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Division III
State of Washington
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STATE OF WASHINGTON
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Case No. 358691-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

WILLIAM MOORMAN,

Appellant,

v.

CLEAR RECON CORP.; U.S. BANK, National Association, as Trustee
for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-
Through Certificates, Series 2006-2; HSBC BANK USA, N.A.; PHH
MORTGAGE CORPORATION, NATIONSTAR MORTGAGE and DOE
DEFENDANTS 1 through 20, inclusive,

Respondents.

WILLIAM MOORMAN'S PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS.....1

II . CITATION TO COURT OF APPEALS DECISION.....1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

V. STANDARD ON REVIEW.....11

VI. ARGUMENT.....11

VII. CONCLUSION.....16

ATTACHMENT A.....Unpublished Opinion, April 16, 2019

ATTACHMENT B.....Order Denying Motion for Reconsideration,
.....May 23, 2019

TABLE OF AUTHORITIES

Cases

Bain v. Metropolitan Mortg. Grp., Inc., 175 Wn.2d 83, 93, 285 P.3d 34
(2012)..... 7, 14

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d
265 (1986))..... 14

Coggle v. Snow, 56 Wn.App. 499, 512, 784 P.2d 554 (1990) 14

GMAC v. Everett Chevrolet, Inc., 179 Wn.App. 126, 134, 317 P.3d 1074
review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014) 14

Podbielancik v. LPP Holdings, Inc., 191 Wn.App. 662 (2015) 14

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1
(1986)..... 14

Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882
(2007)..... 7

Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).. 14

Rules

RAP 13.4(b) 11

I. IDENTITY OF PETITIONERS

Petitioner William Moorman is the owner of the subject property and the Plaintiff and Appellant in the underlying litigation.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Moorman seeks review of the decision of Division III of the Court of Appeals in this case (hereinafter the “Decision”), Case No. 358691-III. The unpublished Opinion was filed on April 16, 2019 (Att. A) and Motion for Reconsideration was denied on May 23, 2019 (Att. B).

III. ISSUES PRESENTED FOR REVIEW

1. Division III’s decision is entirely unsupported by Washington statutes and case law, and includes citation to a statute that does not apply to this case.
2. The Opinion is also predicated upon a version of the facts that is its own creation based upon its assumptions and/or unsupported conclusions.
3. Division III’s decision, although unpublished, will be used as precedent against other property owners because of the authority granted under GR 14.1. The decision negates entirely the requirements of the Deed of Trust Act and is direct contravention of this Court’s holdings.

IV. STATEMENT OF THE CASE

Division III’s Opinion did not rely upon any statute or case law that supports its conclusions as to the alleged establishment of an agency relationship between PHH and U.S. Bank for purposes of affirming summary judgment against Mr. Moorman. The Court completely ignored

significant evidence that expressly contradicted defense assertions in briefing that the relationship existed, which made clear that there were still genuine issues of material fact that precluded summary judgment. The Court used this “finding” to reach all of its other conclusions to deny Mr. Moorman relief, in direct contravention of Washington law. CR 56.

Procedural History

| <u>Date</u> | <u>Filing/Description</u> |
|--------------------|---|
| 8/16/16 | Complaint filed in Chelan County Superior Court on August 16, 2016 in Case Number 16-2-00703-6 to set aside the non-judicial foreclosure sale seeking a temporary restraining order and preliminary injunction, and for a violation of the Washington Consumer Protection Act against all defendants, Clear Recon Corp., U.S. Bank National Association, as Trustee for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2006-2, PHH Mortgage Corporation and HSBC Bank USA, N.A. A Motion for Temporary Restraining Order/Setting Preliminary Injunction Hearing, was also filed that day, and Declaration of William Moorman and Declaration of Melissa A. Huelsman were filed in support. CP 3-122. |
| 8/18/16 | The Court entered an Order Denying the Motion for Temporary Restraining Order and Setting Preliminary Injunction Hearing. CP 123-125. |
| 9/16/16 | Defendants PHH and HSBC filed their Answer and Affirmative Defenses. CP 133-137. |
| 2/9/17 | Mr. Moorman filed a second Motion for Temporary Restraining Order/Setting Preliminary Injunction Hearing, with a Declarations of William Moorman and Declarations of Melissa Huelsman in Support. He also filed a Motion for Leave to Amend Complaint with Declaration of Melissa |

