NO. 308910

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife,

Petitioner/Appellants,

v.

BUDGET FUNDING I, LLC, a California corporation; BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington,

Respondents/Respondents

BRIEF OF APPELLANTS

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I. Introduction.

This case involves a quiet title action with respect to certain real property located in Pasco, Washington, brought by Appellants, Philip and Caroline Kairez ("Kairez"). [CP 191-196] The Respondent, Budget Funding 1, LLC, ("Budget") brought a motion for summary judgment [CP 174-176] seeking a summary dismissal of the Kairez complaint and a quieting of title in the Pasco property in favor of Budget. The Franklin County Superior Court granted Budget's motion, and on April 20, 2012, filed its Final Judgment Dismissing Claims Against Budget and Preserving Claims Pursuant to CR 54 (b). [CP 9-24] Kairez filed its timely Notice of Appeal on May 17, 2012 [CP 7-8] seeking a reversal and remand for trial because genuine issues of material fact preclude summary judgment, and therefore, the trial court erred in granting Budget summary judgment.

II. Assignments of Error.

Assignment of Error No. 1

The trial court erred in granting Budget's Motion for Summary Judgment, because genuine issues of material fact exist, that if taken in the light most favorable to Kairez, require this matter to proceed to trial.

III. Statement of the Case.

Nick Kairez, the son of Appellants, Phillip Kairez and Carolyn Kairez, formed NRK Investments, LLC, a Washington Limited Liability Company ("NRK"), on March 21, 2006. [CP 78] Nick Kairez was the sole member and manager of NRK. [CP 78] NRK was formed by him for the purpose of purchasing an apartment complex in Pasco, Washington, located at 604 Yakima Street ("Pasco Property"). [CP 78] To that end, NRK purchased the property pursuant to a real estate contract entered into with James and Krista

Gottula. The real estate contract was dated April 10, 2006, and recorded April 11, 2006 with the Franklin County Auditor. [CP 35; 78]

As part of NRK's purchase of the Pasco Property, Kairez loaned Nick Kairez $50,000 to make the down payment. Those monies were transferred to Nick on or about April 3, 2006. [CP 35] To memorialize the loan, and secure it, a $50,000 Promissory Note and Deed of Trust were dated and recorded on May 17, 2006. An additional $40,000 Amendment to Promissory Note was March 30, 2007, and recorded on April 11, 2007. [CP 35] In addition to the aforementioned $90,000, Kairez loaned additional sums for ongoing costs relative to the Pasco Property through approximately December 8, 2008. The total amount loaned, and utilized for the purchase, renovation, and operation of the Pasco

Property, was $149,104.30.[1] [CP 36] All along, Phillip, Carolyn and Nick Kairez understood that the loans were made solely for these purposes and only utilized for the benefit of the Pasco Property. [CP 35; 78]

In 2007, Nick Kairez sought refinancing from Budget, and offered the Pasco Property as collateral. Budget extended a loan in the amount of $263,250 on or about September 14, 2007. As part of the loan, the Gottulas were paid the remaining balance on their real estate contract. A Fulfillment Deed recognizing that the Gottulas had been paid in full, was recorded on September 28, 2007. [CP 36; 79]

On or about September 14, 2007, a wire transfer from the Budget loan proceeds was made to a Kairez

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[1] 1. The Deed of Trust granted by Nicholas Kairez to Kairez provides at page 2: "This Deed of Trust is for the purpose of securing performance of each agreement of Grantor(s) contained in this Deed of Trust, and payment of the sum of Fifty Thousand Dollars ($50,000.00) with interest, in accordance with the terms of a Promissory Note of even date herewith, payable to Beneficiary or order, and made by Grantor(s), and all renewals, modifications, and extensions of the note, and also such further sums as may be advanced or loaned by Beneficiary to Grantor(s)or any of the Grantor(s) successors or assigns, together with interest thereon at the rate agreed upon." [CP 46-50]

bank account in the amount of $70,672. At that time, they were owed just over $145,000. [CP 36] In receiving that payment, it was not Kairez's intent to accept less than one-half of what they were owed in full and final payment of the debt and relinquishment of their lien position. Notably, there was no request made by Budget for any reconveyance or fulfillment deed, nor was any presented to Kairez, signed by them, or recorded. [CP 36]

