctive relief because Bank of America was entitled to institute foreclosure proceedings and to substitute Northwest Trustee as the successor trustee. (CP 174-76) It also argued that Blair's cause of action for violation of the CPA failed as a matter of law because he could not establish the required elements. (CP 176)

It argued that Blair failed to allege any unfair or deceptive practices by Bank of America. (*Id.*) It also averred that any injury suffered by Blair was as a result of his own failure to pay his mortgage payments. (CP 177-78) It asserted that Blair's cause of action for intentional and/or negligent misrepresentation failed because it was insufficiently pled. (CP 178-79) Bank of America also argued that there was no risk of injury to Blair in the absence of a preliminary injunction. (CP 179)

Blair replied to the opposition to his motion on September 27, 2012. (CP 235) Blair again asserted that Bank of America was not the owner of the loan and was therefore not entitled to initiate foreclosure in violation of the deed of trust act. (CP 235-39) He also argued that any violation of the deed of trust act would constitute a violation of the CPA. (CP 239)

On September 28, 2012, after hearing, the court granted Blair's motion for preliminary injunction provided that he make his monthly mortgage payments to the court's registry. (CP 403) The court also denied Northwest Trustee's motion to dismiss finding that it was premature. (CP 403)

Thereafter, in October 2012, Northwest Trustee filed its answer to Blair's complaint. (CP 408-15) Bank of America filed its answer to Blair's complaint in October 2012, as well. (CP 416-25)

On May 24, 2013, Bank of America served Blair's counsel Melissa Huelsman by United States mail with "Defendants' Request for Admissions to Plaintiff (Set One)." (CP 607-08) Blair's responses to these discovery requests were due on or before June 24, 2013, however, he failed to respond. (CP 607) As a result, the request for admissions were deemed admitted under CR 36(a).

On June 6, 2013, Bank of America filed a motion to dissolve the preliminary injunction. (CP 427) It argued that the preliminary injunction should be dissolved because Blair failed to make his monthly payments to the court for February and April 2013. (CP 430) It further argued that any continued injunctive relief should be conditioned upon the posting of a bond payment in addition to requiring the monthly payments to be made to the court. (CP 431) Blair filed his opposition in June 2013, arguing that

he believed he was in compliance with his obligations, and that he was attempting to make estimated monthly payments because he had not received monthly statements from Bank of America. (CP 453-55)

Bank of America replied, arguing that Blair failed to meet the statutory requirements in order to restrain the trustee's sale by failing to make his monthly mortgage payments. (CP 460-61) After a hearing on June 14, 2013, the court denied the motion to dissolve the preliminary injunction. (CP 465)

3. Northwest Trustee Filed A Motion For Summary Judgment.

In June 2013, Northwest Trustee filed a motion for summary judgment. (CP 466) It argued that it was entitled to summary judgment because the deed of trust act does not authorize a cause of action for damages for the wrongful institution of nonjudicial foreclosure proceedings where no Trustee's sale has occurred. (CP 471) It further asserted that Blair failed to demonstrate that any genuine issue of material fact existed as to his cause of action for violation of the CPA. (CP 473-76) Northwest Trustee further argued that Blair failed to state a claim for breach of duties under the deed of trust act. (CP 476)

Northwest Trustee specified that the bases of Blair's claim were: (1) that it violated the deed of trust act by demanding payment; (2) that it

breached its duties under the deed of trust act where the notice of trustee's sale failed to include the identification of the "actual" beneficiary; and (3) because it was not appointed as successor trustee by the note holder as defined under the act. (CP 476) Northwest Trustee asserted that it never made any demands for payment to Blair, nor could he demonstrate evidence of any such demands. (CP 476-77)

Next Northwest Trustee contended that it did not breach its duties under the deed of trust act where it relied on the beneficiary declaration from Bank of America. (CP 477) It also averred that Blair lacked standing to challenge the appointment of successor trustee where he was neither a party nor a third-party beneficiary to the document. (CP 478-79) It also argued that Blair failed to state a claim for intentional/negligent misrepresentation against it. (CP 479-80)

Northwest Trustee filed a second Motion for Summary Judgment in November 2013, which reflected changes in case law subsequent to its first motion regarding a borrower's ability to assert a claim for damages under the deed of trust act in the absence of a completed foreclosure in accordance with the decisions in *Walker v. Quality Loan Servs. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) and *Bavand v. Onewest Bank, F.S.B.*,

176 Wn. App. 475, 309 P.3d 636.[4] (CP 516) In its motion, Northwest Trustee again argued that Blair failed to establish that it violated the CPA. (CP 521-22) It asserted that the presence of MERS in the mortgage documents could not impute a violation of the CPA to it. (CPA 522-24) It contended that Blair failed to identify how any actions by Northwest Trustee impacted the public interest. (CP 525) It further argued that Blair did not suffer any injury as a result of its actions. (CP 526)

Northwest Trustee again asserted that it did not breach its duties under the deed of trust act. (CP 527) It claimed that it was entitled to rely on the beneficiary declaration of Bank of America as proof that it was the holder of the note. (CP 528-29) It also argued that Freddie Mac's ownership interest did not alter Bank of America's status as the beneficiary. (CP 530-33) Northwest Trustee argued that Blair did not suffer any prejudice from the foreclosure notice where the foreclosure was a result of his defaulting on his mortgage obligations. (CP 533-35) It contended that Blair could not demonstrate that it intentionally or

[4]The holdings of *Walker* and *Bavand* regarding a borrower's ability to maintain a cause of action for monetary damages under the deed of trust act prior to a completed foreclosure were overruled by the Washington Supreme Court's decision in *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014). *See Myer v. U.S. Bank, Nat'l Ass'n*, ___ F.Supp.3d ___, 2015 WL 1619048 (W.D.Wash. Apr. 10, 2015) (recognizing *Frias* overruled the holdings of *Walker* and *Bavand*).

negligently represented the identity of the true note holder or its ability to foreclose. (CP 535-38)

4. Bank Of America Filed A Motion For Summary Judgment.

Also in November 2013, Bank of America filed a motion for summary judgment. (CP 585) It explained that Blair's complaint was based upon two theories of liability: (1) that Bank of America was not the true beneficiary as defined by the Washington deed of trust act, and thus, it could not initiate foreclosure proceedings; and (2) that Bank of America should not have been telling Blair that it was reviewing him for a loan modification while simultaneously pursuing foreclosure. (CP 590) It asserted that neither argument had merit. (*Id.*)