- Huelsman in Support. CP 138-291.
- 2/16/17 The Court entered an Order Granting Mr. Moorman's Motion for Leave to Amend Complaint and an Order Granting Motion for Temporary Restraining Order and Setting Preliminary Injunction Hearing. CP 292-296.
- 4/11/17 Mr. Moorman filed his Motion for Preliminary Injunction along with supporting Declarations of William Moorman and Declarations of Melissa Huelsman. CP 314-446.
- 5/3/17 The Court entered an Order Granting Mr. Moorman's Motion for Preliminary Injunction. CP 457-459.
- 12/15/17 Defendants PHH and HSBC filed a Motion for Summary Judgment, with declarations of Karen Booth, Jane Spare, Sorell Elbert in Support. CP 460-621.
- 1/9/18 Mr. Moorman filed his Response to the Motion for Summary Judgment with a Declaration of Melissa Huelsman in Support. CP 622-751.
- 1/16/18 Defendants PHH and HSBC filed their Reply in Support of MSJ. CP 752-760.
- 1/19/18 The Court entered an Order Granting Defendant PHH and HSBC's Motion for Summary Judgment. CP 761-762.
- 1/29/18 Defendants PHH and HSBC filed a Motion to Disburse Court Registry Funds and for Award of Attorney Fees with a Declaration of Abraham Lorber in Support. CP 763-787.
- 2/20/18 Mr. Moorman filed his Notice of Appeal to Division III. CP 788-793.
- 2/20/18 Mr. Moorman filed his Response to Defendants PHH and HSBC's Motion to Disburse Court Registry Funds and for Award of Attorney Fees with a Declaration of Melissa Huelsman in Support. CP 794-860.
- 2/22/18 Defendants PHH and HSBC filed a Reply in Support of

their Motion to Disburse Court Registry Funds and for Award of Attorney Fees. CP 861-865.

- 2/27/18 The Court entered an Order Granting PHH and HSBC's Motion to Disburse Court Registry Funds. CP 866-868.
- 7/9/18 Mr. Moorman filed his Opening Brief in the Appeal.
- 9/13/18 Respondents PHH and HSBC filed their Answering Brief.
- 3/14/19 Oral Argument before the Court of Appeals, Division III panel.
- 3/29/19 Respondents PHH and HSBC filed their corrected Answering Brief.
- 4/16/19 Court of Appeals, Division III, issued Opinion in favor of Defendants.
- 5/6/19 Mr. Moorman filed his Motion for Reconsideration.
- 5/23/19 Court of Appeals, Division III, issued order denying Mr. Moorman's Motion for Reconsideration.

Factual History

Division III predicated its decision entirely upon an erroneous determination that there was competent and uncontroverted "evidence" of PHH's (subservicer) appointment as an "agent" of U.S. Bank (alleged noteholder) - a complete misrepresentation of the evidence presented to the Court. The contents of contradictory evidence is outlined below:

Spare Declaration

Division III (and the trial court) relied exclusively upon the conclusory testimony of Ms. Spare, unsupported by any documentation of

the relationship, even though Defendants PHH, HSBC (servicer) and U.S. Bank are **all** national banks and large corporations. The notion that these entities would engage in an “attorney-in-fact” or Power of Attorney relationship without written documentation is, frankly, absurd. Mr. Moorman presented plenty of contradictory evidence which raised genuine issues of material fact about Ms. Spare’s uncorroborated assertions.

