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Case No. 72905-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JACK GRANT,

Appellant,

vs.

FIRST HORIZON HOME LOANS, et. al.

Respondents.

Appeal from an Order of the Whatcom County Superior Court

Case No. 10-2-02676-9

BRIEF BY RESPONDENT QUALITY LOAN SERVICE CORP. OF WASHINGTON

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I. INTRODUCTION

Appellant Jack Grant refinanced a home loan and stopped making his mortgage payments. Failure to make mortgage payments is an event of default, triggering the trustee's power of sale.

The record demonstrates that the trustee in this case was lawfully appointed, and advanced the foreclosure pursuant to law. Dismissal of the claims against the trustee should be affirmed.

II. FACTS

A. Loan.

In 2004, Jack and Lisa Grant Karen re-financed their home loan and executed a note (the "Note") for the principal sum of $800,000.00. CP at 31-34. As security for the Note, the Grants gave a deed of trust (the "Deed of Trust") encumbering their property. CP at 36-50.

Shortly after origination, the Grant's loan was sold into a securitized trust, with BNY Mellon acting as trustee. CP at 27, 56-65. At all relevant times, BNY Mellon, through its document custodian, had physical possession of the Note, endorsed in blank. CP at 27.

B. Notice of Default.

In early 2010, the Grants stopped paying their mortgage. CP at 27. Failure to timely make mortgage payments is an event of default. On July

15, 2010, Quality, acting as agent for the beneficiary, issued a Notice of Default[1]. CP at 127, 130-35.

C. Notice of Sale.

On August 31, 2010, BNY Mellon appointed Quality as successor trustee under the Deed of Trust. CP at 127-28, 139-40. Prior to being appointed, Quality had in its possession a beneficiary declaration confirming BNY Mellon held the Note. CP at 127, 137. The beneficiary declaration was accurate; BNY Mellon did, in fact, hold the Note. CP at 27.

On September 28, 2010, Quality, acting as trustee, issued a Notice of Sale. CP 128l, 142-44. The Notice of Sale set an auction of the property for January 7, 2011. CP at 142. The sale was subsequently canceled. CP at 128.

D. Lawsuit.

In October 25, 2010, before the sale date was to occur, Jack Grant filed the subject lawsuit, alleging wrongdoing by Quality and others related to the foreclosure. CP at 315-345. All claims against Quality were dismissed by the trial court. CP at 99-100. On appeal, dismissal of the

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[1] The Notice of Default can be issued by the trustee, beneficiary, or agent. RCW 61.24.030(8); RCW 24.031(1)(a)

claims for damages was affirmed, but the court remanded to determine whether the trustee had authority to advance the foreclosure. CP at 879.

After remand, the trustee and its co-defendants moved for summary judgment. CP at 5-23, 116-125. The motions were granted. CP at 307-09. This appeal followed.

III. ARGUMENT

A. Foreclosure Advanced Pursuant to Law.

Under Washington's Deed of Trust Act, the "beneficiary" is the "holder of the instrument or document evidencing the obligations secured by the deed of trust". RCW 61.24.005(2) (emphasis added). Washington's Supreme Court has further confirmed that the "beneficiary" is the holder of the note. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). The trustee, in confirming the identity of the "beneficiary" (i.e. the holder), is allowed to rely on a declaration as to the holder. RCW 61.24.030(7)(a). *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484 (Div. 1, 2014) *Jackson v. Quality Loan Service Corp of WA*, 72016-3-I (Div. 1, April 6, 2015).

In this case, BNY Mellon is the "beneficiary" under Washington law because they hold the Note. Quality lawfully advanced the foreclosure because it was on behalf of the holder.

Furthermore, Quality had in its possession the beneficiary declaration confirming BNY Mellon held the Note. The trustee is allowed to rely on a beneficiary declaration to verify the holder. That the declaration was executed by the beneficiary's agent and does not make it invalid. *Bain*, 175 Wn.2d at 106 (2012) (beneficiary allowed to act through agents). In any event, the beneficiary declaration has been proven accurate – BNY Mellon did, in fact, hold the Note. Thus, the trustee's reliance on the beneficiary declaration, even though warranted, is a non-issue.

B. Claims For Relief.

i. Summary Judgment Standard.

A CR 56 motion is evidentiary in nature, and the party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial." CR 56. "[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain." *White v. State*, 131 Wash.2d 1, 9, 929 P.2d 396 (1997).

