No. 73336-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BYRON BARTON and JEAN BARTON

Appellants

v.

JP MORGAN CHASE BANK, N.A., FIRST AMERICAN TITLE, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON,

Respondents.

Appeal from Superior Court for King County
The Honorable Mary E. Roberts

APPELLANTS' OPENING BRIEF

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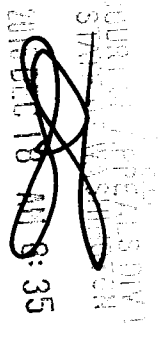

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CR 12(b)(6)

I. INTRODUCTION

Appellants' home was sold at a trustee's sale. After the sale occurred, Appellants filed a lawsuit for damages for violations of the Consumer Protection Act, the Deed of Trust Act, Wrongful Foreclosure, Misrepresentation and other claims. The claims alleged involve JP Morgan Chase's lack of authority to foreclose on the property due to the fact that there is inadequate proof that Chase ever owned the note; the trustee's failure to abide by the Deed of Trust Act in initiating and

carrying out a trustee's sale, when the Act is very specific as to the procedures required for trustee's sales; and damages associated with the respondents' wrongful and unlawful acts. The Superior Court granted the Respondents' motion to dismiss for failure to state a claim, even though the Bartons provided proof that the respondents failed to follow these laws or provide proof that they were the beneficiaries entitled to foreclose.

II. ASSIGNMENTS OF ERROR

1. The Court erred in granting the motion to dismiss when Plaintiffs stated a claim for the Consumer Protection Act.

2. The Court erred in granting the motion to dismiss when Plaintiffs stated a claim for violation of the Deed of Trust Act.

3. The Court erred in granting the motion to dismiss when it found the principle of equitable estoppel applied.

Issues Pertaining to Assignments of Error

The Respondents' actions were unfair and deceptive when they failed to provide a Notice of Pre-Foreclosure Options to the Bartons Prior to scheduling a Trustee's Sale or sending a Notice of Default. (Assignment of Error 1, 2).

The Respondents violated the Deed of Trust Act when they failed to provide the Bartons with a Notice of Pre-forelcosure Options to be followed by a Notice of Default, and an opportunity to mediate to obtain a loan modification. (Assignment of Error 2).

The Respondents sold the Bartons' property at a trustee's sale when they did not have proper authority as the Trustee or the Beneficiary (Assignment of Error 1, 2).

The Appellants' did not waive their post-foreclosure claims by not filing a pre-foreclosure lawsuit. (Assignment of Error 2).

Equitable estoppel does not apply in this case because the foreclosure proceedings and post-foreclosure actions did not arise until the present case was filed, and could not have been brought in the previous case, because they had yet to occur. (Assignment of Error 3).

III. STATEMENT OF THE CASE

On April 11, 2014, QLS sold Appellants' home at a trustee's sale in King County. VRP 12. No defendant sent, nor did Appellants ever receive a proper and lawful Notice of Default related to this trustee's sale as required by the Deed of Trust Act, RCW 61.24.030(8). VRP 11. Nor did Appellants ever receive a Notice of Pre-Foreclosure Options as required by the Deed of Trust Act, RCW 61.24.031(1). VRP 11. Nor did any defendant enter into the mediation process with Appellants in violation of RCW 61.24.163.

The mortgage agreement in question was entered into in August 2007 between the Bartons and Washington Mutual, F.A. ("Washington Mutual" or "WAMU"). At no time did Washington Mutual lawfully transfer or assign the mortgage to Respondent JPMorgan Chase Bank. VRP 13. The Purchase and Assumption Agreement between Washington Mutual and JP Morgan Chase does not provide specific loan numbers or

directions to transfer mortgage loans to JP Morgan Chase, and nowhere can Chase provide proof that it lawfully obtained Appellants' mortgage. On September 25, 2008, the Office of Thrift Supervision closed WAMU and appointed the FDIC as receiver. Subsequent to the closure of WAMU, Chase acquired some of WAMU's assets from the FDIC as the receiver. Chase had until December 30, 2008 to file their proof of claim to the FDIC as receiver to Washington Mutual to preserve claims against Appellants that arise out of the mortgage transaction including foreclosure of Appellants' property. No such proof was filed. Chase's status as beneficiary under the deed of trust is therefore fraudulent and it does not maintain the right to foreclose under the Washington Deed of Trust Act.

No valid assignment of the Deed of Trust was recorded with King County showing that the loan was transferred from WAMU to Chase. The "appointment" of QLS is also invalid since Chase is not a lawful beneficiary, it is not empowered to appoint a successor trustee. QLS was not lawfully empowered or entitled to proceed with a foreclosure of Appellants' property and the trustee's sale should be voided and rescinded.

