74602-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 74602-2-1

JOHN PHILLIP HALL,

Appellant

v.

JP MORGAN CHASE BANK, a national bank, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005-PR4 Trust, WAMU MORTGAGE PASS_THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, a foreign trust,

Respondents.

BRIEF OF APPELLANT

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2. The trial court erred by denying plaintiff's motion for leave to amend complaint regarding newly discovered evidence of fraud and/or negligent misrepresentation by defendant Chase Bank concerning mortgage relief to which plaintiff may have been entitled. (CP 17)
3. The trial court erred by dismissing plaintiff's case while plaintiff's outstanding discovery to defendants Chase Bank and Quality Loan Service remained unanswered. (CP 11-12, 15-16)

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the defendants violated the Foreclosure Fairness Act (FFA) when they refused, at mediation, to allow plaintiff, who had received property through a divorce, to individually seek a loan modification as outlined under RCW 61.24.165(6), which provides that such a person must be treated as a borrower? (Error 1)
2. Whether public policy favors a broad interpretation of the provision of the FFA at RCW 61.24.165(6), consistent with the stated legislative intent of the statute to reduce and avoid the

incidence of residential home foreclosure in Washington State? (Error 1)

3. Whether an unfair or deceptive act or practice in violation of the FFA is a violation of Washington's Consumer Protection Act (CPA) as specifically described at RCW 19.86.093, stating that a violation of a statute containing a specific legislative declaration of public interest impact may constitute a CPA violation? (Error 1)
4. Whether evidence of defendant loan servicer Chase Bank's misrepresentations to plaintiff and the Court about the unavailability of loan assumption and modification options that should have been offered pursuant to loan investor Freddie Mac guidelines constitute an unfair and deceptive act? (Error 1 & 2)
5. Whether the trial court erred, in light of evidence of defendant Chase Bank's misrepresentations about the unavailability of loan assumption and modification options, in not permitting plaintiff to amend his complaint? (Error 2)
6. Whether the trial court erred in granting defendant Quality Loan Service's (QLS) motion for summary judgment in light of trustee's conflicts of interest, first in serving as lender's counsel facilitating denial of plaintiff's loan modification request and then as trustee, when QLS shares ownership interests with the law firm trustee

previously worked for as beneficiary's counsel in violation of his duty to maintain impartiality? (Error 1)

7. Whether the trial court erred in dismissing plaintiff's claims while plaintiff's discovery requests to Chase Bank and QLS remained outstanding and unanswered? (Error 3)

III. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Defendants Wells Fargo and WAMU Mortgage Trust, through servicer Chase Bank and trustee QLS, have been pursuing a trustee sale of plaintiff's Edmonds townhome residence. (CP 471 & 554) The current trustee Robert McDonald has, prior to entry of the trial court's order restraining sale, declined to continue or cancel the trustee sale. (CP 498 & 513-515)

Plaintiff received sole ownership of the condominium property pursuant to an agreed decree of dissolution entered January 2014. (CP 472-482) Plaintiff has reported income adequate to cover the previous amount of the monthly mortgage payment of $1,009 per month. (CP 426-428 & 484-492)

Plaintiff hired attorney James Jameson in 2014 to facilitate his efforts to modify or refinance the loan and assist with a mediation under the Washington Foreclosure Fairness Act (FFA).

(CP 494-496) A mediation, under the FFA and overseen by the Washington Department of Commerce, was held on April 14, 2014, at the Dispute Resolution Center of Snohomish, Island, and Skagit Counties. (CP 494-496) A loan modification package, with supporting financial documentation, was submitted prior to the mediation to Chase Bank and their local legal representative Robert McDonald, then of the firm McCarthy and Holthus and who now serves as trustee for Quality Loan Service Corp. (CP 494-496)

At the mediation, despite having been previously provided a copy of the decree awarding the property to plaintiff, the representative of Chase Bank stated that unless plaintiff's ex-wife was present, or that plaintiff had a power of attorney from his ex-wife authorizing him to negotiate, they would not proceed with the mediation. (CP 494-496) Additionally, despite requests from Chase for additional documentation prior to the mediation, the bank did not request any such power of attorney until the mediation itself. (CP 494-496) The merits of plaintiff's loan modification application and financial documentation were never considered at the mediation. (CP 426-428 & 494-496)

While the lender's representative indicated at the mediation that plaintiff could resubmit his application with a power of attorney from his ex-wife at a later time for further review by the bank, at the conclusion of the mediation, the bank's representative refused to continue or reschedule the mediation, despite being made aware of the already passed amendment to the FFA at RCW 61.24.165(6), which required that a party in plaintiff's position be treated as a borrower at the mediation. (CP 426-428 & 494-496)