Bank of America argued that it was entitled to summary judgment on Blair's first cause of action for TRO and preliminary injunction because the court already granted the requested relief making the claim moot. (CP 592) It also asserted that Blair's attempt to seek a TRO and preliminary injunction in a separate cause of action was improper as such relief could only be sought by application and motion. (CP 592) Therefore, it argued that summary judgment should be granted on Blair's first cause of action because it was moot and procedurally improper. (CP 593)

Next Bank of America argued that Blair could not prove any violation of the CPA because he failed to establish any of the necessary elements to prove a violation, and thus, it should be granted summary judgment on his second cause of action. (CP 593) It argued that Blair failed to establish injury to his business or property: the first required element of a CPA claim. (CP 594) It argued that, although Blair asserted that the foreclosure was improperly instituted, it was instituted as a result of his admitted default on his loan obligations, and not as a result of any asserted misrepresentations regarding the identity of the beneficiary. (CP 594-95)

Bank of America argued that Blair was not able to demonstrate that he suffered any harm as a result of MERS's presence on the loan documents. (CP 595) It argued that the foreclosure was occasioned by Blair's own default, and not by any conduct of MERS. (CP 596) It also asserted that the presence of MERS in the documents did not cause Blair confusion about where to make his payments since he admitted that he knew that he needed to make payments to Bank of America, his loan servicer, and not to MERS. (CP 596) Blair also admitted that he knew to submit his loan modification application to Bank of America. (*Id.*) Bank of America also asserted that Blair could not prove injury through his submission of and denial of a loan modification application. (CP 596-97)

In addressing the second required element of a CPA cause of action, Bank of America argued that Blair failed to prove that it engaged in an unfair or deceptive act. (CP 597) It argued that it did not misrepresent Freddie Mac's status as the owner of the note. (CP 597-98) It further argued that it did not misrepresent that Bank of America was the holder of the note or the beneficiary under the deed of trust and that Blair could not identify any such misrepresentation. (CP 598) It asserted that all of the evidence submitted conclusively established that Bank of America or its predecessors in interest had held the note since the loan's origination; thus, making it the lawful beneficiary under the deed of trust act. (CP 599) Finally, Bank of America argued that case law permits Freddie Mac to own the note, while Bank of America holds the note on its behalf. (CP 600)

It also asserted that none of Bank of America's actions in connection with Blair's loan modification application were unfair or deceptive. (CP 601) Blair admitted that he was not entitled to a loan modification. (*Id.*) Because there was no legal requirement that the loan be modified, it was not deceptive or unfair to deny his loan modification application. (*Id.*) It averred that there was nothing unfair or deceptive in pursuing foreclosure after spending a year and a half attempting to collect a completed loan modification application from Blair. (*Id.*)

Bank of America contended that Blair failed to prove either an intentional or negligent misrepresentation cause of action. (CP 602) It argued that the intentional misrepresentation cause of action was actually a fraud claim. (*Id.*) That being the case, it argued that Blair failed establish the elements of his fraud cause of action, specifically it alleged that he failed to identify a misrepresentation or that he relied to his detriment upon any such misrepresentations. (CP 603)

It also argued that Blair failed to establish his cause of action for negligent misrepresentation where he could not prove that Bank of America supplied false information relating to the parties' relationships regarding his loan. (CP 604) Nor was Blair able to demonstrate that he suffered any harm as a result of the asserted misrepresentation. (CP 605)

5. Blair Opposed The Motions For Summary Judgment.

Blair opposed Bank of America's motion for summary judgment. (CP 1052) Blair argued that all of the defendants breached their duties under the deed of trust act. (CP 1054) Blair contended that the deed of trust act only allowed for a beneficiary who was also the owner of the note to institute non-judicial foreclosure. (CP 1054-61) He also argued that the legislative history of the act bolstered his interpretation. (CP 1059-61)

Blair argued that, by breaching the deed of trust act, Bank of America also violated the CPA. (CP 1062-64) Blair contended that its

conduct was likely to deceive the public. (CP 1065) He asserted that he demonstrated injury that was proximately caused by its actions, and thus, summary judgment should be denied. (CP 1067) He specified that he was injured by incurring legal fees to enjoin the foreclosure, lost time from work, and commuting expenses to and from the hearings in his case. (*Id.*) Blair also argued that he sufficiently pled facts which supported his claims for intentional and negligent misrepresentations, and his reasonable reliance on them. (CP 1068)

Blair also filed an opposition to Northwest Trustee's motion for summary judgment. (CP 1070) He asserted that Northwest Trustee breached the requirements of the deed of trust act when it initiated foreclosure proceedings without receiving the legal authority to do so from Freddie Mac, the owner of the loan. (CP 1078-86) He further argued that the breach of the deed of trust act would constitute a violation of the CPA. (CP 1086-91) Blair also argued that the legal expenses he incurred to stop the foreclosure proceeding demonstrated injury sufficient to state a claim under the CPA. (CP 1091-92) Finally, Blair asserted that he had sufficiently stated a claim for negligent and/or intentional misrepresentation where he demonstrated that Northwest Trustee made numerous misrepresentations to him during the foreclosure process. (CP 1092)

Bank of America replied, arguing that Blair's interpretation of the deed of trust act as requiring that only a beneficiary who was the owner of the note could institute foreclosure proceedings was inconsistent with the act and case law interpreting it. (CP 1106-08) It argued that it complied with the requirements of the deed of trust act. (CP 1108) It asserted that this was so particularly where Freddie Mac's guidelines specified that the loan's servicer must conduct the foreclosure in its own name. (CP 1109) Bank of America asserted that Blair's interpretation of the deed of trust act ignored Washington Supreme Court precedent concluding that the note holder has the authority to conduct a non-judicial foreclosure. (*Id.*) It further contended that the Washington legislature did not require direct owner-beneficiary contact with the borrower in individual loan transactions. (CP 1110)