Elbert Declaration

The Sorell Elbert Declaration made on behalf of U.S. Bank is **completely silent** on the alleged principal/agency relationship with PHH or any other entity. If it existed, someone at U.S. Bank could testify as to its existence. Ms. Elbert did not do so and exclusively provided testimony about U.S. Bank’s actions as a document custodian.^{1 2} CP 612-613.

Trust Agreement/Master Servicing Agreement

The U.S. Bank Trust Agreement, including the Master Servicing Agreement, is the documentation that controls **all** of the relationships among the Defendants as it relates to the loans acquired by the U.S. Bank Trust and it does **not** document any sort of agency relationship. CP 626-

¹ The MSJ was only brought by HSBC and PHH, even though the trial court also dismissed CRC and U.S. Bank at the hearing. Mr. Moorman maintains that this “construction” of the moving papers was intended to provide a forum for the provision of false information to the trial court and the appellate court.

² The MSJ asserted HSBC was the “noteholder” through Ms. Spare whose testimony was based upon her knowledge of “Nationstar’s” systems. CP 460; 573:3. She also asserted the Moorman Note was indorsed by “Silver State”, when it has no relationship to the subject loan. CP 574; 580. These are among the many inconsistencies in the Defendants’ briefing and evidence.

713. The Master Servicer is identified Aurora Loan Services, LLC, an entity which has since been acquired by Nationstar.³

Ms. Elbert contended that U.S.Bank, **as the custodian**, received the original Note on **December 21, 2005**. CP 612-613. The Trust Agreement makes clear that the Depositor, Structured Asset Securities Corporation (CP 681), was the entity required to transfer the original Notes and other loan documents to one of the custodians (CP 651) “[c]oncurrently with the execution and delivery of this Agreement”. CP 681-683. The Trust Agreement is dated **February 1, 2006**. CP 626. This raises the question of how U.S. Bank could have obtained possession and acquire noteholder or custodian status **prior** to the transfer of the Note to the Trust, consistent with the requirements of the Trust Agreement.

The Trust Agreement holds that the Depositor, Structured Asset, is the noteholder until at least **February 1, 2006**. CP 626-713. While this took place is well before the attempted foreclosures, it makes clear that U.S. Bank did **not** provide truthful testimony to the Court.

Duties of the Master Servicer begin at Page 131 (CP 699-711) and

³ Mr. Moorman was notified in December 2016 that Nationstar would be his new loan servicer and it was added as a defendant to this lawsuit. However, counsel for Nationstar advised that servicing of the loan would remain with **PHH** (not HSBC, which had always been the servicer) and Nationstar was dismissed without prejudice. CP 447-450; 455-456; 660. At Page 55, HSBC is identified as a “Servicer”, among others. CP 680. However, a report about disbursements being made to the Trust only identifies Nationstar as the “servicer”. CP 715-725.

Section 9.04(a)(iv) outlines the power given to the Master Servicer and Servicers to “effectuate a foreclosure”. *Id.* They are empowered to execute documents to put loans in or out of MERS and into the name of the Master Servicer or the Servicer as they desire. CP 700. As this Court has made clear, no contractual language can change DTA requirements. *See, Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, *supra*, (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)).

The Trust Agreement specifically **disavows** any contractual relationship between servicers and the Trustee, U.S. Bank. CP 733. There is no Power of Attorney or other language in the Trust Agreement that gives “agency” powers to servicers on behalf of U.S. Bank, nor is there any evidence at all that the alleged noteholder, U.S. Bank, ever actually acts as a principal for purposes of overseeing and controlling the actions of its purported agents – the Master Servicer (unknown), Servicer (HSBC) and alleged Subservicer (PHH). CP 699-711. In fact, the Trust Agreement makes clear that U.S. Bank only receives payments and monthly reports from the servicers. Therefore, there cannot be any agency relationship which meets the requirements outlined by this Court in *Bain*, citing to *Moss v. Vadman*, p. 25. CP 733.