Defendant trustee QLS shares common ownership and/or management with the law firm of McCarthy & Holthus, the former employer of trustee and attorney Robert McDonald, who, prior to his current duty as trustee of the foreclosure proceeding against plaintiff's property, represented the beneficiary lender Wells Fargo at the April 2014 FFA mediation at which plaintiff's first loan modification application was denied without review. (CP 46-53, 426-428, 494-496)

In a declaration for the Court, Chase Bank employee Joseph Devine Jr. stated that the loan investor, Freddie Mac, does not participate in the Loan Assumption Modification Program or otherwise allow for loan assumption. (CP 195) As indicated in at least two Freddie Mac informational bulletins, however, Freddie

Mac does participate in loan assumptions, even by non-borrowers, and requires its servicers to submit loan modification applications for review and final approval by Freddie Mac. (CP 80-93)

Loan servicer Chase Bank was cited and sanctioned by the US Office of the Comptroller of the Currency in 2015 for failing to respond to borrower loan modification requests and failing to make good faith efforts to prevent foreclosures. (CP 161-162)

B. STATEMENT OF PROCEDURE

Plaintiff's complaint, asserting violations of the FFA and CPA by all defendants, as well as allegations involving breach of trust by the trustee, was filed June 3, 2015. (CP 507-511) Plaintiff's first motion to restrain the trustee sale of his residence was filed June 4, 2015, which resulted in voluntary continuance of the sale initially only until the following month. (CP 458-463) The parties pursued informal negotiations and discussion regarding the case over the course of the summer. (CP 77-78) Defendants Chase Bank and QLS filed motions for summary judgment on November 12, 2015. Plaintiff's counsel propounded separate discovery requests to both defendants shortly thereafter, seeking information regarding ownership interests of QLS and McCarthy & Holthus, as well as information from Chase Bank regarding a

second loan modification application believed to be under review. (CP 174)

Additionally, in the course of preparing a response to the defendants' motions, plaintiff's counsel discovered information regarding the availability of loan modifications and related procedures provided through principal loan investor Freddie Mac, (CP 80-93) that was contradicted by representations made by Chase Bank employee Joseph Devine Jr. in his declaration to the Court. (CP 195) Given the discrepant testimony, plaintiff's counsel filed a motion for leave to amend the complaint to be heard December 15, 2015, with defendants' motions, which was denied. (CP 17) At that time, plaintiff had not had had an opportunity to depose Mr. Devine, who provided no further declaration explaining the discrepancy between his representations that no loan modifications or assumptions were available from Freddie Mac and Freddie Mac's clear guidelines indicating that such relief was routinely available. Plaintiff's discovery requests were also unanswered as noted in his response to the defendants' motions for summary judgment. (CP 174)

This appeal was filed January 12, 2016. As the trustee declined to continue or cancel the sale then scheduled for February

26, 2016, plaintiff's counsel filed a second motion to enjoin the sale, which was granted by the Court on February 24, 2016. (CP 513-515)

IV. ARGUMENT

A. Standard of Review: De Novo

By well-established authority, in reviewing a trial court's ruling on summary judgment, the standard of review is *de novo*, with the appellate court performing the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014), *cert. denied*, 135 S.Ct. 1904, 191 L.Ed.2d 765 (2015). Where the record consists entirely of declarations, affidavits and other documentary evidence, the appellate Court stands in the same position as the trial court and is not bound by the trial court's factual determinations. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) Summary judgment is only appropriate if the pleadings show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one that affects the outcome of the litigation. *Eicon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

Appellate inquiry follows in the same track as the trial court, reviewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in the favor of the nonmoving party. *Eicon Constr.*, 174 Wn.2d 164. Summary judgment is only appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *O.S. T. v. Regence BlueShield,* 181 Wn.2d 691, 703, 335 P.3d 416 (2014). Further, beyond acceptance of all facts asserted by the non-moving party as true in consideration of such a motion, the Court must also consider any hypothetical facts which could support plaintiff's complaint. *Bravo v. Dolsen Companies*, 125 Wash.2d 745, 888 P.2d 147 (1995).

B. Interpretation of FFA Statute and Obligations of Defendants Thereunder Is Fundamental to this Case

If, at the April 2014 FFA mediation, the defendants had treated Mr. Hall as a borrower, as the statute at RCW 61.24.165(6) states, and referred his loan modification application to Freddie Mac for review of it on the merits, as its guidelines direct, Mr. Hall could be well over a year into a modified loan already, certainly eliminating adverse consequences for him, and, additionally improving the balance sheets for its investors such as Freddie Mac.