It asserted that it did not violate the CPA because its actions were in concert with the requirements of the deed of trust act. (CP 1111) Moreover, Bank of America argued that Blair's injuries were caused by his own failure to meet his loan obligations and not by any action on its part. (CP 1111-12) It contended that Blair was not injured by MERS's involvement in the loan transaction where its role was limited to being appointed under the deed of trust and executing an assignment of any interests that it possessed. (CP 1112-13) Finally, it reiterated that Blair

could not sustain a cause of action for either intentional or negligent misrepresentation because he could not demonstrate that it provided any false information to him or that he relied to his detriment on any such purported misrepresentations. (CP 1113-14)

The court held oral argument on the motions for summary judgment on March 10, 2014 and took the statements of counsel under advisement. (CP 1116) For the first time, Blair argued that the beneficiary declaration held by Northwest Trustee on the day foreclosure was initiated was invalid because he asserted that Bank of America was not in possession of the original promissory note at the time the declaration was prepared and when foreclosure proceedings were instituted. (CP 1117) The court allowed supplemental briefing to address Blair's argument. (*Id.*)

Bank of America submitted supplemental briefing and declarations at that time. (CP 1117-46) Bank of America argued that it met all of the requirements for initiating nonjudicial foreclosure in this case. (CP 1118) Bank of America contended that Blair attempted to create a controversy where none actually existed in the deed of trust act. (*Id.*) It further explained that that the definition of "holder" in the Washington UCC, as well as case law interpreting the deed of trust act supported its argument that "holder" status is determinative, not "owner" status. (CP 1119) In

reliance on it supplemental declarations and exhibits, Bank of America asserted that it demonstrated possession of the note through its subsidiary and document custodian ReconTrust since September 2008. (CP 1120)

6. The Trial Court Granted The Motions For Summary Judgment.

In May 2014, the trial court issued its decision granting summary judgment in favor of all of the defendants. (CP 1147) The court determined that Blair had not demonstrated that Bank of America violated the deed of trust act. (CP 1148) The court held that the deed of trust act allowed for a lawful beneficiary to appoint a successor trustee. (CP 1148) The court found that a "beneficiary" was defined as the "holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation" under RCW 61.24.005(2). (*Id.*) It noted that a "holder" of a negotiable instrument was defined by Washington's Uniform Commercial Code (UCC) as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." (CP 1148)

The court determined that the beneficiary declaration that Bank of America provided to Northwest Trustee would have been insufficient without further support; however, it noted that Bank of America

supplemented the record "to establish that it in fact held the requisite documents at all relevant times to the attempted foreclosure in this case." (CP 1149) Therefore, the court held that Bank of America had the authority to appoint Northwest Trustee as successor trustee. (*Id.*) Under the circumstances of the case, the court found that there were no facts to sustain Blair's deed of trust act claims. (*Id.*)

Finding that Blair's CPA claim was based on the alleged violation of the deed of trust act, the court dismissed the claim. (*Id.*) The court also determined that Blair's causes of action for intentional and/or negligent misrepresentation "failed to establish a material false representation by any of the defendants that plaintiff relied on and proximately caused him damages." (CP 1149-50) The trial court issued its order on September 9, 2014. (CP 1161)

Blair timely filed a notice of appeal from the trial court's order.

II.

STANDARD OF REVIEW

The Court of Appeals reviews an order granting summary judgment *de novo*. *See Beaupre v. Pierce Cnty.*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). The reviewing court may affirm the decision of the trial court on any ground supported by the record, even if the argument was not considered by the court below. *King Cnty. v. Seawest Inv. Assocs., LLC*,

141 Wn. App. 304, 170 P.3d 53 (2007). Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Torgerson v. North Pac. Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001). The non-moving party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(c); *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999).

Where a defendant moves for summary judgment and shows an absence of evidence to support an essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence sufficient to establish the existence of the challenged element of that party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Where the plaintiff fails to do so, summary judgment is proper "'since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322-23).

III.

RESPONSE ARGUMENT

A. Bank Of America Did Not Violate The Deed Of Trust Act Because Bank Of America Was The Note Holder.

Although Blair did not assert a cause of action for violation of the deed of trust act against Bank of America, all of his claims were based on his assertion that Bank of America and Northwest Trustee breached the act. Bank of America, was entitled to summary judgment where the evidence submitted showed that it complied with the requirements of the act for initiating nonjudicial foreclosure; thus, negating the basis for all of Blair's claims.

RCW 61.24.005(2) defines the beneficiary of a deed of trust as the actual note holder. *See also Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012) (writing, ". . . a plain reading of the statute leads us to conclude that only the actual holder of the promissory note . . . may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property."); *see also Jackson v. Quality Loan Serv. Corp.*, ___ P.3d ___, 2015 WL 1542060, at * 5 (Wash. App. Div. 1, April 6, 2015) (noting, "the beneficiary is the holder of the note, a trustee may rely on a beneficiary's declaration as proof of the beneficiary's right to foreclose."); *Lyons v. U.S. Bank, Nat'l Ass'n*, 181

Wn.2d 775, 789-90, 336 P.3d 1142 (2014) (stating, "[t]ypically, unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary's declaration when initiating a trustee's sale."); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 488, 309 P.3d 636 (2013) (stating "that a proper beneficiary under the Act must be a 'holder' of the note or other secured obligation.")

Washington's UCC provides that:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-301.

Furthermore, RCW 61.24.030(7)(a) states, in relevant part, "[b]efore the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection."

Bank of America was entitled to summary judgment where it complied with the requirements of the deed of trust act. Blair admittedly defaulted on his loan. (CP 616) He also admitted that due to his failure to make his payments, there was an amount past due and owing on the loan. (*Id.*) Here Bank of America was the holder of the promissory note as shown by the declaration of Brieanne Siriwan, Assistant Vice-President of Bank of America. (CP 1142) Bank of America was given the rights to enforce the note by Freddie Mac, who is the investor/owner on the note. (CP 1142)

As the holder of the note with the right to enforce and the lawful beneficiary, Bank of America appointed Northwest Trustee as the successor trustee. (CP 920) Bank of America provided Northwest Trustee with a beneficiary declaration stating that it was the holder of note with the right to enforce. In reliance on the beneficiary declaration, Northwest Trustee sent a notice of trustee's sale to Blair. (CP 927-32) Thus, it is apparent that Bank of America complied with the provisions of the deed of trust act.

