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Court of Appeals
Division I
State of Washington
No.: 74050-4-I

74050-1

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

PAULINE CONNER,

Plaintiff/Appellant,

v.

EVERHOME MORTGAGE COMPANY, a division of EVERBANK, REGIONAL TRUSTEE SERVICES, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, LENDER PROCESSING SERVICES, DOES I-XXX, INCLUSIVE,

Defendants/Respondents.

RESPONDENTS' APPELLATE BRIEF

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I. INTRODUCTION

This appeal arises out of a completed non-judicial foreclosure proceeding that resulted in an unlawful detainer action against Appellant Pauline Conner ("Conner"). The trial court stayed the unlawful detainer action pending outcome of Conner's wrongful foreclosure lawsuit. The trial court denied Conner's request for a continuance and dismissed Plaintiff's claims against Lender Respondents on multiple grounds.

Conner admitted to defaulting on her loan payment and purposefully failing to cure despite having the means to do so. CP 305, 311. Conner also admitted to intentionally taking action to cloud title to stall the foreclosure action. CP 325-330. Conner admitted that she failed to restrain the trustee's sale despite having received proper notice. CP 314-318. The subject property sold at a trustee's sale, and Conner no longer owns the house. CP 348.

Lender Respondents moved for summary judgment, arguing that Conner waived her claims by failing to restrain the sale and also failed to produce evidence raising a genuine issue of material facts to support her claims of misrepresentation, negligence, breach of contract, and Consumer Protection Act ("CPA"). To feign the appearance of a genuine issue of material fact, Conner flooded the court with documentation, none of which created any evidence disputing that Conner defaulted on her loan, failed to cure the default and failed to restrain the sale, thereby waiving all but her CPA claim. The trial court granted Lender

Respondents' Motion for Summary Judgment, finding that Everbank had the right to foreclose upon the Note because it was the holder of the note at all relevant points in time and that the MERS had no effect on Everbank's status as the holder. CP 13. Moreover, Conner provided no evidence of any damages or other injury she suffered because of the Respondents' alleged deceptive acts in connection with the foreclosure.

This Court should affirm the trials court's order denying the request for continuance and granting summary judgment.

II. STATEMENT OF THE CASE

A. Factual Background

1. Loan Origination and Possession of the Note

In May 2006, Conner obtained a loan for $279,000 from Irwin Mortgage Corporation ("IMC"). CP 874, 878-881. The loan was memorialized by a promissory note ("Note") and secured by a Deed of Trust encumbering property at 21604 78th Avenue SE, Woodinville, Washington ("the Property"). The Deed of Trust identifies IMC as "Lender" and MERS as beneficiary "as nominee for Lender and Lender's successors and assigns." CP 874, 882-899. In June 2006, IMC sold the loan to Fannie Mae and indorsed the Note in blank. CP 874-875, 900-902. The Note and Deed of Trust are referred to as the "Loan."

Effective January 2007, loan servicing transferred to Everbank. CP 874-875. Everbank serviced the Loan on behalf of Fannie Mae. CP 875. Since then, Everbank has maintained possession of the original Note. CP 875.

On September 2, 2009, Rick Wilken, as Vice President of MERS, executed an Assignment of the Deed of Trust from MERS to Everbank. CP 875, 903-910. The Assignment was notarized and recorded on October 20, 2009, in Snohomish County. CP 875.

2. The Nonjudicial Foreclosure and Subsequent Litigation

Conner defaulted under the Note and Deed of Trust beginning in May 2009. CP 1194. Everbank advised Conner of her default, its referral of the Loan to foreclosure and of her options. CP 875-876. Specifically, Everbank offered to update Conner's financials for a possible repayment plan and explained how it would work, but Conner never filled out a loss mitigation packet. CP 876, 302. Connor chose not to cure the default. CP 310.

On September 1, 2009, Everbank referred the Loan to Regional authorizing it to commence nonjudicial foreclosure. CP 654. On September 2, 2009, Everbank appointed Regional successor trusttee via an Appointment of Successor Trustee executed by Everbank's Assistant Vice President, Rick Wilkens. CP 655, 667-669. Wilkens had authority to sign on behalf of Everbank under an Everbank corporate resolution. CP 876, 917-920.

On September 8, 2009, Michele De Craen, an Assistant Vice President of

Everbank executed, before a notary, an Affidavit of Holder of Note stating Everbank was the holder and in possession of the Note. CP 876, 914-916. Regional obtained the Affidavit of Note Holder from Everbank as part of its foreclosure referral package. CP 654.

Subsequently, on September 18, 2009, as authorized agent for Everbank, Regional issued Conner a Notice of Default ("NOD"). CP 654, 659-663. The NOD identifies the Deed of Trust and informs Conner "the beneficial interest under said Deed of Trust and the obligations secured thereby are presently held by or will be assigned to Everbank." CP 654, 659-663. With the NOD, Regional delivered the required notice under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA"). CP 654, 665. The FDCPA Notice identifies the "current creditor" as Everbank. CP 654, 665.