In April, 2009, Kairez heard from Nick Kairez that Budget was claiming NRK had defaulted, and was arranging to begin foreclosure proceedings. Upon hearing this, Kairez requested a copy of the Trustee's Sale Guarantee issued by Defendant Benton Franklin Title Company. Said guarantee, issued on June 25, 2009, included the Kairez Deed of Trust as a superior lien to that of Budget's. [CP 37] Kairez did not receive foreclosure notices, including notice of the Trustee's

Sale, further cementing their understanding of their superior lien position, as only lien holders junior to Budget were required to be given notice. [CP 37]

The trustee's sale occurred on December 18, 2009. [CP 79] Thereafter, a Litigation Guarantee requested by Kairez on or about December 27, 2010, failed to note as a special exception their Deed of Trust at all. The most superior interest reported was now Budget's. [CP 37] The procedure set forth above under Section I followed.

IV. Summary of Argument.

Judge Matheson of the Franklin County Superior Court erred in granting Budget's Motion for Summary Judgment. Genuine issues of material fact as to the Kairez interest in the Pasco Property as well as with respect to the Kairez tort claims and Consumer

Protection Act claim, preclude summary judgment. The matter should proceed to a necessary trial.

V. Argument

A. Summary Judgment Standard/ Standard of Review

Summary judgment may be granted only if the pleadings, affidavits, admissions, and other material properly presented show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c); Leland v. Frogge,* 71 Wn.2d 197, 427 P.2d 724 (1967). The burden is on the moving party to establish the absence of any genuine issue of material fact. *Regan v. City of Seattle,* 76 Wash.2d 501, 503-504, 458 P.2d 12 (1969). Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the non-moving party to relief." *White v. Kent Medical Center,*

Inc., 61 Wn.App. 163, 175, 810 P.2d 4 (1991) (Quoting *Mostrom v. Pettibon*, 25 Wn.App. 158, 162, 607, P.2 864 (1990)). It is the court's duty to draw all reasonable inferences in favor of the non-moving party. *Hash by Hash v. Childrens Orthopedic Hosp. and Medical Center*, 110, Wn.2d 912, 916, 757 P.2d 507 (1988). If reasonable persons might reach a different conclusion, the motion should be denied. *Bernethy v. Walt Failor's Inc.,* 97 Wn.2d 929, 930, 653 P.2 280 (1982). Summary Judgment is not appropriate where a genuine issue of material fact exists or the moving party cannot demonstrate that they are entitled to judgment as a matter of law and the motion may not be used as a substitute for trial on disputed issues of fact. *Green v. A.P.C.,* 136 Wn.2d 87, 960 P.2d 912(1998). The function of summary judgment is to avoid a useless trial, however a trial is not useless but absolutely necessary where there is a genuine issue as to any

material fact. *Preston v Duncan,* 55 Wn.2d 678, 682, 349 P.2d 605(1960). Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the non-moving party to relief."

The grant of a motion for summary judgment is reviewed de novo. *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

B. Issues of Material Fact Preclude Summary Judgment Regarding Kairez Interest in Pasco Property

In granting summary judgment, the trial court ruled that taking the facts in a light most favorable to Kairez, the Pasco Property was nevertheless never owned by Nick Kairez, and thus the Notes and Deed of Trust executed by him were ineffective to create a lien in favor of Kairez in the property. Budget relied upon *Griffin v Union Savings and Trust Co.*, 86 Wash. 605

(1915), for the proposition that if the signature block does not indicate the signing party is acting in a corporate capacity, the signature only binds the individual. However, the trial court ignored the critical portion of that ruling whereby the Court held there was not any evidence that the signing party intended to bind the corporate entity. The Court stated as follows:

> There is not a word of testimony that Woolley himself intended to bind the appellant by this guaranty, or that he was ever asked to give a bank guaranty. Griffin did not testify that he himself ever at any time told Woolley that he wanted a bank guaranty. Though he testified that he did tell Struthers and Hightower that he would accept a bank guaranty, there is no evidence that either Struthers or Hightower ever requested a bank guaranty from Woolley or told him that Griffin had demanded or expected to receive a bank guaranty. There is nothing in evidence raising an implication that Griffin had any reason, because of any antecedent custom or course of dealing with Woolley or with the bank, to rely upon this instrument as binding the bank. He had never had any dealings with Woolley or with the bank, and there is no evidence that Woolley ever gave to any one on behalf of the bank any guaranty of any kind. There is not a single circumstance in evidence having any