Blair asserts that Bank of America was not entitled to summary judgment because genuine issues of material fact remained regarding whether Bank of America had the requisite authority to institute foreclosure. (AOB p. 9) Blair argues that Bank of America was only a

custodian of the note and therefore, it did not have the right to enforce the note. (AOB pp. 10-14) He also contends that Bank of America did not have the authority to appoint Northwest Trustee as the successor trustee in accordance with the provisions of the deed of trust act. (AOB pp. 14-16)

Blair further argues that Northwest Trustee's initiation of the nonjudicial foreclosure sale at the direction of Bank of America constituted a violation of the deed of trust act. (CP 16-22) Blair bases most of his arguments on the case of *Lyons v. U.S. Bank, Nat'l Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014). He asserts that the *Lyons* case showed that "the exact same Beneficiary Declaration form used in this case does not comply with the DTA requirements." (AOB p. 18) Blair argued that the *Lyons* Court found that a "beneficiary must be both an owner and holder of the note in order to authorize nonjudicial foreclosure . . . ." (AOB p. 19) These arguments are all unavailing as explained below.

1. Bank Of America Was The Holder Of The Note And Lawful Beneficiary With The Right To Enforce.

In contrast to Blair's arguments, the *Lyons* case does not mandate a different result here. In *Lyons*, the borrower brought suit against the trustee for violating its duties of good faith under the deed of trust act. *Lyons*, 181 Wn.2d at 779, 336 P.3d at 1145. In that case, the original lender executed two beneficiary declarations eight months apart. *Id.* at

780, 336 P.3d at 1145. The first beneficiary declaration stated that the lender, as trustee for a securitized trust, was the holder of the note, but the second declaration stated that the original lender was the holder. *Id.* The borrower received a loan modification from the original lender which required that she make a large payment. *Id.* The borrower made the payment as required and the lender promised to discontinue the foreclosure; however, the loan was service released shortly after she made the payment. *Id.* at 780, 336 P.3d at 1145.

Lyons's attorney contacted the trustee on multiple occasions to inform it that the loan was no longer in default and that the foreclosure should be discontinued. *Id.* at 781, 336 P.3d at 1146. He even sent a cease and desist letter to the trustee. *Id.* Rather than cancelling the foreclosure sale, the trustee informed the borrower that the new servicer instructed it that it should continue; however, the new servicer had no record that the property was even in foreclosure. *Id.* The trustee refused to discontinue the sale, and the borrower's attorney filed a complaint. *Id.*

The borrower brought causes of action for violation of the deed of trust act, the CPA, and for intentional infliction of emotional distress against the trustee. *Id.* at 779, 336 P.3d at 1145. The trustee moved for summary judgment, which the trial court granted on all causes of action and the borrower appealed. *Id.* at 783, 336 P.3d at 1147. The Washington

Supreme Court affirmed summary judgment on the cause of action for violation of the deed of trust act holding, "that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed." *Id.* at 784, 336 P.3d at 1147 (quoting *Frias*, 181 Wn.2d 412, 334 P.3d 529). The Court also affirmed the trial court's grant of summary judgment on the borrower's cause of action for intentional infliction of emotional distress. *Id.* at 792, 336 P.3d at 1151. The Court, however, determined that genuine issues of material fact precluded the entry of summary judgment on the borrower's CPA claims. *Id.* at 785, 336 P.3d at 1147.

There, the borrower asserted that the trustee breached its duty of good faith by failing to investigate the beneficiary's right to foreclose and the identity of the true beneficiary when the trustee had been informed that the loan was service released by the original lender. *Id.* at 788, 336 P.3d at 1149. The Court determined that, if such allegations were true, then they could support a cause of action for violation of the CPA. *Id.* The borrower also alleged that the trustee could not rely on the beneficiary declaration where there were two conflicting declarations without supporting documentation being presented to the court. *Id.* The Court determined that "[s]eeking to foreclose without being a *holder* of the

applicable note in violation of the DTA is actionable in a claim for damages under the CPA." *Id.* (emphasis added).

The Court found that, "the declaration at issue here does not comply with RCW 61.24.030(7)(a). On its face, it is ambiguous whether the declaration proves [lender] is the holder or whether [it] is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3-301." *Id.* at 792, 336 P.3d 1151. The court held that the trustee could still prove that the lender was the lawful beneficiary through other means, but it needed to provide proof, which it had not done. *Id.*

In contrast to Blair's argument, the *Lyons* case does not provide support for his contentions because it is inapposite to the facts at issue here. First, in *Lyons*, there was a genuine controversy as to the identity of the beneficiary who had the right to direct that a foreclosure sale take place. There were two conflicting beneficiary declarations executed by the original lender that were neither explained nor supported by additional evidence. Second, the loan was service released by the original lender and the new servicer had no record that the property was even in foreclosure. Third, the borrower repeatedly contacted the trustee to inform it that there were issues regarding the ownership/holder of the note. Additionally, the Washington Supreme Court specified that the holder of the note is the

lawful beneficiary with the right to enforce the note; however, no evidence was provided to show that the original lender actually held the note at all times relevant. That is not the case here where it is undisputed that Bank of America has been in possession of the note since the loan's origination. The instant case is nothing like *Lyons*.

In fact, this case is reminiscent of and on par with the case of *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014) *review granted*, 345 P.3d 784 (2015). In *Trujillo*, the borrower claimed that his loan was sold to Fannie Mae, but that Wells Fargo retained the servicing rights. *Id.* at 488, 326 P.3d at 771. The recorded assignment of the mortgage showed that Wells Fargo was the beneficiary. *Id.* Moreover, the borrower admittedly defaulted on her loan. *Id.* Wells Fargo provided the successor trustee with a beneficiary declaration stating, under penalty of perjury, that it was the "actual holder of the promissory note . . . evidencing the [delinquent Trujillo] loan or has the requisite authority under RCW 62A.3-301 to enforce said [note]." *Id.* (alteration in the original). In response, the trustee issued a notice of default detailing the amounts in arrears and stating that the "owner of the note is Federal National Mortgage Association." *Id.* The Notice also recited that Wells Fargo was the servicer of the loan. *Id.* at 489, 326 P.3d at 770. The borrower *pro se* filed a complaint against the trustee asserting causes of

action for violations of the Criminal profiteering Act, the CPA and a claim for intentional infliction of emotional distress. *Id.* at 489, 326 P.3d at 770-71. The trustee moved to dismiss the complaint in accordance with CR 12(b)(6), which the trial court granted. *Id.*

The borrower's sole issue on appeal was whether the trustee breached its duty of good faith by recording, transmitting, and serving the notice of trustee's sale after receiving the beneficiary declaration of Wells Fargo stating that it was the "actual holder of the Note," rather than the owner. *Id.* at 492, 326 P.3d at 772. The borrower, however, conceded that Fannie Mae transferred the note to Wells Fargo as soon as it began the foreclosure process, and that it had possession of the note at all relevant times. *Id.* at 498, 326 P.3d at 774.