On October 20, 2009, Everbank recorded the Appointment of Successor Trustee and the Notice of Trustee's Sale ("NOTS") in the official records of Snohomish County. CP 655, 667-674. Contemporaneously, Regional sent Conner a Notice of Foreclosure advising her that the Property would be sold at a public auction on January 22, 2010. CP 655, 681-684. The trustee's sale was postponed until April 16, 2010. CP 655. Fannie Mae was the highest bidder. CP 656. Thereafter, Everbank conveyed the Property to Fannie Mae via a Trustee's Deed that was recorded in Snohomish Couny. CP 656, 685-687. The title company paid an excise tax of $10.00 on the trustee's deed. CP 689.

After Conner failed to vacate, Fannie Mae instituted an unlawful detainer action, which this court stayed pending the outcome of this lawsuit.

On July 1, 2011, Everhome Mortgage Company merged with Everbank with the surviving successor being Everbank. To avoid confusion, the predecessor and successor entities will both be referred to as "Everbank."

B. Procedural Background

1. Conner's Complaint

Conner filed this lawsuit on February 13, 2012, seeking damages and injunctive relief. CP 1253-1269. On May 14, 2012, Conner filed a First Amended Complaint asserting claims for wrongful foreclosure, fraud, breach of good faith and fair dealing, violations of the Consumer Protection Act ("CPA"), and Gross Negligence. CP 1192-1205. Conner's allegations involved mostly MERS-based arguments; specifically, she claims that MERS lacked authority to transfer beneficial interest in the Deed of Trust to Everbank and therefore Everbank lacked authority to appoint a successor trustee. CP 1197-1200, 1203-1204. Conner also made general allegations about fraudulent conduct and robo-signing.

2. Conner's Motion for Partial Summary Judgment

In response to the Clerk's Motion for Dismissal for Want of Prosecution, Conner moved for Partial Summary Judgment on March 5, 2014. CP 1055-1066. Conner requested that the Court find: (1) that MERS did not have authority to transfer the Deed of Trust; (2) that any such transfers by MERS were invalid as a

matter of law; and (3) that Regional Trustee Services Corporation Inc. violated the Washington Deed of Trust Act ("DTA"). CP 1055-1066. Lender Respondents filed an Opposition including Declarations from Everbank and the trustee concerning possession of the Note. CP 963-977, 1074-1076, 1070-1073. Based on the evidence in the record, the Court denied Plaintiff's Motion for Partial Summary Judgment on May 13, 2015. CP 780, 781.

3. Conner's Files for Discretionary Review

On June 5, 2015, Conner filed a Notice of Discretionary Review with the Court of Appeals. CP 92. On October 15, 2014, the Court of Appeals issued a Certificate of Finality on October 15, 2014. CP 92. The Court of Appeals denied discretionary review.

4. Lender Respondents Prevail on Summary Judgment

On September 14, 2015 the trial court heard Conner's Motion to Continue and Lender Respondents' Motion for Summary Judgment. CP 16. On September 22, 2015, the Court issued a Memorandum Decision and Order where the Court denied Conner's Motion to Continue and granted Lender Respondents' Motion for Summary Judgment in its entirety, dismissing all claims. CP 10-15.

5. Conner Files a Notice of Appeal

Conner filed her notice of appeal on October 9, 2015. CP 1-9. On appeal, Conner assigns issues pertaining to these trial court rulings: (1) denying Conner's Motion to Strike Certain Declaration; (2) dismissal of Conner's CPA claim; (3)

failing to find that Conner pled violations of the Washington Deed of Trust Act; and (4) denying Conner's Motion to Continue. *See Opening Brief, page 1*. Conner does not appeal the trial court's dismissal of her causes of action for wrongful foreclosure, fraud, or gross negligence. *Id.*

III. STATEMENT OF ISSUES

1. Whether Conner waived her claims when she decided not to restrain the trustee's sale.

2. Whether the trial court properly dismissed the trustee's breach of the duty of good faith claim.

3. Whether the evidence established there is no violation of the Deed of Trust Act.

4. Whether Conner failed to raise a genuine issue of material fact regarding the requisite elements of her CPA claim.

5. Whether the trial court properly considered the evidence on summary judgment.

6. Whether the trial court properly denied Conner's request for a continuance under CR 56(f).

IV. ARGUMENT

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. See *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 770 P. 2d 182 (1989). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.,* 100 Wn. App. 851, 854 (2000). Summary judgment should be denied only if a reasonable jury could return a verdict for Appellants on the record they submitted. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251 (1986); *Young v. Key Pharmaceuticals, Inc*., 112 Wn. 2d 216 (1989).

To survive a motion for summary judgment, the nonmoving party has "the burden of establishing specific and material facts to support each element of [his or her] prima facie case." *Hiatt v. Walker Chevrolet Co*., 120 Wn.2d 57, 66 (1992) (emphasis in original). The nonmoving party must set forth specific facts, by affidavits or otherwise, showing there is a genuine issue for trial. *Young*, 11 Wn.2d at 216. Mere allegations or conclusory averments of fact or legal conclusions cannot raise a genuine issue of material fact. *Baldwin v. Sisters* of *Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P. 2d 298 (1989).