IV. SUMMARY OF ARGUMENT

The Consumer Protection Act allows a cause of action when there is proof that there has been an unfair and deceptive act or practice that affects commerce and causes injury and damages to a person who uses those goods or services. Respondents committed these acts when they violated the Deed of Trust Act by failing to provide the proper notices to Appellants and yet foreclosed on their home despite those failures.

The Respondents violated the Deed of Trust Act by failing to provide the proper notices to Appellants and proceeded with a trustee's sale, a violation of the Act. After a trustee's sale has occurred, Appellants are entitled to damages. They did not waive their claims by not filing a pre-foreclosure lawsuit.

Appellants are not equitably estopped from filing the present claims for damages because many of the actions in the complaint took place or were discovered in the process of the foreclosure that occurred, which were actions that did not, nor could not have occurred as a basis for previous lawsuits.

V. LEGAL ARGUMENT

A. Standard of Review

For a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct.

1079, 31 L. Ed. 2d 263 (1972). Dismissal of actions under CR 12 is appropriate only if it appears beyond a doubt that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006); *Suleiman*, 48 Wn. App at 376. A CR 12(b)(6) motion should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes factual allegations that show on the face of the complaint that there is some insuperable bar to relief." *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006), *citing Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

A claim is factually plausible when it contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009). The Washington Court of Appeals held that "we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Davenport v. Washington Education Association*, 147 Wn. App. 704, 197 P.3d 686 (2008), *citing Postema v. Pollution Control Hearings Board.*, 142 Wn.2d. 68, 122, 11 P.3d 726 (2000). The court

reviews "questions of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the plaintiffs." *Id.* Ultimately, "any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support a plaintiff's claim." *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn.App. at 218, citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

An appellate court reviews questions of law de novo. *State v. McCormack,* 117 Wash.2d 141, 143, 812 P.2d 483 (1991), *cert. denied,* 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992). Issues of statutory interpretation are reviewed de novo. *Hartson P'ship v. Goodwin,* 99 Wash.App. 227, 231, 991 P.2d 1211 (2000). This appeal involves both statutory interpretation and questions of law, so the court should apply the de novo standard of review.

B. The Court Erred In Granting the Motion to Dismiss on the Consumer Protection Act Claim

The CPA prohibits unfair or deceptive business practices, and these claims are analyzed in view of the five elements of *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest

(5) and caused injury to plaintiff in her or her business or property. *Id. at* 780.

1. ***The Reespondents Committed Unfair and Deceptive Acts Under the Consumer Protection Act***

The CPA does not define "unfair" or "deceptive." Instead, courts have developed standards on a case-by-case basis. *Ivan's Tire Service v. Goodyear Tire*, 10 Wn.App. 110, 517 P.2d 229 (1973). "To prove that an act or practice is deceptive, *neither intent nor actual deception is required.* The question is whether the conduct has the *capacity to deceive* a substantial portion of the public. *Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead.* Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law that we review de novo." *State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). (emphasis added). The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

The Complaint alleges that all Respondents engaged in a pattern and practice of unfair and unlawful activity that ultimately resulted in

unfair, deceptive, and unlawful foreclosure proceedings. In fact, actual deception is not required in order to state a CPA claim, but the question is whether the conduct has the capacity to deceive. Even if their actions would be considered lawful, this does not absolve them of liability under the Consumer Protection Act, because even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead. There is no question that the deceptive conduct by Chase and QLS occurred, and the conduct was alleged in the complaint.

2. *Defendants' Acts Impact the Public Interest*

Appellants stated a claim that the acts of Chase and QLS that caused harm to the appellants are acts that impact the public interest. A plaintiff may show that a deceptive commercial act or practice has affected the public interest by satisfying any of five different factors. *Hangman Ridge*, 105 Wn.2d at 789; *Bavand v. OneWest Bank,* 309 P.3d 636, 176 Wn.App. 475, 506 (2013).

> (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?[1]

[1] *Hangman Ridge*, 105 Wn.2d at 790.

In *Bavand*, the court held that "OneWest also purported to appoint a successor trustee when it had no authority to do so, both because its assignment occurred a day before MERS attempted to 'assign' its interest to OneWest and because, even if such an assignment had occurred a day prior, MERS had no interest to assign. Given these three facts, Bavand pled sufficient information for the public interest element of her CPA claim to withstand summary judgment." *Bavand*, 176 Wn.App. at 507. Here, Chase routinely forecloses on properties that involved loans that originated with WAMU but Chase fraudulently claims that it owns those notes. Clearly there is a "real and substantial potential for repetition of defendant's conduct after the act involving plaintiff." And these acts were "repeated acts prior to the act involving plaintiff." Chase's course of business (in collusion with QLS and other trustees) is part of a pattern of a generalized course of conduct. Appellants are simply one among many homeowners against which these defendants committed unfair and deceptive acts.