The court determined that, consistent with both the deed of trust act and the Washington UCC, it is one's status as a holder of the note which affords it the right to enforce. *Id.* It further stated that ownership is not relevant to determining who may enforce the note in accordance with both case law and state common law. *Id.* at 498-502, 326 P.3d at 774-76. Thus, because the borrower conceded that Wells Fargo had possession of the note at all times relevant, it was entitled to enforce the note and institute foreclosure as the lawful beneficiary. *Id.* at 502, 326 P.3d at 776.

Additionally, the Washington Supreme Court has stated that where the plain language of a statute is unambiguous and "the legislative intent is apparent, . . . we will not construe the statute otherwise." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003). The plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Henne v. City of Yakima*, 182 Wn.2d 447, 453, 341 P.3d 284, 287 (2015) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

RCW 62A.3-301 was in effect in September 2011 when the beneficiary declaration was prepared and remains fully applicable to the loan at issue in this litigation. Indeed, in its holding in *Bain.*, 175 Wn.2d 83, 285 P.3d 34, the Supreme Court of Washington quoted the UCC definition of "holder," as well as RCW 62A.3-301, and expressly upheld the applicability of these statutes in the context of the deed of trust act:

> The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. E.g., Selkowitz Opening Br. at 14. We agree. This accords with the way the term "holder" is used across the deed of trust act and the Washington UCC.

Id. at 104.

Further, in concert with Washington Supreme Court precedent and state common law, it is apparent that the "holder" of an instrument is the party with the right to enforce regardless of his status as an owner. *See John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969). In *John Davis*, John Davis was both the owner and the holder of the promissory note. *Id.* In determining the right to enforce the note, the Washington Supreme Court stated, "the holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument." *Id.* at 222-23, 450 P.2d 166. Thus, at common law, even where one person was both the holder and the owner of a promissory note, it was the person's status as the holder, not the owner, which entitled him to enforcement. *Id.*

This is consistent with recent case law stating that the holder of the note is the lawful beneficiary with the right to enforce the note. *See also Bain*, 175 Wn.2d at 101, 285 P.3d at 34 (writing, "that the legislature meant to define 'beneficiary' to mean the actual holder of the promissory note or other debt instrument."); *see also Jackson*, 2015 WL 1542060, at * 5 (noting, "the beneficiary is the holder of the note, a trustee may rely on a beneficiary's declaration as proof of the beneficiary's right to foreclose."); *Lyons*, 181 Wn.2d at 789-90, 336 P.3d 1142 (stating "[s]eeking to

foreclose without being a holder of the applicable note" would violate the deed of trust act.).

The Washington deed of trust act does not actually define the term "owner", in contrast to its definition of the term beneficiary. Nor does the Washington UCC define the term. However, UCC Comment 1 to RCW 62A.3-203 notes, "[o]wnership rights in instruments may be determined by principles of the law of property, independent of article 3, which do not depend upon whether the instrument was transferred under Section 3-203." Thus, possession of an instrument, which is typically the hallmark of ownership under property law, may confer an ownership interest. *See Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990) (stating that one of the "fundamental attributes of ownership [is] the right to *possess*, to exclude others and to dispose of property.") (emphasis added). Indeed, there is no requirement under either the deed of trust act or the UCC, that a note have only one owner.

Here, the declaration signed under penalty of perjury states that Bank of America is the "beneficiary and actual holder of the promissory note." (CP 583) Blair's challenge to the declaration pertains to the follow up statement "or has the requisite authority under the RCW 62A.3-301 to enforce said obligation . . . ." Blair believes that the second half of the declaration somehow voids the effectiveness of the declaration, and could

not be reasonably relied upon by the trustee. However, Blair is confused. A statement that a party is the beneficiary and note holder is not at odds with a statement that a party is entitled to enforce under RCW 62.A.3-301.

In light of this, Bank of America was the holder of the note at all times since the origination of the loan. (CP 852-55) It is also apparent that Bank of America had the right to enforce the note. It was also empowered to negotiate with Blair regarding a loan modification. (CP 892-916) And it had the authority to appoint Northwest Trustee as the successor trustee to institute foreclosure proceedings. (CP 920)

2. Bank Of America Was Given The Right To Enforce The Note By Freddie Mac.

Case law establishes that Freddie Mac's (and Fannie Mae's) practice of requiring another entity to hold the note and initiate foreclosure accords with Washington's deed of trust act. *See Trujillo*, 181 Wn. App. at 496, 326 P.3d at 774 (holding that, even though Fannie Mae was the owner of the loan, the loan servicer was the proper beneficiary entitled to institute foreclosure where it held the note at all times relevant to the foreclosure proceedings); *In re Reinke*, No. 09-19609, 2011 WL 5079561, at *10 (Bankr. W.D. Wash Oct. 26, 2011) (stating "the issue of [Freddie Mac's] ownership, however, is largely immaterial to the issues before the Court. Because under Washington law the focus of the analysis is on who

is the *holder* of the note, and thus, the *beneficiary* under the [deed of trust act], Plaintiff's concern should be whether he knows who to pay.") (emphasis in original); *see also Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102 (W.D.Wash. 2011) (noting "even if Fannie Mae has an interest in Plaintiffs' loan, Flagstar has the authority to enforce it."); *Zalac v. CTX Martg. Corp.*, No. C12-01474 MJP, 2013 WL 1990728, at *3 (W.D.Wash. 2013) (reciting "Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law. Further, despite the sale of Plaintiff's loan to Fannie Mae, Chase alerted Plaintiff that it remained servicer of his loan and was authorized to handle any of Plaintiff's concerns.")