Summary judgment is reviewed de novo. *Vallandigham v. Clover Park Sch. Dist. No*., 400. 154 Wn.2d 16, 26, 109 P.3d 805 (2005). This Court will consider the same evidence that the trial court considered on summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Yet, this Court may affirm the trial court ruling on any ground supported by the record, "even if the trial court

did not consider the argument." *King Cnty. v. Seawest Inv. Assocs*., LLC, 141 Wn. App. 304, 310, 170 P. 3d 53 (2007) citing *LaMon v. Butler*, 112 Wn.2d 193, 200 - 01, 770 P. 2d 1027 (1989); RAP 2.5(a).

The trial court correctly applied these standards in granting summary judgment to Lender Respondents. Accordingly, this Court should affirm that decision.

1. Conner Has Abandoned her all of her claims but Breach of Duty of Good Faith and Her CPA claim and Waived all other claims but a CPA claim

Conner's Amended Complaint contains a cause of action for wrongful foreclosure, fraud, and gross negligence. Conner, however, abandons these claims on appeal. Conner does not raise the trial court's denial of these causes of action as an issue on appeal. These claims are not subject to appellate review.

RCW 61.24.127(1) sets forth what claims are not waived if a borrower fails to enjoin a foreclosure:

> (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:
>
> (a) Common law fraud or misrepresentation;
>
> (b) A violation of Title 19 RCW;
>
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026

RCW 61.24.127(1) (codifying Laws of 2009, c. 292, § 6 (effective July 26, 2009)).

This statute confirms the borrower's right to assert post-sale claims subject to the limitations in subsection (2). Because Conner failed to restrain the trustee's sale despite her knowledge of the sale, only these non-waived claims set forth in subsection (1) survived post-sale.[1] This is consistent with the three goals of the DTA – (1) that the nonjudicial foreclosure process be efficient and inexpensive, (2) that parties have adequate opportunity to prevent wrongful foreclosure, and (3) that the stability of land titles be promoted. *Plein v. Lackey*, 67 P.3d 1061, 1065, 149 Wash.2d 214, 225 (2003).

Of the non-waived claims enumerated in RCW 61.24.127(1), only the CPA claim is at issue on appeal because: (1) Conner did not raise issue with dismissal of the fraud cause of action on appeal; (2) material noncompliance of the trustee does not apply to Lender Respondents, and (3) a DTA claim does not constitute as a non-waivable claim under RCW 61.24.127(1). As for the CPA claim, it is subject to limitations in RCW 61.24.127(2). This subsection states: (2) the nonwaived claims under subsection (1) of this section are subject to these limitations:

(a) The claim must be asserted or brought within two years from

[1] Conner received notice that the Property was at risk of being sold on January 22, 2010. Not only was she aware of the pending sale, she knew of certain claimed defenses to the sale. See Deposition of Conner, Pg. 91, ¶4-12 and Pg. 101, ¶19-22. CP 338, 349. Conner also recorded several instruments in encumbering the Property[1] and, she filed bankruptcy. Deposition of Conner, Pg. 91, ¶4-12. CP 348.

the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document -22- purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and

(f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages

as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.

Subparagraph (b) and subgraph (c) set limitations on the remedy available to the borrower (i.e., injunctive relief and rescission of the sale are not available remedy). Subparagraph (d) and (e) prohibit the borrower from clouding title (borrower s barred from filing or otherwise encumbering property. Finally, Subparagraph (f) limits claims to actual damages, except to the extent additional damages are recoverable under the CPA. Notwithstanding these limitations, RCW 61.24.127 does not modify the elements of a cause of action under the CPA. *Frias v. Asset Foreclosure Services, Inc.*, 334 P.3d 529, 537, 181 Wash.2d 412, 430 (2014). As explained below, Conner must prove the established requirements of a CPA claim to prevail on her claim, but she fails to meet this burden.

2. The Trial Court Properly Dismissed the Trustee's Breach of the Duty of Good Faith against Lender Respondents

The trial court properly concluded in its Memorandum Decision that Everbank, Fannie Mae, and MERS never owed Conner a duty of good faith and fair dealing. CP 14. This cause of action was directed solely at the trustee –Regional Trustee Services, Inc., ("Regional") who was neither a moving party on summary judgment nor a party to this appeal. Moreover, Regional went into receivership and is no longer in operations, Conner's remedy against Regional involved filing a claim in the receivership proceeding. Conner provides no case law or supporting

authority for extending a trustee's duty of good faith to other parties. In summary because the trustee's breach of its duty of good faith does not extend to Lender Respondents, Conner's appeal of this issue is without merit.