> reasonable tendency to estop the appellant from disputing liability upon this guaranty. It received no benefit from it, and there is no competent evidence that it was intended, either by Woolley or by anyone else, that it ever would receive any such benefit. The evidence is clear that Woolley, as manager of the branch bank, had no actual authority to execute this, or any guaranty on its behalf. While this fact would not be important as binding upon Griffin had the guaranty been so drawn as to be clearly intended to bind the appellant, since Griffin would then have had the right to rely upon the fact that the giving of such a guaranty was within the apparent scope of Woolley's authority as manager, the lack of actual authority is nevertheless important as bearing upon the question of Woolley's intention in giving the guaranty. The very fact that he had no such authority is some evidence that he never intended to bind the appellant by this instrument, prima facie his personal undertaking.

Griffin v. Union Sav. & Trust Co. 86 Wash. 605, 611-612, 150 P. 1128, 1131 (Wash.1915)

Unlike the factual situation in *Griffin*, here Nick Kairez freely admits he intended all along to bind NRK. Kairez have a like understanding. Further, NRK (and for that matter Budget) received significant benefit from the Kairez loans, in that every penny was invested in the

Pasco Property. At best there are issues of fact as to intent to bind NRK that must go to trial, and the trial court erred in granting summary judgment.

Moreover, Nick Kairez, as the sole member of NRK, had actual and apparent authority to bind NRK:

> (a) Management of the business or affairs of the limited liability company shall be vested in the members; and (b) each member is an agent of the limited liability company for the purpose of its business and the act of any member for apparently carrying on in the usual way the business of the limited liability company binds the limited liability company unless the member so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the member is dealing has knowledge of the fact that the member has no such authority. Subject to any provisions in the limited liability company agreement or this chapter restricting or enlarging the management rights and duties of any person or group or class of persons, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.

RCW 25.15.150(1)

Nick Kairez had authority to encumber NRK property. In fact, there was no other asset available to satisfy a nearly $150,000 debt, other than the NRK property. Once again, this leads to the only reasonable conclusion – that Nick Kairez, Phillip Kairez and Carolyn Kairez understood this debt to be an entity debt, secured by entity property. Additionally, the fact that Budget paid over $70,000 on what they now claim is a non-existent interest, is telling as to what Budget truly believes. Whether an agent has apparent authority to bind the corporation depends upon the circumstances and is to be decided by the trier of fact. *Louron Indus.,Inc. v Holman,*7 Wn.App. 834, 502 P.2d 1216 (1972). Again, at a minimum, the facts, and reasonable inferences drawn therefrom, supported a denial of the motion for summary judgment.

Budget's argument is also akin to an *ultra vires* claim – that Nick Kairez was not authorized to

encumber the Pasco Property on behalf of NRK, because he didn't follow appropriate or necessary procedures. However, so long as a contractual agreement is not contrary to public policy or the terms of a statute, a corporation that has received directly or indirectly the benefits of a contract, generally is estopped from asserting the defense of ultra vires. *Union Fruit Producers, Inc. v. Plumb,* 1 Wash.2d 278, 284, 95 P.2d 1033 (1939); *A.M. Castle & Co. v. Public Serv. Underwriters,* 198 Wash. 576, 589, 89 P.2d 506 (1939); *Millett v. Mackie Mill Co.,* 193 Wash. 477, 480, 76 P.2d 311 (1938); *Pierce v. Astoria Fish Factors, Inc.,* 31 Wash.App. 214, 218-20, 640 P.2d 40, *review denied,* 97 Wash.2d 1034 (1982). By retaining and using the benefit obtained, the corporation ratifies the contract, and the corporation's creditors also are bound by its ratification. *Pierce,* 31 Wash.App. at 218-19, 640 P.2d 40. The defense of ultra vires will "not be allowed to

prevail where it would defeat the ends of justice and work a legal wrong". *U.S. Fidelity,* 106 Wash. at 483, 180 P. 463 (quoting *Railway Co. v. McCarthy,* 96 U.S. (6 Otto) 258, 267, 24 L.Ed. 693 (1877)). Whether ratification has occurred is to be decided by the finder of fact. *Barnes v. Treece,* 15 Wash.App. 437, 443, 549 P.2d 1152, 1157 (Wash.App.,1976)(citing 2 W. Fletcher, Cyclopedia of the Law of Private Corporations s 781 (perm. ed. M. Wolf & E. Comiskey rev. 1969)).