While Bank of America does not dispute that Freddie Mac is the owner of the subject loan [CP 852], this does not negate a finding that Bank of America has physical possession of the note and that it is endorsed in blank. Bank of America is the note holder and entitled to enforce the note—indeed Bank of America's relationship with Freddie Mac specifically obligated Bank of America to do so. (CP 852). Moreover, Bank of America's authority to foreclosure and otherwise enforce the note is entirely consistent with Freddie Mac's guidelines which state: "The Servicer must instruct the foreclosure counsel or trustee

to process the foreclosure in the Servicer's name . . . [unless applicable law precludes]." (CP 650)

Blair argues that Bank of America is nothing more than a document custodian of the note. (AOB pp. 10-16) He asserts that, as a document custodian, Bank of America has no authority over the note and is not an actual holder of the note. (AOB p. 11) Blair contends that "document custodians have no right to take any action or make any decisions with respect to the promissory note they hold." (CP 13) Thus, he argues that Bank of America was not the holder of the note with a right to enforce.

Blair's argument, however, is contradicted by the evidence presented to the trial court in support of Bank of America's motion for summary judgment and by Blair's own evidence. While Freddie Mac's document guidelines do limit the role of a document custodian to certain functions, Bank of America was also the servicer of the loan in addition to being a document custodian, which Blair does not contest. In accordance with Freddie Mac's document custody guidelines, a servicer may be a self-custodian for the mortgages that it services. (CP 299)

Bank of America demonstrated that it held Blair's note continually since its origination. (CP 1142) Moreover, it is uncontested that Bank of America serviced the loan, and was authorized to negotiate with Blair

regarding a possible loan modification. Although Bank of America acted as a self-custodian of the note through its subsidiary ReconTrust, that in no way diminished its concurrent role as the holder and lawful beneficiary of the note.

B. Blair's Cause of Action For Violation of the CPA Fails Because He Cannot Satisfy The required Elements For Asserting Such A Claim.

The Washington CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. To establish a violation of the CPA, a plaintiff must plead and prove five elements: "(1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). "Whether an alleged act is unfair or deceptive is a question of law, [however,] implicit in the definition of 'deceptive' under the Consumer Protection Act (CPA) is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Cmty.*

Ass'n. v. Echo Lake Assocs., 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

To establish a CPA violation, a plaintiff must establish injury to his business or property. *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327, 617 P.2d 415 (1980) (CPA plaintiffs must show that injury resulted from defendant's acts); *Seattle Rendering Works, Inc. v. Darling-Delaware Co.*, 104 Wn.2d 15, 701 P.2d 502 (1985) (unless plaintiffs are injured, they cannot prevail under the CPA). A plaintiff must also plead and prove that there is a causal link between the alleged misrepresentation or deceptive practice and his purported injury. *Indoor Billboard v. Integra Telecom*, 162 Wn.2d 59, 81-82, 170 P.3d 10 (2007).

In *Indoor Billboard*, the court employed the proximate cause standard set forth in WPI 15.01 for CPA claims, which requires a plaintiff to prove that "but for" the defendant's allegedly unfair or deceptive practice, the plaintiff would not have been harmed. The failure to establish even one of these elements is fatal to a plaintiff's claim. *Hangman Ridge*, 105 Wn.2d at 793, 719 P.2d 531. "A claim under the CPA based on violations of the [deed of trust act] must meet the same requirements applicable to any other CPA claim." *Lyons*, 181 Wn.2d at 785, 336 P.3d at 1147-48.

There is no case law or statutory basis for damages for the wrongful ***initiation*** of a foreclosure sale. *See Frias,* 181 Wn.2d at 420, 334 P.3d 529 ("We then analyze whether the DTA implies a cause of action for damages premised on DTA violations absent a completed foreclosure sale, and we conclude it does not."); *Vawter v. Quality Loan Serv.*, 707 F. Supp. 2d 1115, 1123-24 (W.D. Wash. 2010) ("Interjecting a cause of action for damages for wrongful institution of nonjudicial foreclosure proceedings into the [Deed of Trust's Act's] scheme would potentially upset the balance struck by the legislature."); *Pfau v. Wash. Mut. Inc.*, No. CV-08-00142-JLQ, 2009 WL 484448, at *12 (E.D. Wash. Feb. 24, 2009) ("There is no case law supporting a claim for damages for the initiation of an allegedly wrongful foreclosure sale. There is simply no statutory basis supporting a claim for damages for wrongful institution of foreclosure proceedings.") (*citing Kreinke v. Chase Home Fin.*, No. 35098-0-II, 2007 WL 2713737 (Wash. App. Sept. 18, 2007)); *Henderson v. GMAC Mortg.*,No. C05-5781RBL, 2008 WL 1733265, at *5 (W.D. Wash. Apr. 10, 2008) ("illegal foreclosure" claim fails because "no foreclosure ever occurred"), aff'd 347 Fed. Appx. 299 (9th Cir. 2009) (plaintiffs could not recover on their illegal foreclosure claim absent foreclosure.); *Bain v. OneWest Bank, F.S.B.*, No. C09-0149-JCC, 2011 WL 917385, at *6 n.4 (W.D. Wash. Mar. 15, 2011) ("The Deed of Trust

Act does not authorize a cause of action for damages for the wrongful institution of a nonjudicial foreclosure proceeding where no trustee's sale has occurred.").

In his brief, Blair asserts that his CPA claim is based on allegations that Bank of America violated the deed of trust act. (AOB p. 9) As discussed above at pp. 22-37 *supra*, none of the conduct alleged violated the deed of trust act. Even if it did, however, Blair would still need to satisfy all of the other requirements of the Act. He cannot do so.

Blair fails to explain how the actions of Bank of America caused him any injuries. (AOB p. 25) Critically, Blair admits that he defaulted on his loan, which led to the initial of foreclosure. (CP 616) He does not contend that he cured his default. Blair does not contend that the foreclosure was wrongful, just that it was implemented by the improper party. (*See* AOB generally) Blair does not assert that he was prejudiced by the conduct of Bank of America. Blair signed the note and deed of trust agreeing to pay his debt and he failed to do so. Thus, any injury he suffered was caused by his own failure to make monthly payments. For these reasons, as well, summary judgment was correctly granted in favor of Bank of America on Blair's CPA cause of action.

1. Blair's CPA Claim Is Based Upon His Assertion That Bank Of America Violated The Deed Of Trust Act; However, Because Bank Of America Was The Note Holder, It Did Not Violate The Deed Of Trust Act.