3. The DTA Claim was Properly Dismissed

Conner's primary cause of action was for "Wrongful Foreclosure", which Conner argues on appeal also encompassed a cause of action for violation of the Deed of Trust Act. Conner based this cause of action on the theory that the assignment from MERS to Everbank was invalid, and Everbank did not have authority to appoint the successor trustee and foreclose. CP 1200. Because the record before the trial court and controlling Washington law refuted Conner's claims, the trial court properly dismissed this wrongful foreclosure/violation of the DTA. Furthermore, Conner waived this cause of action by failing to restrain the sale.

i. Everbank was the Holder of the Note and Lawful Beneficiary to Foreclose

Conner's Note was originally payable to Irwin Mortgage Corporation ("IMC"). CP 12. Subsequently, IMC indorsed the Note in blank and sold the Note to Fannie Mae. CP12. Thereafter, in January 2007, Fannie Mae transferred to the Note in blank to its servicer, Everbank. CP 12. Everbank has continuously possessed the Note since January 2007 and its counsel provided the original Note available for viewing at the summary judgment hearing. CP 12.

The DTA, specifically, RCW 61.24.005(2), defines beneficiary to mean the holder of the instrument or document evidencing the obligations secured by the Deed of Trust. In *Bain v. Metro. Mortgage Grp. Inc.*, 175 Wn.2d 83, 103-04 (2012), the Washington Supreme Court looked to the Uniform Commercial Code's ("UCC") definition of holder to define that term as used in RCW 61.24.005(2). *Bain v. Metro. Mortgage Grp. Inc.* The Washington UCC defines the "holder" as the "person in possession if the instrument is payable to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A); *Bain*, 175 Wn. 2d at 104. The trial court's ruling that Everbank had the right to foreclose because it was the holder of the Note at all relevant times is consistent with both the Deed of Trust Act and the UCC.

In her Amended Complaint, Conner alleges that MERS was not a valid beneficiary and had no beneficial interest to assign. CP 1200, 1203-1204. In the wake of *Bain* and *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn. 2d 775, 785, 336 P.3d 1142, 1147 (2014), Court have widely rejected generic and conclusory MERS based allegations such as those raised by Conner. *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."); *Mickelson v. Chase Home Fin. LLC*, No. CII-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). Furthermore, Conner has no standing to complain of MERS' assignment. *See Brodie v. Nw. Tr. Serv., Inc.*, 2012 WL 6192723, *2–3 (E.D. Wash. 2012) (a borrower lacks standing to attack a MERS assignment because the borrower is not a party to it and cannot be injured by it); *Ukpoma v. U.S. Bank, N.A.*, 2013 WL 1934172, *4 (E.D. Wash. 2013) ("Plaintiff, as a third party, lacks standing to challenge" the assignment).. The recording of an assignment is not for the benefit of the borrower, but rather serves the purpose of putting subsequent purchasers on notice of which entity has a security interest in the property. RCW 65.08.070.

Any assignment of the Deed of Trust from MERS to Everbank had no legal effect on the ownership or possession of the Note because, among other things, under Washington law, a security interest follows the obligation it secures. *See e.g.*, *Am. Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 61 (1911), *on reh'g*, 67 Wash. 572 (1912) ("There is no doubt that a mortgage, or any other security given for the payment of a bill or note, passes by a transfer of the bill or note to the transferee."). In a recent Court of Appeals Division I decision, involving similar allegations as to those here, the Court found "no genuine issue of material fact supporting the allegation that the MERS's assignment of the deed of trust to Wells Fargo was unlawful or defective under the DTA." *McAfee v. Select Portfolio Servicing, Inc*., 2016 WL 1562228, at *4 (Wash.App. Div. 1, 2016). The Court based its ruling on fact that the note was endorsed to Wells Fargo which then subsequently was

assigned the Deed of Trust. *Id.* Therefore, the assignment of the Deed of Trust from MERS to Everbank had no legal significance and is irrelevant to any of the issues here. Conner cannot sustain a wrongful foreclosure claim based on MERS involvement. Consequently, Conner's attacks on the validity of the Deed of Trust assignments are misplaced.

ii. Conner waived all allegations regarding violations of Chapter 61.24 RCW

Conner misstates the trial court's ruling on the violations of the Deed of Trust Act and misinterprets the waiver application provided in RCW 61.24. First, the trial court noted that Conner did not plead violations of the Deed of Trust Act. CP14. This is accurate. Conner's first amended complaint does not disprove this point. Moreover, the trial court did not base its ruling on waiver but, instead determine that Conner pled no DTA violation.

Under RCW 61.24.127, if a borrower fails to enjoin a foreclosure prior to the trustee's sale, all claims are waived except for the following: (a) common law fraud; (b) violation of Title 19 RCW; (c) failure of the trustee to materially comply with the DTA; and (d) violation of RCW 61.24.026. RCW 61.24.127 (1)(a)-(d). Notably, a violation of the DTA does not appear as a non-waivable claim. Therefore, it is immaterial that Conner filed her lawsuit within two years from the foreclosure sale because she is seeking relief under a cause of action waived by her failure to restrain the trustee's sale. The trial court properly came to this conclusion

in granting summary judgment in Lender Respondent's favor.