Again, NRK, and subsequently Budget, received all of the benefit of the significant sums provided by the Kairez. Nick Kairez freely admits that the loans were solely for the benefit of NRK. Budget should not be allowed to disavow this obvious ratification to its windfall. At best, there are presented issues of material fact which preclude summary judgment, and the trial court erred in granting the same.

Finally, although Budget asserts, and the trial court found, that Nick Kairez never had any interest in the Pasco Property, that is incorrect. Title to LLC-owned property passes to the owner of a cancelled LLC. *Sherron Associates Loan Fund V LLC v Saucier*, 157 Wn. App. 357, 237 P.2d 338 (2010). NRK ceased to exist as an LLC at the latest July 1, 2008. Thereafter, Nick Kairez was the owner of the Pasco Property. Even if he had not had authority to enter into the Notes and Deed of Trust, or had not already ratified the debt owed as an LLC debt, to the extent that debt was incurred by him personally, he did have an interest in the property to support the Deed of Trust granted to Kairez. The trial court erred in granting summary judgment given the existence of these material facts.

C. Kairez Not Barred From Claiming a Continuing Property Interest and Issues of Marterial Fact Preclude Summary Judgment

Budget argued that because Kairez accepted payment from Budget, they are barred from asserting any further interest. Budget relies upon *Jones v Curtiss, 20 Wn.2d 470, 147 P.2d 912 (1944)* for support. Notably, in *Jones*, the plaintiffs had signed a written consent to take a lesser amount than what they were owed, which resulted in an express accord and satisfaction. There is nothing of the sort here. At best there is a factual dispute as to what the intent of the $70,000 payment was. There is no reconveyance, fulfillment deed, nor any other document evidencing such an express accord and satisfaction. Furthermore, Philip Kairez has signed nothing. Budget's claim that

they would not have funded the loan to NRK without assurance that the Kairez lien would be released, belies the fact that no such release was requested, nor obtained by Budget. As late as June, 2009, the Kairez Deed of Trust remained of title. Budget certainly recognized the need for a fulfillment deed when it came to clearing title of the Gottula real estate contract, and one was immediately recorded. That similar documentation was not procured with respect to the Kairez lien is, again, one of many issues of material fact that preclude summary judgment. The trial court erred in granting summary judgment in light of these genuine issues of material fact.

Budget further argued that the doctrine of estoppel bars Kairez from asserting an ongoing lien interest in the Pasco Property. However, if anyone should be estopped, it is Budget. The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its

later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Robinson v. Seattle,* 119 Wash.2d 34, 82, 830 P.2d 318, *cert. denied,* --- U.S. ----, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992). A party asserting equitable estoppel against a private party must prove each element of estoppel with clear, cogent and convincing evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.,* 121 Wash.2d 726, 853 P.2d 913 (1993). Under this burden of proof, the trier of fact must be convinced the fact in issue is "highly probable". *Colonial Imports,* 121 Wash.2d at 735, 853 P.2d 913. Further, In addition to satisfying each of these elements, the party asserting the doctrine must be free from fault in the transaction at issue. *Mutual of Enumclaw Ins. Co. v. Cox,* 110 Wash.2d 643, 651, 757 P.2d 499 (1988). A party

may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations. *Mutual of Enumclaw,* 110 Wash.2d at 651, 757 P.2d 499 (citing 31 C.J.S *Estoppel § 75, at 453-54 (1964)).*

Here, Budget failed to secure a reconveyance, fulfillment deed, or other express agreement memorializing that payment to Kairez was payment in full. On that fact alone, Budget should be estopped from asserting Kairez does not have a continuing lien interest in the Pasco Property. Budget is the only party here who stands to be unjustly enriched, as they have received the benefit of nearly $150,000 cash influx into the property without paying for even half of it. Budget cannot show equitable estoppel by clear, cogent and convincing evidence. These factual and weight of the evidence issues must go to the trier of fact. The grant of summary judgment was in error.

D. Negligence and Consumer Protection Act Claims Should Not Have Been Summarily Dismissed

The Kairez lien disappeared from the title report sometime between June 25, 2009 and December 27, 2010. [CP 37] The primary intervening event was Budget's foreclosure action and trustee's sale.