Mr. Moorman identified documents which contradict the testimony of Ms. Spare on behalf of PPH and the lack of testimony or documentation

of the alleged “agency” by U.S. Bank:

Conflicting Evidence

Recorded documents: NOTS issued on **June 4, 2010** scheduling a foreclosure sale on **September 3, 2010** asserted that it was issued in reliance upon Assignment of Deed of Trust by MERS, on behalf of **HSBC Mortgage Corporation** to **HSBC Mortgage Corporation** recorded in Chelan County on **May 14, 2010**. CP 202-205.

SPARE Dec.: ¶ 8 – “When HSBC Mortgage sold the loan to U.S. Bank, HSBC retained servicing rights for the Loan through an entity called HSBC Bank, N.A. . . . until May 1, 2013.” CP 574, 607-609.

Moorman Argument

The 2010 foreclosure was initiated **in the name of HSBC – not the loan owner/noteholder U.S. Bank based upon apparently false information in the 2010 Assignment**. CP 207. This confirms that HSBC and U.S. Bank were involved in providing false information in the public records regarding the identity of the noteholder dating back to 2010, if U.S. Bank was actually the noteholder.

Contradictory Evidence

Recorded document: Assignment of Deed of Trust executed on behalf of **HSBC Mortgage Corporation** on April 18, 2012 assigned interest in the Moorman Deed of Trust to **HSBC Bank USA, N.A.**, recorded in Chelan County on **April 19, 2012**. CP 213.

SPARE Dec.: ¶ 8 – “When HSBC Mortgage sold the loan to U.S. Bank, HSBC retained servicing rights for the Loan through an entity called HSBC Bank, N.A. . . . until May 1, 2013”. CP 574, 607-609.

Moorman Position

This confirms that Defendants HSBC and U.S. Bank were involved in providing false information in the public records regarding the identity of the noteholder continuing in 2012.

Contradictory Evidence

Recorded document: Assignment of Deed of Trust executed on April 19, 2012 on behalf of **HSBC Bank USA, NA** assigning the beneficial interest in Mr. Moorman’s Deed of Trust to **U.S. Bank** and recorded in Chelan County on **April 20, 2012**. CP 214.

SPARE Dec.: ¶ 8 – “When HSBC Mortgage sold the loan to U.S. Bank, HSBC retained servicing rights for the Loan through an entity called HSBC Bank, N.A. . . . until May 1, 2013”. CP 574, 607-609. **This is actually consistent with the Spare Declaration. *Id.***

Contradictory Evidence

Recorded document: A “corrective” Assignment of Deed of Trust executed on **October 24, 2013** on behalf of **PHH** assigning the beneficial interest in the Deed of Trust from **MERS, as nominee for HSBC Mortgage Corporation**, to **HSBC Mortgage Corporation**, even though there were other assignments already recorded purporting to assign the interest in the Deed of Trust to other entities (U.S. Bank in 2012) was recorded in Chelan County on **October 31, 2013**. CP 215-216.

SPARE Dec.: ¶ 8 – “When HSBC Mortgage sold the loan to U.S. Bank, HSBC retained servicing rights for the Loan through an entity called HSBC Bank, N.A. . . . until May 1, 2013”. CP 574, 607-609.

Moorman Position

This makes clear that PHH was directly involved in creating and causing to be recorded documents in the Chelan County records that are false.

Contradictory Evidence

Recorded document: Appointment of Successor Trustee executed on **October 9, 2015** appointing Defendant CRC as the successor trustee is signed by **PHH Mortgage acting as “attorney in fact” for U.S. Bank** and recorded in Chelan County on **October 15, 2015**. CP 218.

SPARE Dec.: ¶ 8 - “Based upon Moorman’s default, **U.S. Bank** elected to commence non-judicial foreclosure proceedings. To that end, PHH, as **attorney in fact**, for U.S. Bank, appointed . . . CRC as successor trustee to

the Deed of Trust.” (Emphasis added.) CP 574.⁴

Moorman Position

Other portions of Ms. Spare’s Declaration contradict the assertion regarding the decision to foreclose being made by U.S. Bank. It is also completely contradicted by the plain language of the Trust Agreement which describes the limitations of U.S. Bank’s involvement (accepting money and disbursing to investors.) CP 574-575.