4. The CPA Claim was Properly Dismissed

A violation of the CPA requires: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) impacts to the public interest; (4) injury to business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Failure to meet any of these elements is fatal and necessitates dismissal. *Id;* see also *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002).

i. There Was No Unfair or Deceptive Practice Affecting the Public

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 (2010). CPA liability requires an act or practice with either: (1) the capacity to deceive a substantial portion of the public, or (2) that the "alleged act constitutes a per se unfair trade practice." *Hangman Ridge*, 105 Wash. 2d at 785. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Cmty. Ass'n,* 134 Wash.App. 210, 135 P.3d 499 (2006).

Conner did not allege a per se violation. The Supreme Court in *Bain* specifically rejected the premise that characterizing MERS as the beneficiary is

"per se" deceptive. *Bain*, 175 Wn.2d at 117. Notably, a plaintiff asserting a MERS-based CPA claim "must produce evidence on each element required to prove a CPA claim." *Id.* "*Bain* is clear that there is no automatic cause of action under the CPA simply because MERS acted as an unlawful beneficiary under the Deed of Trust Act." *Mickelson v. Chase Home Finance*, 901 F. Supp 2d. 1286, 1288 (W.D. Wash 2012), *aff'd* 579 F. App'x 598 (9th Cir. 2014).

Therefore, the only method that Conner could establish a CPA claim was to show that Lender Respondents engaged in conduct with a capacity to deceive a substantial portion of the public. Here, Conner bases her CPA claim on two theories— (1) the improper assignment from MERS to Everbank; and (2) the appointment of Regional based on the MERS assignment. *Opening Brief, pg.* 29. However, as the trial court properly concluded the "MERS assignment of beneficiary status to Everbank was ineffective to benefit Everbank of harm Plaintiff." CP 13. The trial court also correctly held there is now way plaintiff could have incurred any injury. CP 14. Because Conner failed to produce evidence on the injury or causation elements required to prove her CPA claim, this Court should affirm the trial court's granting of summary judgment.

In her appeal, Conner claims that but for the assignment, Respondents could have not initiated the non-judicial foreclosure. Conner's MERS-based theory also fails because Everbank's authority to initiate the non-judicial foreclosure and to appoint Regional derives from its noteholder status, not from any assignment of the

Deed of Trust. *See e.g. Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wash.App. 484, 326 P.3d 768, 774 (2014), *as modified* Order Modifying Op. at 1-2 (Nov. 3, 2014); *review granted*, 182 Wn. 2d 1020, 345 P.3d 784 (2015); *Lynott v. Mortgage Electronic Registration Systems, Inc*., No. 12-cv-5572-RBL, 2012 WL 5995053 at 2 (W.D. Wash. Nov. 30, 2012) (holding that "U.S. Bank is the beneficiary of the deed of trust because it holds Plaintiff's note, not because MERS assigned it the deed.").

Critically, a CPA claim based on MERS' involvement does not exist under a *Bain* rationale where, as here, the holder's authority derives from possession of the Note indorsed in bank. Because Everbank is the note holder and beneficiary, it was the proper party to appoint Regional and to foreclose on the subject property. The trial court came to this correct conclusion based on the record before it. Specifically, Everbank was the holder of the Note as shown by the declaration of Bradley Lee. CP 12, 718, 759-762. Everbank was given the rights to enforce the note by Fannie Mae, the owner/investor. CP 12. The original note was also provided for presentation by Everbank's counsel.

As the holder of the note with the right to enforce, Everbank had the right to appoint Regional as the trustee, and provided a beneficiary declaration to Regional, evidencing its right to foreclosure. CP 654. Regional obtained the Affidavit of Note Holder from Everbank as part of its foreclosure referral package. *See* Declaration of Deborah Kaufman, ¶ 5. CP 654. In reliance on the beneficiary

declaration and its records, Regional issued the Notice of Default and subsequently the Notice of Trustee's Sale. CP 654. Regional was entitled to rely on the unequivocal beneficiary declaration. *See* RCW 61.24.030(7)(b); *see also Lyons*; *Brown v. Wash. State Dep't of Commerce,* 184 Wn. 2d 509, 544, 359 P.3d 771 (2015) (a trustee may rely on "a party's undisputed declaration submitted under penalty of perjury that it is the holder of the note."). The Affidavit of Possession of the Note dated September 8, 2009 specifically avers that at the time of the foreclosure sale and during all pertinent times, Everbank possessed the Note. *See* Declaration of E. Michele de Craen, Ex. G. CP 876, 914-916.

Contrary to Conner's allegations, Regional owed no fiduciary duty to Conner. *Opening Brief, page 30.* RCW 61.24.010(3) provides that a "trustee or successor trustee shall have *no fiduciary duty* or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." (Emphasis added). There is simply no statutory requirement or case law support in Washington compelling trustees to conduct any form of investigation into the beneficiary's right to foreclose. As the trial court pointedly declared, "it is abundantly clear from every angle that Everbank had the right to foreclose upon the Note because it was the holder of the note at all relevant times." CP 13. Because Regional owed no fiduciary duty to Conner, and nothing suggested Everbank's note holder status, Conner's allegations of misconduct concerning initiation of the non-judicial foreclosure fail.