The legal interpretation of the statute is one of the fundamental determinations necessary to be made in this case, particularly as this appears to be a matter of first impression on this point. The Court can and should find that the statute means what it says, and enforce it so that lenders and beneficiaries cannot play with its reading, unjustly benefiting thereby and causing serious adverse consequences of stress, uncertainty and cost not only for the plaintiff but also for all other similarly situated citizens of Washington State.

Defendant Chase Bank states in its summary judgment motion that the FFA mediation session held April 14, 2014, was completed in "good faith." This assertion however is flatly contradicted by the declaration of Mr. Hall's then attorney James Jameson, who states that the bank refused to participate in the mediation unless Mr. Hall could produce an authorization from his ex-wife authorizing him to negotiate with the lender and, further, that his financial application was never evaluated on its merits in the manner required under RCW 61.24.163.

As this directly relates to plaintiff's claim that Chase Bank violated the FFA by not fairly engaging in a mediation, it remains an unresolved factual issue as to whether Chase Bank acted in

good faith at the mediation. Additionally, the motion is not supported by the declaration of anyone in attendance at the mediation on behalf of the beneficiary, despite the fact that the current trustee Robert McDonald of QLS was in fact present at the mediation as counsel for Chase Bank.

Coupled with the fact that Chase Bank has also recently been cited and fined by the Office of the Comptroller of the Currency for continuing failures to make good faith efforts to prevent foreclosures and delays to requests for loan modification, a reasonable inference can be made that the bank is continuing to engage in bad faith conduct.

C. Public Policy Favors a Broad Interpretation of FFA.

RCW 61.24.165(6) provides in pertinent part:

> (6) For purposes of referral and mediation under RCW 61.24.163, **a person may be referred to mediation if the person has been awarded title to the property in a proceeding for dissolution or legal separation.** The referring counselor or attorney must determine the person's eligibility under this section and indicate the grounds for eligibility on the referral to mediation submitted to the department. **For the purposes of mediation under RCW 61.24.163, the person must be treated as a "borrower."** This subsection does not impose an affirmative duty on the beneficiary to accept an assumption of the loan. [Emphasis added.]

Defendant Chase Bank's argument that Mr. Hall is not entitled to the relief prescribed in the statute would result in a selective and tortured application of the law, which was enacted to

protect Washington homeowners and the state from the adverse impacts of foreclosures. Defendants' reading of the statute would deny relief to a whole class of people, who are, and should be entitled to relief under the statute. Should only those spouses who received property through a dissolution **AND** are on the note be entitled to protection of the statute? That is not the plain language of the staute, and this Court should not accept such a narrow interpretation. Additionally, defendants' reliance on the FFA Mediation Guidelines is misleading, as those are intended to be guidelines of general application for all mediations, where a named borrower may be occasionally unable to attend, and should not be conflated with or supersede the statute, which more expressly defines who a borrower is in the context of a dissolution or legal separation. While the defendant Chase Bank may argue that it has no "affirmative duty" to allow assumption of a loan, this is clearly distinct from refusing to review his loan modification application in the first place, which is what occurred in this case.

Additionally, in view of the statute at RCW 61.24.163(14)(c), which provides a defense to foreclosure if a lender/beneficiary is not willing to reasonably negotiate a

modification, such conduct by a lender, precluding meaningful review of a loan application, should not be condoned.

Along these same lines, given the legislative intent as set forth in the notes to RCW 61.24.005 to "create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and ***avoid foreclosure whenever possible***," as well as amendment of the statute at RCW 61.24.165(6), expressly addressing the factual scenario of an ex-spouse, as is at issue in this case, a violation of the FFA should be treated as a per se violation of the CPA. RCW 19.86.093 further provides a claimant a private right of action to establish that an unfair or deceptive act or practice is injurious to the public interest if it "violates a statute that contains a specific legislative declaration of public interest impact."

D. Defendant Chase Bank Does Not Deny that It Misled Plaintiff Regarding the Availability of Mortgage Relief Offered By Freddie Mac.