Division III found that the uncorroborated declaration of a PHH “assistant vice president” reviewing “Nationstar’s” records is competent evidence that PHH had “the consent” of U.S. Bank to foreclose on Mr. Moorman and then makes up its own narrative – entirely unsupported by any documentation or testimony – that “U.S. Bank necessarily had the final say on whether PHH could proceed with a foreclosure.” Op. p. 5 (referencing CP 574). The Court then goes on to denigrate the importance of Trust Agreement documentation, which was only presented by Mr. Moorman and ignore entirely the repeated contradictory assertions in the public records as to noteholder status by HSBC, PHH and U.S. Bank. CP 202-205, 213, 214, 215-216, 218.

The entirety of Division III’s Opinion is predicated upon its desired version of the evidence presented to the trial court and completely ignores the absence of requisite documentation. Its assertion that: “We

⁴ No testimony or documentation from U.S. Bank was offered in support of the Spare assertion, based upon a review of “Nationstar’s records” that U.S. Bank was involved in any decision-making about the Moorman loan. CP 574.

think the record is sufficient to establish the necessary principal-agency relationship” is entirely unsupported by anything more than its assumptions. This does not meet the criteria under CR 56 in any way.

V. STANDARD ON REVIEW

Mr. Moorman maintains that the Appellate Court’s Opinion is in conflict with this Court’s binding decisions and the **applicable** statutes, including its decision in *Bain*, after the Court asserted it was “likely” that this Court allow anyone whose low level employee reviewing records from another entity signed a declaration about an alleged agency relationship to non-judicially foreclose without any documentation of said relationship. RAP 13.4(b). RCW 61.24, *et seq.* It is founded upon a version of the facts constructed by Division III and based upon its “assumptions” rather than the facts or lack thereof actually in the record. It is not supported by the statute cited by Division III. RCW 11.125.020 (1).

VI. ARGUMENT

A. Division III’s Decision is not supported by Washington law.

1. Standard on Review at the Court of Appeals.

Division III maintained that it engaged in a *de novo* analysis under Civil Rule 56 as to whether summary judgment was appropriate, but Mr. Moorman maintains that the Court completely ignored its mandate.

B. Genuine issues of material fact remain and the case must be

remanded to the trial court.

This case is rife with genuine issues of material fact that precluded summary judgment. The evidentiary record does not contain any consistent documented assertions. These genuine issues of material fact, which **must** be construed **in favor** of the non-moving party, Mr. Moorman, precluded summary judgment. It was improper under Washington law for a determination to be made in motion practice rather than at trial when facts are in controversy. CR 56.

A motion for summary judgment is to be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). When determining whether an issue of material fact exists on summary judgment, **a court must construe all facts and inferences in favor of the nonmoving party.** *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008) (emphasis added).

A “material fact” for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d

1024, 60 P.3d 92 (emphasis added). Here, neither court properly applied these standards because at no time did they construe the facts in favor of Mr. Moorman and in fact, Division III manufactured “facts” to fit its desired result.

Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. But Washington courts are “reluctant to grant summary judgment when ‘**material facts are particularly within the knowledge of the moving party.**’” *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (Div. II 2010). No “reasonable mind” would ignore the contradictory assertions made in the public record by PHH and HSBC for years nor would a “reasonable mind” ignore the fact that there is no documentation of an “agency” relationship, especially when U.S. Bank **did** provide testimony to the Court about acting as a “custodian.” CP 612 and 613. The lack of any testimony or documentation by U.S. Bank as to the alleged “principal/agent” relationship with PHH is “within the knowledge of the moving party” since the construct of the MSJ was done with only HSBC and PHH as the moving parties, while they asked that the trial court also dismiss U.S. Bank and the foreclosing trustee. CP 465-468. The “reasonable” conclusion from the evidence

presented is that there is no such relationship.