Finally, Conner's claims relating to the MERS assignment fail because Conner is not entitled to rely on this assignment. Washington does not require such transfers and assignments to be recorded. *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash 2011). Recording is only for the benefit of third-parties. *Id*. Conner lacks standing to challenge the MERS assignment.

ii. There Was No Unfair or Deceptive Practice Affecting the Public

Concerning the second prong, Conner must satisfy the public interest requirement. Conner's CPA claim, however, is simply a private dispute between a creditor and debtor rather than a consumer transaction. "[T]he public interest in a private dispute is not inherent." *Hangman Ridge Training Stables, Inc.*, 105 Wn 2d at 790.

Here, Conner failed to show how Lender Respondents took action which "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves or outweighed by countervailing benefits." *Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 787, 295 P.3d 1179, 1187 (2013).

In a consumer transaction, like the one here, these factors are relevant to establish public interest:

> (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?[2]

When applied to the present case, the public interest cannot be met. The only factor that Conner might show could would be the first factor relating to acts occurring in the course of defendants' business. There is, however, no evidence that the alleged deceptive act were part of a pattern or even happened outside of Conner's foreclosure. The acts are not part of a pattern or generalized course of conduct. There is no real and substantial potential for repetition of Lender Respondents alleged acts because the alleged acts pertain only to Conner's foreclosure.

All of Conner's claims relate exclusively to conduct directed at her personally, such as whether Everbank had the right to foreclosure and to appoint Regional as trustee. There are no facts showing the public was affected by the Lender Respondents' conduct in the foreclosure on Conner's home. The trial court's dismissal of the CPA claim should be affirmed.

iii. Lender Respondents Did Not Cause Injury to Conner

To prove a CPA violation, Conner had to establish that but-for Lender Respondents' conduct, they would not have suffered an injury. Indoor *Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10,

[2] *Hangman Ridge Training Stables, Inc.*, 105 Wn 2d at 790.

17-18, 162 Wash.2d 59, 73 (Wash., 2007). Likewise, Conner had to prove an injury to their business or property. *See Hangman Ridge*, 105 Wn.2d at 792. Conner cannot be compensated for lost wages or personal injuries under the CPA. *Wash. Sate Physicians Inc. Exch. & Ass'n Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 57, 204 P.3d 885, 899 (2009). Finally, the fees and costs incurred in litigating the CPA claim are not the type of costs necessary to establish the damages element of a CPA claim. *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563–64, 825 P.2d 714 (1992). Conner failed to plead an injury that was proximately caused by Lender Respondents. Conner admitted she defaulted on her mortgage obligations and that she intentionally failed to cure her default despite having the means to do so. CP 305, 311. The foreclosure resulted from Conner's default, not from Lender Respondents' action. Conner understood that executing the Note required her to repay the loan, and she knew who to pay. CP 277-278, 311. Conner was also notified of the foreclosure action and failed to cure her default or otherwise restrain the sale. CP 305, 311, 316. The record is clear that the foreclosure was initiated on Conner's home solely because of her admitted default and failure to cure her default. CP 13. Because Conner caused her own injury, she failed to establish the "but-for" standard of causation required under the CPA claim.

As part of her CPA claim, Conner also needed to prove an injury to her business or property. *See Hangman Ridge*, 105 Wn.2d at 792. Conner produced no evidence of damages, and any claims of damages due to low credit scores, stress, lost wages, and attorney's fees are not injuries under the CPA. *Wash. Sate Physicians Inc. Exch. & Ass'n Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *Massey v. BAC Home Loans Servicing, LP,* 2013 WL 6825309, 7-8 (W.D. Wash. 2013). Conner's diminished credit score, which there is absolute no evidence of, would have resulted from her default and bankruptcy filings. CP 311, 335. Conner cannot recover for any alleged stress because damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 57, 204 P.3d 885, 899 (2009). Additionally, Conner's claims of lost wages are without merit as Conner testified that she retired in 2013. CP 253, 272. In any event, lost wages are not recoverable under the CPA. *Wash. Sate Physicians Inc. Exch. & Ass'n Fisons Corp.,* 122 Wn.2d 299, 858 P.2d 1054 (1993). Finally, the fees and costs incurred in litigating the CPA claim are not the type of costs necessary to establishing the damages element of a CPA claim. *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563–64, 825 P.2d 714 (1992). Conner failed to plead an injury that was proximately caused by Lender Respondents. Therefore, this Court should affirm the trial court's granting of summary judgment.

iv. The Statute of Limitations Bars Conner's MERS-Based CPA Claims

A CPA claim for damages is subject to a four year statute of limitations. RCW 19.86.120. The statute of limitations runs when the aggrieved party knows or through exercising due diligence should have knowns all the facts necessary to establish a legal claim. *Strong v. Clark,* 56 Wn. 2d 230, 232, 352 P.2d 183, 184 (1960).

