

65975-8-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

DOUG WALKER, an individual,

Appellant,

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation, SELECT PORTFOLIO SERVICING, INC., a Utah Corporation, CREDIT SUISSE FINANCIAL CORPORATION, a Delaware Corporation; TICOR TITLE COMPANY, a Washington Corporation; REGIONAL TRUSTEE SERVICES CORPORATION, a Washington Corporation; AMERICAN BROKERS CONDUIT; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation

Respondents.

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS

Please refer to Mr. Walker's Statement of Facts set forth in his Initial Brief, on file herein.

B. WRONGFUL FORECLOSURE CLAIM.

Citing to unpublished federal trial court orders, Respondents, QUALITY LOAN SERVICE CORP. OF WASHINGTON, INC. (hereinafter "QLS") and SELECT PORTFOLIO SERVICING, INC. (hereinafter "SELECT PORTFOLIO") assert that "there is no claim for wrongful foreclosure where, as here, the foreclosure has been discontinued."¹ Respondents' Supp. Brief, page 2. Respondents offer no published authority to support this assertion. Indeed, none exists.

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*"), the Washington Supreme Court established that violation of *RCW 61.24* is actionable, whether denominated "wrongful foreclosure," "abuse of civil process," or "violation of *RCW 61.24*." As noted by the Court in *Bain*, at pages 118: "Further, if there have been misrepresentations, fraud, or **irregularities in the proceedings**,² and if the homeowner borrower

¹ In support of this assertion, Respondents rely upon *Massey v. BAC Home Loans*, (W.D. Wash. Oct. 26, 2012). However, the order cited is of little precedential value, given the fact that the trial court acknowledged the existence of a claim under *RCW 19.86*, consistent with *Bain*. More importantly, the order was not an "opinion" nor has it been published, in violation of *GR 14.1*.

² Respondents and other members of the mortgage lending industry have consistently scoffed at the notion that Washington law provides for a claim for "wrongful foreclosure," but the use of the term "irregularities in the proceedings" should put an end to

cannot locate the party accountable, and with authority to correct the irregularity, there certainly could be injury under the CPA.” Under existing Washington case law, actionable “irregularities” may occur and relief may be sought either pre-sale or post-sale. See *Bain; Cox v. Helenius*, 103, Wn.2d 383, 693 P.2d 683 (1985); *Albice v. Premier Mortgage Service of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Northwest Land & Investment, Inc. V. New West Federal Savings and Loan Assoc.*, 57 Wn.App. 32, 786 P.2d 324 (1990); and *Udall v. T.D. Escrow Service, Inc.*, 51, Wn.App. 108, 752 P.2d 385 (1988).

Respondents assert that the only relevant question is the identity of the note-holder, apparently under the mistaken belief that any party in possession of a note endorsed in blank is entitled to enforce the obligation and foreclose the security. This is simply not the law in the State of Washington. Even if it assumed that the mere possession of a promissory note endorsed in blank is sufficient to meet the definition of “beneficiary” under *RCW 61.24.005*, it does not meet other standards under the broader requirements of *RCW 61.24* nor does

the discussion, including reliance on that series of opinions from the United States District Court for the Western District of Washington, that include *In re Thomas*, BAP No. WW-11-1151, WW-11-1152, WW-11-1226 (2012); *Vawter v. Quality Loan Service Corp.*, 707 F.Supp. 2d 1115 (W.D. Wash. 2012), *Daddabbo V. Countywide Home Loans, Inc.* 2010 WL 2101485 (W.D. Wash. 2010), *Cervantes v. Countywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011); among others. As noted by the *Bain* court, “MERS asserts that ‘the United States District Court for the Western District of Washington has recently issued a series of opinions on the very issues before the Court, finding in favor of MERS’. . . . We do not find these cases helpful.” *Bain* at page 109. If there is any question that the *Bain* court intended “irregularities in the proceedings” to be a standalone claim, one need only refer to footnote 18, where the court states “[a]ctions like these (issuance of assignments without verifying the underlying information which results in fraudulent transfers) could well be the basis of a meritorious CPA claim.”

it validate the activities of MERS as purported beneficiary in this case. In particular, the *Bain* court cited to some portions of the statute to illustrate this point:

Among other things, “the trustee shall have proof that the beneficiary is the *owner* of the promissory note or other obligations secured by the deed of trust” before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(I).