As Division I held in *Podbielancik v. LPP Holdings, Inc.*, 191 Wn.App. 662 (2015),

On summary judgment, the moving party bears the initial burden of showing that there is no genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party then has the burden to rebut the moving party's contentions. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party fails to “ ‘establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,’ “ the court should grant summary judgment. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In reviewing a grant of summary judgment, any matters argued below but not raised on appeal are deemed abandoned. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 134, 317 P.3d 1074 review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014) (citing *Coggle v. Snow*, 56 Wn.App. 499, 512, 784 P.2d 554 (1990)).

Podbielancik at 666.

This Court has made clear that the DTA **requires** a non-judicial foreclosure may only be initiated by the “beneficiary”, defined as the noteholder. *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012); RCW 61.24.005(2). This Court’s holding in *Bain* about the appropriate use of an “agent” to perform some of the actions required to be performed by the “beneficiary” focused on those places in the Deed of Trust Act (“DTA”) which included the language “beneficiary **or**

authorized agent". *Bain* at p.24, citing to RCW 61.24.031, p. 24. The authority to appoint a successor trustee (RCW 61.24.010(2)) does **not** include "or authorized agent" language. This means that Division III's Opinion contravenes *Bain* and the requirements of the DTA by holding that contradictory public assertions of noteholder status are irrelevant and bare assertions of an "attorney in fact" relationship from computer records of a potential subsequent subservicer ("Nationstar") "prove" an agency relationship make clear the DTA language has been rendered meaningless. Division III holds that any supposedly related entity to real property, without noteholder status or any documentation of alleged principal-agency relationship, may foreclose non-judicially.

B. No Power of Attorney Exists.

In support of its Opinion, Division III cited to RCW 11.125.020(1) for the notion that PHH was an "authorized agent" for U.S. Bank because PHH's assistant vice president testified it was a **subservicer** for U.S. Bank. Op. 4, §2; CP 574. RCW 11.125, *et seq.* is the Uniform Power of Attorney Act ("UPOA") which outlines the **requirements** for use of a Power of Attorney in Washington. RCW 11.125, *et seq.* **Yet, no Power of Attorney exists in this case.** *See*, CP 573-574; **US BANK DEC.** RCW 11.125.030(1) makes clear that its provisions apply to "**all powers of attorney**" with a few exceptions that do not apply in this case. *Id.* Here,

since there is no power of attorney, the UPOA does **not** apply to this case, but Division III nevertheless relied upon the statute. If there is a Power of Attorney which is relied upon under the UPOA, it must be provided. Since one was not presented, the UPOA is irrelevant. (RCW 11.125, *et seq.*).

As this Court held in *Bain*, 75 Wn.2d at 106, “an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, ***with a correlative manifestation of consent by the other party to act on his behalf and subject to his control***” (citing *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)) (emphasis added). None of that existed here.

VII. CONCLUSION

Mr. Moorman respectfully requests that the Supreme Court accept review as this Opinion, and some other similar Opinions rendered by Division I result in a body of case law upon which trial courts can and will rely to contravene the specific requirements of the DTA mandated by the Legislature and ignore this Court’s decisions. The harm to homeowners resulting from unlawful non-judicial foreclosures in Washington will be immeasurable.

Respectfully submitted this 24th day of June, 2019.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

/s/ Melissa A. Huelsman
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CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Monday, June 24, 2019, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

| | |
|---|--|
| Aldridge Pite, LLP Kim Hood, WSBA No. 42903 9311 SE 36th St Ste 100 Mercer Island, WA 98040 Ph: 206-707-9603 Fax: 206-232-2655 Email: khoo@aldridgepite.com Attorney for Clear Recon | <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u> |
| John S. Devlin III, WSBA No. 23988 Abraham K. Lorber, WSBA No. 40668 Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98101 206-223-7000 devlinj@lanepowell.com lorbera@lanepowell.com Attorneys for PHH Mortgage Corp. & HSBC Bank USA | <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u> |

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Monday, June 24, 2019, at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Tony Dondero".