Here, Conner argued that MERS acted as ineligible beneficiary – even though the Deed of Trust expressly states that MERS is identified as "beneficiary" solely as nominee for the Lender. Conner also challenged the MERS assignment to Everbank on this same basis. Conner signed the Deed of Trust that was recorded on June 5, 2006. CP 983-997. Conner had until June 5, 2010 to file a CPA claim based on the allegedly misleading Deed of Trust and subsequent assignment. Because Conner filed her lawsuit over four years later, her CPA claim is barred. Summary judgment on Conner's CPA cause of action was appropriate.

5. The Trial Court Properly Relied on the Declaration of Lee and Kaufman

i. Trial Court Properly Considered the Evidence

Conner argues that the trial court erred in relying on and admitting into evidence the declaration of Lee and Kaufman. *Opening Br. of App*. at 10. Lender Respondents submitted these two declaration into evidence as business records. There is no error, and the trial court properly considered the declarations. A trial

court's decision to admit or exclude evidence lies within its sound discretion and will not be reversed absent a manifest abuse of discretion. *Int'l Ultimate, Inc. v. St. Paul Fire* & *Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (no abuse of discretion in admitting documents under business records exception to hearsay prohibition); *State v. Iverson*, 126 Wash.App. 329, 336,108 P.3d 799, 802 (2005) (the court allowed officers to testify about the identity of jail booking records where the officers did not actually enter the booking information into the jail's computer system, but they were familiar with the system, used it in their regular course of business, and "routinely relied on the information prepared by fellow officers in their ordinary course of business to identify persons who previously had been booked into jail"). Here, the trial court was well within its discretion in accepting the Declarations of Lee and Kaufman and the associated business records, and Conner fails to show an abuse of discretion.

ii. Business Records are Admissible as an Exception to Hearsay

While hearsay testimony is generally inadmissible as evidence, business records that might otherwise be hearsay, are admissible as an exception to the general rule. ER 802; ER 803(6); RCW 5.45, *et seq.* Hearsay constituting as a business records exception is inherently reliable because of the process used to prepare the records. *State v. Hines*, 87 Wash.App. 98, 101, 941 P.2d 9, 10 (1997).

Under Washington law, to be considered on summary judgment, a supporting declaration must be made on personal knowledge and the facts set forth must be admissible in evidence. CR 56(e) provides the requirements for an admissible affidavit:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

CR 56(e) affidavits must be made on personal knowledge, must set forth facts admitted into evidence, and must show that the affiant is competent to testify to the information in the declaration. Washington courts consider the requirement of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute. *See Discover Bank v. Bridges*, 154 Wn.App. 722, 726, 226 P.3d 191 (2010).

A business record is admissible where:

> [T]he custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. Courts broadly interpret the statutory terms "custodian" and "other qualified witness" under the business records statute. *State v. Smith*, 55

Wn.2d 482, 348 P.2d 417 (1960); *State v. Quincy*, 122 Wn.App. 395, 399, 95 P.3d 353 (2004). Under the statute, the person who created the record need not identify it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953). The testimony by one with custody of the record as a regular part of work will suffice. *Id.* at 608. "Admissibility hinges upon the opinion of the court that the sources of information, method and time of preparation were such as to justify its admission." *Quincy,* 122 Wn.App. at 401. Computerized records are treated under the same standards as any other business records. *State v. Ben-Neth*, 34 Wn. App. 600, 604-605, 663 P.2d. 156 (1983).

In the trial court proceeding, Lender Respondents submitted several declarations to support of their Motion for Summary Judgment. On appeal, Conner challenges the court's reliance on the Declaration of Lee and Kaufman. These declarations, however, satisfy all the business records' requirements and are virtually identical to evidence admitted in *Discover Bank*. In *Discover Bank v. Bridges,* the debtors argued that the trial court erred in considering business records and declarations from three employees of DFS Services, LLC, a debt collection entity, working on behalf of the creditor Discover Bank. The Court rejected the debtors' argument finding that the declarations, which included assertions about the declarant's employment, personal review of the records, and maintenance of such records, satisfied the business records exception. *Discover Bank,* 154 Wn.App. at 726.

As in *Discover Bank*, the declarants– Lee and Kaufman, collectively stated in their declarations that (1) they worked for the respective company; (2) that they had access to the records in the course of their employment; (3) that they made their statements based on personal knowledge and review of the records made under the penalty of perjury; and (4) the attached account records were correct copies made in the ordinary course of business. Based on the forgoing, the Declaration of Lee and Kaufman satisfy the requirement of RCW 5.45.020.

iii. Self-Authenticating Documents are Admissible

On appeal, Conner claims that the Declarations lack the necessary foundation and do not satisfy as business records. Conner is mistaken.