In his brief, Blair argues that his CPA claim is grounded in his assertion that Bank of America violated the deed of trust act [AOB p. 9]; however, because Bank of America did not violate the deed of trust act, this claim fails. As Bank of America has proven, it did not violate the deed of trust act, because it held the note at all times relevant to the foreclosure proceeding. (CP 1142) It was also the beneficiary under the deed of trust. (CP 918) Moreover, Freddie Mac gave Bank of America the right to enforce the note. (CP 650)

Each party involved in the non-judicial foreclosure of Blair's property acted in strict compliance with the statute and honestly and accurately portrayed itself and its relationship to the deed of trust. Additionally, MERS was not involved in the nonjudicial foreclosure having previously assigned its interest under the deed of trust. Both the deed of trust act and established Washington Supreme Court precedent agree that Bank of America acted in concert with the act at all times. Bank of America, as the note holder, satisfied the statutory definition of beneficiary and was the party authorized to appoint a successor trustee and initiate the foreclosure proceedings. Therefore, any claimed CPA

violation predicated on an alleged violation of the deed of trust act is meritless.

2. The Presence Of MERS In The Deed Of Trust Does Not Constitute A *Per Se* Violation Of The CPA.

The Washington Supreme Court has held that the mere fact that MERS is listed on the deed of trust is not *per se* actionable injury under the CPA. *Bain*, 175 Wn.2d at 117, 285 P.3d 34. In the wake of *Bain*, Courts have frequently rejected generic and conclusory MERS-based allegations where the plaintiff has not alleged facts showing that MERS had a causal role in their claimed injuries. *See, e.g., Kullman v. Northwest Trustee Services, Inc.*, No. 12-cv-5852-RBL, 2012 WL 5922166, at *2 (W.D. Wash. Nov. 26, 2012) ("Plaintiffs have failed to allege any prejudice arising from MERS's role in the foreclosure."); *Burkart v. Mortgage Elec. Registration Sys., Inc.*, No. C11-1921RAJ, 2012 WL 4479577, at *5 (W.D. Wash. Sept. 28, 2012) ("If the Burkarts want to plead one or more claims based on MERS' improper designation as the beneficiary in their deed of trust, they must provide sufficient allegations to establish that they have been injured."); *Mickelson v. Chase Home Fin. LLC*, No. C11-1445 MJP, 2012 WL 5377905, at *2-3 (W.D. Wash. Oct. 31, 2012) (refusing to reconsider prior orders dismissing CPA claims based in part on characterizing MERS as beneficiary where plaintiffs

could not make plausible claims of injury); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005) ("Despite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale."); *Koegel v. Prudential Mutual Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (declining to set aside trustee's sale despite trustee's failure to comply with the deed of trust act's notice requirements because plaintiff had not shown prejudice).

"An appellate court will not consider a claim of error that a party fails to support with legal argument in their opening brief." *Jackson*, 2015 WL 1542060, at *3.

In his complaint, Blair contended that MERS was not a proper beneficiary to the deed of trust and that "none of the Defendants has the ability to alter the definitions provided for in the deed of trust act by calling an entity such as Defendant MERS the 'beneficiary' when in fact, Defendant MERS is never the beneficiary' of any rights under the Deed of Trust." (CP 6) Blair also argued that MERS recorded a false document inferring that it possessed a beneficial interest in the deed of trust. (CP 1065)

However MERS's role was limited to being appointed under the deed of trust and recording an assignment transferring its interest in the

deed of trust. (CP 624-25, 918) The Washington Supreme Court has ruled that MERS does not meet the statutory definition of "beneficiary" with respect to Washington deeds of trust where MERS is identified as beneficiary in a nominee capacity for the lender and lender's successors and assigns when MERS is not the holder of the underlying promissory note, and that a borrower *may* be able to make a claim under the CPA *if* they can establish that they were actually harmed by MERS's appointment. *Bain*, 175 Wn.2d at 89, 285 P.3d 34. The Supreme Court, however, did not declare that deeds of trusts are void due to the mere involvement of MERS, or that assignment of deeds of trust are ineffective or fraudulent, where MERS is making the assignment as an agent of the beneficiary. Moreover, a borrower must demonstrate an injury *caused by* MERS in order to establish a CPA claim against MERS. Blair cannot establish this requirement. Accordingly, he cannot sustain a CPA claim against MERS.

Although Blair made this argument in his complaint and in response to the motion for summary judgment, he abandoned it on appeal by failing to raise it in his brief. Regardless of his failure to make the argument on appeal, it is apparent that the presence of MERS in the deed of trust does not constitute a violation of the CPA where the plaintiff cannot allege prejudice arising from it. Blair does not allege that he

suffered any injury related to MERS's appearance on the deed of trust. Blair did not demonstrate that MERS made any misrepresentations that caused him any injury at all. Therefore, MERS was entitled to summary judgment on Blair's cause of action under the CPA.

3. Blair Was Not Injured By The Conduct Of Bank Of America.

To demonstrate a violation of the CPA, Blair was required to show that he was injured by Bank of America's conduct. Blair could not do so; thus, where he could not demonstrate an essential element of his claim, the court correctly granted summary judgment. (*See* AOB generally)

In contrast, Blair claims that foreclosure was improperly initiated. As explained above at pp. 26-34 *supra*, Blair's argument stems from an erroneous belief that Bank of America is not the beneficiary under the deed of trust, not because Blair was current in his monthly payments. In fact, Blair has openly admitted that he failed to make the required payments in a timely manner. (CP 6) The foreclosure resulted from Blair's default, not from the actions of Bank of America. Therefore, the foreclosure was initiated on Blair's home solely as a result of his admitted default. Blair caused his own injury, and thus, he has not suffered any injury that would give rise to a CPA claim. Therefore, he cannot satisfy the "but for" standard of causation required under the CPA.

C. Blair's Intentional Misrepresentation Cause Of Action Fails Because He Does Not Specifically Assert Any Misrepresentation That He Relied Upon To His Detriment.

To state a claim for fraud a plaintiff must allege: "(1) A representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, [and] (9) his consequent damage." *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001); *see also Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "The complaining party must plead both the elements and circumstances of fraudulent conduct." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987) (citing 3A L. Orland, Wash. Prac. 129 (3d ed.1980)). The statute of limitations for fraud is three years. RCW 4.16.080(4).