In an action for damages under the Consumer Protection Act, a party must prove: (1) an unfair deceptive act or practice; (2) that occurred in conduct of trade or commerce; (3) that has an impact on public interest; (4) that results in injury to the plaintiff in their business or property; and (5) that satisfies the requirement of a causal link between the unfair practice or deceptive act and the injury suffered. *Young v Savidge*, 155 Wn.App. 806, 230 P.3d 222(2010). The

CPA was intended to be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920.*

The first element of the CPA, an unfair or deceptive act, can be met if the act "had the capacity to deceive a substantial portion of the public." *Brown ex rel. Richards v Brown*, 157 Wn. App. 803, 239 P.3d 602 (2010). Neither intent to deceive, proof of a specific party being deceived, nor the possibility of future deception is a necessary predicate to finding a violation of the CPA. *Panag v Farmers Ins Co. of Washington,* 166 Wn.2d 27, 204 P.3d 885 (2009). The CPA does not define "unfair or deceptive act or practice," but "[i]mplicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Nguyen v Doak Homes, Inc*, 140 Wn. App. 726, 734, 167 P.3d 1162(2007). Whether the act in question had the capacity to deceive a substantial portion of the

public is a question of fact. *Holiday Resort Community Ass'n v Echo Lake Associates, LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006).

That the Kairez lien interest was removed from title during the same time that Budget was conducting its foreclosure, without any reconveyance, fulfillment deed, or other document signed by Phillip and Carolyn Kairez , at a minimum raises a factual dispute as to whether there has been an unfair or deceptive act or practice. Summary judgment should not have been granted.

The third element of the CPA, that the act had an impact on the public interest, can be met if the allegedly deceptive act sufficiently affects the public interest. The five relevant factors for a finding of the existence of a public interest are: (1) Whether the alleged acts were committed in the course of the defendant's business; (2)

whether the acts are part of a pattern or generalized course of conduct; (3) whether repeated acts were committed prior to the act involving the plaintiff; (4) whether there is a real and substantial potential for repetition of defendant's conduct after the act involving the plaintiff; and (5) whether the act complained of involved a single transaction, many consumers were affected or were likely to be affected by it. *Bloor v Fritz*, 143 Wn.App. 718, 180 P.3d 805 (2008). Not all of the five factors need to be present in order to find that the transaction affected the public interest. *Mayer v Sto Industries, Inc*, 123 Wn. App. 443, 98 P.3d 116 (2004). In the case of a private dispute, the public interest determination is made by evaluating four factors: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff,

indicating potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions. *Michael v Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009). Not all of the factors need to be present, and none is dispositive. *Id.* Whether or not a transaction is a "private" transaction or a "consumer" transaction subject to the CPA is a question of fact for the jury. *Id.*

Impact on public interest is generally a question of fact for the jury. Facts and inferences, taken in the light most favorable to Kairez, include that the alleged unfair and deceptive acts occurred in the course of Budget's business, that Budget advertises to the public in general, and that there is a real and substantial potential for repetition. Again, these issues need to go to the jury. The trial court erred in granting summary judgment.

The injury element of the CPA can be met if there is a loss of use of property which is causally related to an unfair or deceptive act, including injury without specific monetary damages. *Panag v Farmers Ins Co of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009). Even non-quantifiable injuries, such as loss of goodwill, may satisfy the injury element of the CPA. *Stephens v Omni Ins Co*, 138 Wn.App. 151, 159 P.3d 10 (2007). Here, the Kairez lien interest and position have been removed from title during the course of the foreclosure. There can be no question that satisfies the liberal injury standard of the CPA. Summary judgment on the CPA claim should not have been granted.

Similar to the CPA claim, the negligence claim is based on the mysterious disappearance of Kairez's lien interest of record. Budget owes a duty to all parties affected by the foreclosure to proceed in good faith and with concern for their due regard. That included a duty

owed to Kairez to recognize their senior lien. Taking the facts and inferences drawn from those facts in the light most favorable to Kairez, Budget breached this duty. The negligence claim should proceed to the trier of fact, and the grant of Budget's summary judgment motion on this claim was in error.

V. Conclusion.

For the reasons set forth above, the trial court erred in granting Budget's motion for summary judgment. Accordingly, this Court should reverse and remand for trial.

DATED this 8th day of October, 2012.

Respectfully Submitted.

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