In this case, the remaining claims after the first appeal were rendered moot by the absence of a sale, and dismissal was appropriate. Furthermore, even if Mr. Grant were able to resurrect his claims for damages, he failed his burden in demonstrating evidence sufficient to defeat defendants' summary judgment. Not only was there no defect in

the foreclosure by the trustee, but the record was completely devoid of any evidence that Grant suffered legally recoverable damages caused by the trustee.

ii. Injunctive and Declaratory Relief.

For reasons discussed in co-defendant's answering brief, the absence of a sale rendered the claims for injunctive and declaratory relief moot. Dismissal was appropriate.

iii. Consumer Protection Act.

For reasons discussed in co-defendants answering brief, the CPA claim was already dismissed, and that dismissal was affirmed. Plaintiff does not get a second bite of the apple.

Additionally, the CPA claim fails on the law and record before the court on summary judgment. A claim under Washington's Consumer Protection Act ("CPA") requires (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to meet all of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

a) Unfair or Deceptive Act.

"Whether an action constitutes an unfair or deceptive practice is a question of law." *Columbia Physical Therapy, Inc., PS v. Benton Franklin Orthopedic Associates*, PLLC, 168 Wn.2d 421, 442, 228 P.3d 1260, 1270 (2010). An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *State v. Pacific Health Center, Inc.*, 135 Wn. App. 149, 170, 143 P.3d 618, 628 (2006). "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc.*, LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

As a threshold matter, Grant fails to identify any defect in the foreclosure by the trustee, let alone an "unfair or deceptive" act. Quality was properly appointed trustee by the holder, and advanced the sale on behalf of the holder. The sale was advanced because the Grants stopped paying their mortgage, which triggered the trustee's power of sale.

b) Public Interest.

An act or practice is injurious to the public interest if it "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093(3). A plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest." *Indoor*

Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (citing *Hangman Ridge*, 105 Wn.2d at 788; *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976)).

Grant failed to identify or demonstrate any "public interest". This case involves a mortgage loan the Grants stopped paying. Foreclosure by a trustee is the remedy provided by contract, and what the Grants agreed to when they took out the loan. These are private actors, and the case involves enforcement of a contract, and the trustee advanced the sale pursuant to both the contract and applicable law.

c) Causation and Damages.

A CPA claimant must demonstrate injury to "business or property" proximately caused by the "unfair or deceptive" act. RCW 19.86.090; *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). A CPA claimant must show that there is a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman*, 105 Wn.2d at 793. "[T]he term proximate cause means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without such injury [or] event would not have happened." *Schnall v. AT&T Wireless Servs. Inc.*, 171 Wn.2d 260, 278 (2011) (quoting 6 Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed.2005)).

Grant failed to demonstrate any injury to "business or property" proximately caused by the trustee's actions. Grant's declaration submitted in opposition to summary judgment (CP at 150) consists of the following conclusory statement, with zero supporting documentation:

> I spent a considerable amount of time and money, including money for certified postage, investigating who was entitled to enforce and or/or negotiate my loan, as well as trying to determine whether Quality Loan Service Corporation of Washington (Quality) was a lawful trustee.

As pointed out in co-defendant's briefing, the above does not satisfy injury to "business or property" under the CPA. And to the extent Grant paid his attorneys to bring his claim, those are fees and costs not recoverable under the CPA. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992) (merely having to prosecute a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property."); *Demopolis v. Galvin*, 57 Wn. App. 47 (1990); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, *3-4 (W.D. Wash. Aug 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 *4 (W.D. Wash. Oct 23, 2013) (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property

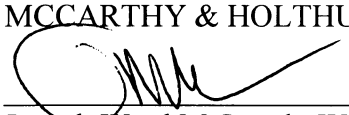
element; if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation").

IV. CONCLUSION

The foreclosure was advanced by the trustee pursuant to law. Mr. Grant's claims fail and the dismissal should be affirmed.

Dated: July 21, 2015

MCCARTHY & HOLTHUS, LLP



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CERTIFICATE OF MAILING

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On July 21, 2015, I arranged for service of the forgoing BRIEF BY RESPONDENT QUALITY LOAN SERVICE CORP. OF WASHINGTON on the following parties via U.S. 1st Class Mail and email:

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