C. Appellants Did Not Waive Claims By Not Filing a Pre-Foreclosure Lawsuit

The Supreme Court reviewed the question of whether the borrower waives the right to bring a post-sale challenge for failing to utilize the pre-sale remedies under RCW 61.24.130 in *Albice v. Premier*

Mortg. Svcs., 174 Wash.2d 560 (2012). The question was reviewed by the Supreme Court to determine the nature of the post-sale rights afforded to a borrower to bring claims against the trustee and the beneficiary. In the *Albice* matter, Defendant Dickinson argued that because Plaintiff failed to use their presale remedies, their post-sale challenge was barred. The Supreme Court disagreed with this position. They found that waiver cannot apply to all circumstances or types of post-sale challenges. *Id.* at 570.

The Court held that the use of the word "may" indicates the legislature neither requires nor intends for courts to strictly apply waiver.[2] *Id.* "Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the Act." *Id.* The court found that the appropriate inquiry in "determining whether waiver applies, the second goal – that the non-judicial foreclosure process should result in its interested parties having an adequate opportunity to prevent wrongful foreclosure – becomes particularly important."[3] *Id.* at 571. In *Schroeder v. Excelsior*

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[2] *Citing* RCW 61.24.040(1)(f)(IX),"failure to bring... a lawsuit *may* result in waiver of any proper grounds for invalidating the trustee's sale..."

[3] The Act furthers three goals: (1) that the non-judicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985).

Management Group, LLC,[4] the court affirmed this line of reasoning and found that, "Based on *Plein*,[5] the defendants argue that Schroeder failed to give the statutory five-day notice required by RCW 61.24.130(2), failed to successfully enjoin the sale, and thereby waived his right to contest the sale...We conclude that the respondents' reliance on *Plein* is misplaced. It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements. *Albice,* 174 Wash.2d at 568, 276 P.3d 1277 (citing *Udall*, 159 Wash.2d at 915-16, 154 P.3d 882). A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. *Id.*"

The Supreme Court in *Albice* held that waiver could not be equitably established in that case. The Supreme Court held that, "...to ensure trustees strictly comply with the requirements of the act, courts must be able to review post-sale challenges where, like here, the claims are promptly asserted..." and that "Enforcing statutory compliance encourages trustees to conduct procedurally sound sales." *Id.* at 572. In *Bavand*, the court found, "Former RCW 61.24.010(2) (2009) states:

> The trustee may resign at its own election or be replaced by the ***beneficiary*** .... If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the ***beneficiary*** to

[4] *Schroeder v. Excelsior Management Group, LLC*, 297 P.3d 677 (Wash. 2013).
[5] *Plein v. Lackey*, 149 Wash.2d 214, 227, 67 P.3d 1061 (2003).

> replace the trustee, the ***beneficiary*** shall appoint a trustee or a ***successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.***

The plain words of this statute establish that the beneficiary of a deed of trust is the sole entity entitled to appoint a successor trustee if the beneficiary elects to replace the original trustee named in that deed of trust. This statute makes equally clear that only upon the recording of the appointment of a successor trustee with the auditor in the relevant county is a successor trustee 'vested with all the powers of an original trustee.' Among these powers is, of course, the power to conduct a nonjudicial foreclosure culminating in a trustee's sale." *Bavand*, 176 Wn.App. 487.

The court in *Bavand* concluded that "The only reasonable reading of this statute is that the successor trustee must be properly appointed to have the powers of the original trustee. Thus, a dispositive question in this appeal is whether RTS was properly appointed as a successor trustee by the beneficiary of Bavand's deed of trust. We conclude that this record shows that RTS was not properly appointed as a successor trustee." *Id.* The court based its conclusion on the fact "that OneWest is not named either in the deed of trust or the promissory note that Bavand executed in favor of IndyMac Bank." *Id.* Finally, the court in *Bavand* concluded that "Because OneWest was not the beneficiary of the deed of trust at the time

it attempted to appoint a successor trustee, it had no authority under former RCW 61.24.010(2) (2009) to appoint RTS as successor trustee. Absent that authority, RTS was not vested with any of the powers of the original trustee under the 2011 deed of trust. Specifically, RTS had no authority to conduct a foreclosure and trustee's sale of Bavand's property." *Id.* at 488.