As stated above at pp. 22-37 *supra*, Blair failed to demonstrate that Bank of America made a false representation of material fact. Additionally, Blair failed to explain how he relied to his detriment on any alleged misrepresentation. (CP 1068) Nor did Blair demonstrate that he

suffered any damage as a result of any so-called misrepresentation. (*Id.*) As a result, Bank of America was entitled to summary judgment on Blair's cause of action for intentional misrepresentation.

In his brief, Blair contends that "Defendants/Appellees supplied false information to Mr. Blair and the public at large when they indicated through publicly recorded documents that BANA, not Freddie Mac, was the beneficiary of Mr. Blair's deed of trust/promissory note and had authority to appoint NWTS as a foreclosure trustee." (AOB p. 28) He asserts that this conduct caused him pecuniary damage because he had to hire an attorney to investigate and stop the non-judicial foreclosure of his property. (*Id.*)

Blair's argument is once again based on his assertion that Bank of America violated the deed of trust act. As discussed above at pp. 22-37 *supra*, Bank of America and Freddie Mac complied with the deed of trust act in instituting the nonjudicial foreclosure. They did not misrepresent the roles of either party in the foreclosure. Moreover, MERS played no role in initiating the foreclosure, nor did Blair specifically assert that MERS made any misrepresentation to him; thus, his cause of action fails. Furthermore, any claim of fraud against MERS for its appearance in the deed of trust would be barred by the statute of limitations. Additionally, as previously discussed at p. 45, Blair could not demonstrate that the

actions of Bank of America caused him any injury; thus, the court properly granted summary judgment on his cause of action for intentional misrepresentation or fraud.

D. Blair's Cause of Action For Negligent Misrepresentation Fails Because He Cannot Identify Any Misrepresentation That He Relied On That Caused Him Injury.

A plaintiff claiming negligent misrepresentation must prove the following six elements: (1) that defendant supplied information for the guidance of others in their business transactions that was false; (2) that the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) that the defendant was negligent in obtaining or communicating false information; (4) that the plaintiff relied on the false information supplied by the defendant; (5) that the plaintiff's reliance on the false information supplied by the defendant was justified (that is, that reliance was reasonable under the surrounding circumstances); and (6) that the false information was the proximate cause of damages to the plaintiff. *Borish v. Russell*, 155 Wn. App. 892, 905 n.7, 230 P.3d 646 (2010) (quoting *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)). A claim for negligence or negligent misrepresentation is governed by a three-year statute of limitation. RCWA 4.16.080(2).

All elements of a negligent misrepresentation claim must be proven by "clear, cogent, and convincing evidence." *Id.* "Where the correct information is reasonably ascertainable by the complaining party, he [or she] may not justifiably rely on the other party's statement." *Rainier Nat'l Bank v. Clausing*, 34 Wn. App. 441, 446-47, 661 P.2d 1015 (1983) (affirming dismissal of fraud claim against bank, quoting trial court's opinion that complaining party had no right to rely on statements by relatively minor bank employee and he could have asked for underlying documents). "Moreover, the plaintiff must not have been negligent in relying on the representation." *Ross v. Kirner*, 162 Wn.2d 493, 500, 172 P.3d 701 (2007).

Blair asserts that the same alleged misrepresentations and damages support his claim for negligent misrepresentation. (AOB p. 28) Blair again fails to demonstrate that Bank of America made any misrepresentations to him. As discussed above at pp. 22-37 *supra*, Bank of America did not violate the deed of trust act in instituting foreclosure because it was the holder of the note and lawful beneficiary with the right to enforce. Additionally, Blair fails to identify any misrepresentation made by MERS or any resultant damage. Any claim for negligent misrepresentation against MERS would be barred by the statute of

limitations. Blair caused his own damage by failing to pay his mortgage. Therefore, Blair's cause of action for negligent misrepresentation failed.

IV.

CONCLUSION

The facts of this case are simple, despite what Blair argues in his brief. Blair executed a note secured by a deed of trust. He failed to make his monthly payments and defaulted on his loan.

When Blair defaulted on his loan, Bank of America, the actual beneficiary and holder of the note with the right to enforce, initiated foreclosure proceedings. It executed a beneficiary declaration stating that it was the holder of the note with the right to enforce, and appointed Northwest Trustee as the successor trustee, which it was empowered to do under the deed of trust act.

In light of the above, Bank of America respectfully requests that this honorable court affirm the decision of the trial court granting summary judgment in their favor.

RESPECTFULLY SUBMITTED this 15th day of May, 2015.

LANE POWELL PC

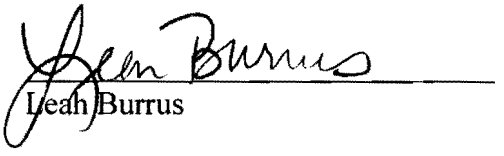
By _____
John S. Devlin III
WSBA No. 23988
Attorneys for Defendants-Respondents
Bank of America, N.A., Mortgage
Electronic Registration Systems, Inc., and
Federal Home Loan Mortgage
Corporation

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington and United States that on May 15, 2015, I caused a copy of the foregoing document to be served on the following persons in the manner indicated below at the following addresses:

Melissa A. Huelsman, WSBA #30935 Law Offices of Melissa A. Huelsman, P.S. 705 Second Avenue, Suite 601 Seattle, WA 98104-1726 Facsimile: (206) 447-0115 mhuelsman@predatorylendinglaw.com *Attorney for Plaintiff-Appellant James C. Blair II*	☐ ☑ ☐ ☐ ☑ ☐	by CM/ECF by Electronic Mail by Facsimile by First Class Mail by Hand Delivery by Overnight Delivery
Joshua Schaer, WSBA #31491 RCO Legal, P.S. 13555 SE 36th St Ste 300 Bellevue WA 98006-1263 Telephone: (425) 458-2121 Facsimile: (425) 458-2131 jschaer@rcolegal.com *Attorneys for Defendant-Respondent Northwest Trustee Services, Inc.*	☐ ☑ ☐ ☐ ☑ ☐	by CM/ECF by Electronic Mail by Facsimile by First Class Mail by Hand Delivery by Overnight Delivery

DATED this 15th day of May, 2015, at Seattle, Washington.



Leah Burrus