First, there is no requirement that Lender Respondents identify who compiled the information in the business records. *Discover Bank*, 154 Wn.App. at 726. The records referred to in the Declaration of Lee and Kaufman are self-authenticating and authenticated by other testimony including Conner's deposition testimony. CP 264-265, 300-302, 307, 311, 314, 341, 346-347. Specifically, the Note is self-authenticating under RCW 62A.3-308 and ER 902(i). Conner also authenticated the Note and all the foreclosure documents in her deposition. CP 264-265, 300-302, 307, 311, 314, 341, 346-347. The recorded documents such as the Deed of Trust and Assignments are also self-authenticating under RCW 5.44.060. Because the Affidavit of Possession, was attached to the Declaration of Lee, there was no reason to also include it to the Declaration of Kaufman. The

Supreme Court recently held that the trustee may rely on the beneficiary's declaration as proof of the beneficiary's right to foreclose.

The record shows that Lee and Kaufman are employees of their respective companies whose job duties relate to loans in foreclosure and that they are personally familiar with the business records of such loans. The record also reveals that the records were made at or near the time of events they describe. Based on their personal review and knowledge of the file, Lee testified to the loan's history including the servicing and accounting of the loan, and the possession and ownership of the Note, and Kaufman testified about the default on the loan and non-judicial foreclosure proceeding. As the trial court noted in its memorandum decision, Conner offered nothing to contradict the declarations or anything to question the accuracy of the declarations. CP 12. Therefore, the trial court admitted the Declaration of Lee and Kaufman, and it was in their discretion to do so. Conner failed to set forth any evidence to create a genuine issue of fact about the authenticity of these documents.

6. The Trial Court Properly Denied Conner's Request for a CR 56(f) Continuance

Over three years ago after filing her Complaint and three weeks after being served with Lender Respondents' motion for summary judgment, Conner moved to continue the motion for additional discovery. Since filing the Complaint, Conner has stood on the sidelines of her own case and only took action when the Clerk

issued a Motion to Dismiss for Want of Prosecution on February 11, 2014. CP 48. Given that Conner had over three years to prosecute this case and failed to do so, good cause does not exist to warrant a continuance. Moreover, the trial court did not find that the answers, which Conner claimed it needed to obtain through discovery, were materials for its ruling on summary judgment. CP 11.

A trial court's denial of a motion for a CR 56(f) continuance is reviewed for an abuse of discretion. *Lake Chelan Shores Homeowners Ass 'n v. Sf. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 183, 313 P.3d 408 (2013). "A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014) (quoting *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)).

A trial court may deny a CR 56(f) continuance if: (1) the party seeking it has no good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of material fact. *Baechler v. Beaunaux*, 167 Wn. App. 128, 132, 272 P.3d 277 (2012). The court in *Winston v. Dep't of Corr*., 130 Wn. App. 61, 65, 121 P.3d 1201, 1203 (2005) denied the motion to continue the summary judgment on two grounds – (1) because the discovery sought could have been accomplished earlier and the moving party failed to show good cause for the delay in conducting the discovery; and (2) the moving party relied on what he hoped to reveal through additional discovery rather than identify

evidence that would give rise to a genuine issue of fact. *Winston v. Dep't of Corr.*

Conner did not and cannot make the showing necessary to justify a CR 56(f) continuance. Conner did not serve discovery on the Lender Respondents and did not state what evidence would be established with additional discovery or how the evidence would raise a genuine issue of material fact. Conner also failed to offer a good reason for the delay and the case had been pending for over three years. A party cannot complaint if it fails to diligently pursue discovery before summary judgment. *See Mackey v. Pioneer Nat. Bank,* 867 F.2d 520, 524 (9th Cir. 1989).

The trial court properly denied Conner's request for a continuance.

V. CONCLUSION

There are no genuine issues of material fact, and the trial court properly granted summary judgment for Lender Respondents. This Court should affirm the summary judgment order entered on September 22, 2015.

Respectfully submitted this 9th day of May, 2016.

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No. 74050-4-I

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

PAULINE CONNER,

Plaintiff/Appellant.

v.

EVERHOME MORTGAGE COMPANY, a division of EVERBANK, REGIONAL TRUSTEE SERVICES, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, LENDER PROCESSING SERVICES, DOES I-XXX, INCLUSIVE,

Defendants/Respondents

DECLARATION OF MAILING

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I, Illya Lisunov, declare: I am a citizen of the United States over the age of 21 years and I am competent to be a witness herein. On May 9, 2016, in compliance with the notification requirements pursuant to the laws of the State of Washington, mailed via FedEx (tracking No.: 776299466856), postage prepaid, copies of the following:

1. **RESPONDENTS' APPELLATE BRIEF**

addressed to each of the following:

Kovac & Jones, PLLC
Richard Llewlyn Jones
1750 – 112th Ave NE., Suite D-151
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A true and correct courtesy copy of same was emailed to rlj@kovacandjones.com.

DATED on May 9, 2016 at Seattle, WA.

lllya Lisunov