In the present case, JP Morgan Chase fraudulently claims itself to be the beneficiary even though it cannot show that it obtained Appellants' note and/or deed of trust from the FDIC or WAMU. Since it is not the beneficiary of the deed of trust, it is not empowered to appoint a successor trustee, so its appointment, if any, of QLS as the successor trustee is invalid and unenforceable. VRP 14-15. Since QLS is not a valid trustee, it is not empowered to take the actions of the original trustee, including foreclosure proceedings.

The Trustee's Deed did not recite all the statutorily mandated facts, but rather stated legal conclusions without supporting facts. The Trustee's Deed, executed on April 16, 2014 and recorded on April 28, 2014 stated that "the current Trustee transmitted the Notice of Default to the required parties, and that said Notice was posted or served in accordance with law." (Trustee's Deed, ¶4). This statement is false and a fraud upon the record. No Notice of Default for this trustee's sale was

ever served upon Appellants. The Trustee's Deed also states that "All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in chapter 61.24 RCW." (Trustee's Deed, ¶9). This statement is also false and a fraud upon the record. No Notice of Default was ever served upon Appellants and no Notice of Pre-Foreclosure Options was sent to plaintiffs, in violation of RCW 61.24.031(1).

The Deed of Trust Act, RCW §61.24.130 provides for an action to restrain a trustee's sale, and specifically states, in pertinent part:

> (1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale.

In *Bavand v. OneWest Bank*, the court found "The supreme court reinforced a basic statement of law that it originally had made in *Cox v. Helenius:* Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void.[6] In such cases, there is no waiver of the right to seek and obtain relief." *Bavand* at 492.

[6] *Cox v. Helenius*, 103 Wash.2d 383, 388-89 (1985).

However, Appellants' sole remedy was not limited to the filing of a pre-foreclosure lawsuit, and failure to file such a suit is not automatically a waiver of certain claims. The Deed of Trust Act, RCW §61.24.127 provides for post-foreclosure lawsuits, and specifically states, in pertinent part:

> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter ***may not be deemed a waiver of a claim for damages*** asserting: [emphasis added]
>
> (a) Common law fraud or misrepresentation;
> (b) A violation of Title 19 RCW; [The Consumer Protection Act]
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
> (d) A violation of RCW 61.24.026.

The Supreme Court explained that "Waiver, however, cannot apply to all circumstances or types of post-sale challenges. RCW 61.24.040(1)(f)(IX) provides that "[f]ailure to bring ... a lawsuit may result in waiver of any proper grounds for invalidating the Trustee's sale" (emphasis added). The word 'may' indicates the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act." *Albice* at 570. Plaintiffs did not file a lawsuit to restrain the sale, but they were still left with the opportunity to file claims for common law fraud and

misrepresentation, violation of the Consumer Protection Act, and Violation of the Deed of Trust Act, which is exactly what they did. The statute simply says that failure to restrain the sale may not waive three very specific claims and enumerates the limitations on *those* claims. It does *not* say that other claims are *not* available to the borrower or grantor, and the decision by the Supreme Court upholds this position.

D. Equitable Estoppel Cannot Be Established

Respondents attempt to dismiss based on an equitable estoppel theory. "In Washington *res judicata* occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Schroeder* at 684 citing *Mellor v. Chamberlin*, 100 Wash.2d 643, 645-46, 673 P.2d 619 (1983). The court in *Schroeder* found that these elements had not been met. *Id.* "The subject matter of the 2009 litigation was the 2007 deed of trust. The subject matter of the 2010 litigation was the foreclosure of the 2009 deed of trust." *Id.* If one of these elements is not met, there is no *res judicata*. Not all four elements need be present.

Appellants' complaint raises a completely new and separate set of facts based on new acts committed by defendants that that were not, nor could not be, raised in Plaintiffs' previous lawsuits. VRP 12. Most

significantly, the new set of facts included in this complaint are: Chase is an unlawful "beneficiary," and QLS is not a properly appointed Trustee. On April 11, 2014, QLS sold Appellants' home at a trustee's sale in King County. At no time did any Respondent ever send, nor did Plaintiffs ever receive a Notice of Default related to this trustee's sale as a requirement of the Deed of Trust Act, RCW 61.24.030(8). Nor did Appellants ever receive a Notice of Pre-Foreclosure Options as required by the Deed of Trust Act, RCW 61.24.031(1). Nor did any Respondent enter into the mediation process with Appellants in violation of RCW 61.24.163. Defendants' argument is fatally flawed because there is no identity of subject matter (this lawsuit involves a trustee's sale that was not the subject of the previous lawsuits), or identity of causes of action.

E. CONCLUSION

Accordingly, this Court should reverse the trial court orders and remand for further proceedings consistent with the Court's opinion.

Signed and dated this 17th day of December, 2015.

/s/ Jill J. Smith
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CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division I, and properly served to the counsel listed below, on December 17, 2015.

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