Tony Dondero, Paralegal

ATTACHMENT A

FILED
APRIL 16, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

| | | |
|---|---|---------------------|
| WILLIAM MOORMAN, |) | No. 35869-1-III |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| CLEAR RECON CORP.; U.S. BANK, |) | UNPUBLISHED OPINION |
| NATIONAL ASSOCIATION, as Trustee |) | |
| for Structured Adjustable Rate Mortgage |) | |
| Loan Trust Mortgage Pass-Through |) | |
| Certificates, Series 2006-2; HSBC BANK |) | |
| USA, N.A.; PHH MORTGAGE |) | |
| CORPORATION; and DOE |) | |
| DEFENDANTS 1 through 20, inclusive, |) | |
| |) | |
| Respondents. |) | |

LAWRENCE-BERREY, C.J. — William Moorman appeals from the trial court’s summary judgment dismissal of his Consumer Protection Act (CPA), chapter 19.86 RCW, claim against all respondents. Moorman argues that Clear Recon Corp. was not properly appointed successor trustee, and its initiation of a nonjudicial foreclosure against his property thus violated the “Deeds of Trust” act, chapter 61.24 RCW. We disagree and affirm.

FACTS

In November 2005, Moorman borrowed \$1,000,000 from HSBC Mortgage Corporation (HSBC Mortgage) to purchase waterfront property on Lake Chelan. The loan was memorialized by a promissory note and was secured by a deed of trust. The original deed of trust trustee was Chicago Title Insurance, Co.

Shortly after origination of the loan, HSBC Mortgage sold the loan to U.S. Bank, N.A., as Trustee for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2006-2 (U.S. Bank). Since then, U.S. Bank has had physical possession of the original note. HSBC Mortgage retained servicing rights to the loan through an entity called HSBC Bank USA, N.A. (HSBC Bank).

In May 2013, HSBC Bank assigned the servicing of the loan to PHH Mortgage Corporation (PHH). HSBC Bank gave Moorman notice of the change in loan servicer.

Moorman defaulted on the loan. In October 2015, Clear Recon Corp. (CRC) was appointed successor trustee. This appointment was made by PHH signing as U.S. Bank's attorney-in-fact. In December 2015, CRC recorded a notice of trustee's sale.

In August 2016, Moorman brought the present lawsuit seeking to restrain the trustee's sale and damages for alleged violations of the CPA. The parties stipulated to a preliminary injunction conditioned on Moorman making regular payments to the court

No. 35869-1-III
Moorman v. Clear Recon Corp.

registry. HSBC Bank and PHH moved to summarily dismiss Moorman's claims against all defendants. The trial court granted their motion, and Moorman timely appealed.

ANALYSIS

A. LEGAL STANDARD

We review summary judgment rulings de novo and engage in the same inquiry as the trial court. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). A defendant who moves for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once that burden is met, the burden shifts to the party with the burden of proof at trial to make a showing sufficient to establish the existence of an element essential to that party's case. *Id.* In demonstrating the existence of a material fact, the nonmoving party may not rely on mere allegations, but the response must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). Summary judgment is properly granted where there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

B. NO VIOLATIONS OF THE DEEDS OF TRUST ACT

Moorman argues that CRC was not properly appointed successor trustee and, thus, lacked authority to initiate the nonjudicial foreclosure. We disagree.

1. *U.S. Bank is the beneficiary*

Nonjudicial foreclosures are governed by chapter 61.24 RCW, the Washington Deeds of Trust act (DTA). The DTA “creates a three-party transaction in which a borrower conveys the mortgaged property to a trustee, who holds the property in trust for the lender as security for the borrower’s loan.” *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 65, 358 P.3d 1204 (2015). If the borrower defaults, the lender must strictly comply with the requirements of the DTA to nonjudicially foreclose on the property through a trustee’s sale. *Id.* at 65-66.