In its response to plaintiff's motion to enjoin the trustee sale, defendant Chase Bank offers no declaration or evidence denying or rebutting the fact that its employee Joseph Devine, Jr. provided a declaration to this Court stating that "Freddie Mac does not participate in the Loan Assumption Modification Program or

otherwise allow for loan assumption." Chase also offers no declaration or evidence contradicting the two Freddie Mac bulletins submitted in support of this motion that clearly indicate that Freddie Mac ***does*** in fact offer loan assumptions, even to individuals in Mr. Hall's position, "non-borrowers" who have received title to a property through a divorce. The egregious misconduct and deceptive business practices of Chase Bank towards Mr. Hall exemplify the same type of corporate malfeasance that resulted in the bank being sanctioned by the Office of the Comptroller of the Currency last year.

Mr. Hall received the property pursuant to a decree of dissolution, is the rightful owner of the property, and should have been permitted to have the merits of his loan modification application fairly considered as a "borrower" as defined at RCW 61.24.165(6) and as expressly required by loan investor Freddie Mac. Further, the "non-borrower" argument made by Chase Bank has previously been rejected by other Courts. Specifically, in the *McGarvey* decision, also involving Chase Bank as servicer for a WaMu loan, the Court found that the injured "non-borrower" in that case could pursue claims against Chase under California's

analog of the Consumer Protection Act. *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148 (E.D. Cal. Oct. 10, 2013)

Whether defendant Chase Bank's statements to plaintiff, his counsel, and the Court, that no loan relief is available to him are misrepresentations, intentional or negligent, is a material issue of fact precluding summary judgment. CR 56(c); *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

Given the outrageous conduct of defendant Chase Bank in misleading plaintiff, his counsel, and the Court to believe that no loan modification relief was available to the plaintiff, a claim patently at odds with guidelines of the loan investor Freddie Mac, it is not unreasonable that plaintiff may have been delayed in discovering that information and should therefore have been permitted to amend his complaint to reflect the newly discovered evidence.

CR 15(a) provides in pertinent part: "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Absent prejudice to the opposing party, the Court has held such amendments shall be granted. *Olson v. Roberts & Schaeffer Co.*, 25 Wn.App 225, 607 P.2d 319 (Div. 2 1980). The

fundamental legal and equitable issues raised in this case and the harm to plaintiff should outweigh any potential claims of prejudice that defendants may raise.

E. Trustee Conflicts Pose Additional Unacceptable Flaws in This Attempted Nonjudicial Foreclosure

In a nonjudicial foreclosure, "the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected." *Klem v. Washington Mutual,* 176 Wn.2d 771 at 20; 295 P.3d 1179 (2013), *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, (1985). The trustee's actions in this matter evince a disregard for the absolutely necessary impartiality that must be required in foreclosures proceeding under the streamlined procedures afforded under the Deed of Trust Act. It is clear that in wearing two different hats, first as counsel previously advocating unlawfully on behalf of the defendant bank and now as trustee who has refused to continue or cancel the sale at plaintiff's reasonable request, both actions seemingly adverse to plaintiff's interests, the trustee is in an untenable conflict of interest and this Court should cancel the trustee sale, remove the trustee, and allow a fair and equitable mediation to occur.

F. Given Plaintiff's Outstanding Discovery, Pursuant to CR 56(f), Summary Judgment Is Premature and Prejudicial

Lastly, summary judgment should not have been granted in this matter given plaintiff's outstanding and unanswered discovery requests, which issue plaintiff raised in his response to the motion. CR 56(f) provides:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In his initial discovery requests to defendants Chase Bank and QLS, plaintiff sought additional information regarding the cross-ownership and/or management between trustee QLS and the law firm that previously employed QLS employee Robert McDonald, which raise serious concerns regarding his potential and actual conflicts of interest, especially in light of his actions adverse to plaintiff's interests in his capacities as beneficiary's counsel previously and new position as trustee overseeing sale of plaintiff's home. Plaintiff also believes that it would be important to depose Chase Bank employee Joseph Devine, Jr. regarding his

declaration to the lower Court and other evidence contradicting his declaration.

Therefore, until plaintiff has been afforded an opportunity to complete his discovery and additional relevant factual information can be evaluated, the trial court's order of summary judgment was wholly premature and should be reversed.

V. CONCLUSION

For these reasons, the lower court's order of summary judgment should be reversed and the matter remanded with a ruling that plaintiff is a borrower within the meaning of RCW 61.24.165(6), entitled, as an individual, to a mediation with the lender.

Respectfully submitted this 28th day of March, 2016.

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DECLARATION OF SERVICE

I, Christopher Kerl, hereby declare that on the 28th day of March, 2016, I caused a true and correct copy of the following:

1. Brief of Appellant;

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DATED this 28th day of March, 2016.

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