RCW 61.24.010 sets forth the qualifications of trustees and successor trustees. RCW 61.24.010(2) requires a successor trustee to be appointed by the beneficiary. “Beneficiary” means the holder of the note. RCW 61.24.005(2). The evidence is undisputed that U.S. Bank is the holder of the note and, therefore, is the beneficiary with the power to appoint a successor trustee.

No. 35869-1-III
Moorman v. Clear Recon Corp.

2. *PHH, as the agent for U.S. Bank, had authority to appoint CRC successor trustee*

It is likely that a beneficiary's agent can appoint a successor trustee. *See Bain v. Metro. Mortg. Grp.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012). A prerequisite to agency is control of the agent by the principal. *Id.* at 107. Here, PHH signed as attorney-in-fact for U.S. Bank when it appointed CRC successor trustee. An attorney-in-fact is an agent. RCW 11.125.020(1).

Moorman complains that PHH failed to provide a written document signed by U.S. Bank that sets forth U.S. Bank's right of control over PHH. Such a document might conclusively establish PHH's agency and U.S. Bank's right of control, but it is not the only way to establish agency. PHH's assistant vice president attested that PHH was a subservicer of the loan, which entailed "interfacing with the borrower regarding loan issues . . . and foreclosing on loans in default." Clerk's Paper (CP) at 573. She also attested that PHH acted as a subservicer with "the consent of the client, in this case U.S. Bank." CP at 574. Because U.S. Bank could withdraw its consent for PHH to act for it, it necessarily had the final say on whether PHH could proceed forward with a foreclosure. We think the record is sufficient to establish the necessary principal-agent relationship.

Moorman argues that the "Master Servicer Agreement" between U.S. Bank and HSBC Bank does not explicitly set forth what right of control U.S. Bank has over its

servicers and subservicers. Even if true, the nature of the relationship need not be established solely in the Master Servicer Agreement. Here, PHH presented un rebutted evidence that it acted as a subservicer of the loan with the consent of U.S. Bank. The record sufficiently establishes the necessary principal-agent relationship between U.S. Bank and PHH. We conclude that PHH's appointment of CRC as successor trustee did not violate the DTA.

C. CPA CLAIM

Moorman claims that the respondents engaged in unfair and deceptive acts in the attempted foreclosure of his property in violation of the CPA. To prevail on a private CPA claim, a plaintiff must establish the following elements: (1) that the defendant engaged in an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) a public interest impact, (4) injury to plaintiffs in their business or property, and (5) causation. *Univ. of Wash. v. Gov't Employees Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d 559 (2017).

On appeal, Moorman argues the unfair or deceptive act was CRC's initiation of the nonjudicial foreclosure without being properly appointed successor trustee. Because we have concluded CRC was properly appointed, Moorman's CPA claim fails.

No. 35869-1-III

Moorman v. Clear Recon Corp.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.
Korsmo, J.

Siddoway, J.
Siddoway, J.

ATTACHMENT B

FILED
MAY 23, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**


| | | |
|---|---|------------------------|
| WILLIAM MOORMAN, |) | No. 35869-1-III |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | ORDER DENYING |
| |) | MOTION FOR |
| CLEAR RECON CORP.; U.S. BANK, |) | RECONSIDERATION |
| NATIONAL ASSOCIATION, as Trustee for |) | |
| Structured Adjustable Rate Mortgage |) | |
| Loan Trust Mortgage Pass-Through |) | |
| Certificates, Series 2006-2; HSBC BANK |) | |
| USA, N.A.; PHH MORTGAGE |) | |
| CORPORATION; and DOE DEFENDANTS |) | |
| 1 through 20, inclusive, |) | |
| |) | |
| Respondents. |) | |

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of April 16, 2019, is denied.

PANEL: Judges Lawrence-Berrey, Korsmo, Siddoway

FOR THE COURT:


ROBERT LAWRENCE-BERREY
CHIEF JUDGE

LAW OFFICES OF MELISSA HUELSMAN

June 24, 2019 - 4:58 PM

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