Bain, at page 93-94 (Emphasis added).

Appellant, DOUG WALKER (hereinafter “Mr. Walker”) contends that this reading of the entire statute would impose a requirement of ownership in addition to possession of the note itself as a pre-condition to a non-judicial sale. This contention is not only based on *Bain*, but is supported by a plain reading of RCW 61.24.030(7)(a), which provides as follows:

It shall be requisite to a trustee's sale:

* * *

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

There is no reasonable way to read *Bain* and the statutory provision cited above in any other manner except that being the holder is a necessary, but not a sufficient condition to conducting a non-judicial foreclosure: the “holder”

must also be the “owner” of the obligation.³ This is particularly so once the sale is challenged and supports the competing interests of the Act as outlined in *Cox v. Helenius*, 103, Wn.2d 383, 693 P.2d 683 (1985) and discussed in more detail below.

While Respondents may be able to establish they or their agents may have obtained possession of Mr. Walker’s Note, or a copy thereof, endorsed in blank, they have not established that they “own” the note, in accordance with the provision of *RCW 61.24.030(7)(a)*. In fact, this issue was never considered by the trial court.

Taking Mr. Walker’s factual assertions as true, as the Court must, Mr. Walker has asserted that none of the Respondents named herein have ever been holders and owners of the subject Note at any time relevant to this cause of action and are not “beneficiaries” under the subject Deed of Trust. If MERS never held or owned the underlying obligation at any time relevant to this cause of action, MERS was never a legal beneficiary under *RCW 61.24.005(2)* from the outset of the transaction and, therefore, and its purported assignment of the Note and

³ It has become farcical to see retained counsel for mortgage lenders and servicers walk into court holding what may arguably be the borrower’s original note, endorsed in blank with an undated rubber stamp, and for counsel to parade the note around the courtroom, like a wooden image of Jesus in a Basque Easter festival, believing the note, signed in blank, gives the servicer any status whatsoever to enforce the obligation or initiate non-judicial foreclosure proceedings, without express authority from the true and lawful owner/holder of the note and deed of trust. See *In re Jacobson*, 402 B.R. 359 (2009). *RCW 61.24.030(7)(a)* clearly demands more than mere possession of the note. QLS has frequently argued before this Court that under *RCW 61.24.030(7)(b)*, they have the right to rely on the “beneficiary’s declaration,” but they ignore the duty clearly set in *RCW 61.24.030(7)(a)* that they have “proof that the beneficiary is the owner of any promissory note.”

Deed of Trust was wrongful and void. It follows that all action taken by Respondents in reliance upon MERS' wrongful assignment is also void, including the execution and recording of the Appointment of Successor Trustee, the assertion of a default, the execution and posting of the Notice of Trustee Sale. Finally, absent the actual authority to act in their own right, none of the Respondents named herein obtain the prior express authority from the true and lawful holder and owner of the subject obligation to take the actions they did regarding the subject Note and Deed of Trust.

In addition to action taken without authority, Respondents' improperly prepared, executed and recorded at least two relevant documents to the process. The Appointment of Successor Trustee of May 22, 2009, whereby SELECT PORTFOLIO appointed QLS successor trustee, was prepared and filed two months before MERS purportedly assigned the subject Note and Deed of Trust to SELECT PORTFOLIO on July 6, 2009. See CP 153-156. This is the sort of "fraudulent transfer" the Bain Court expressed concern about and constitutes a clear "irregularity in the proceedings." *Bain* at 118, footnote 18. How could SELECT PORTFOLIO appoint QLS as successor trustee if MERS was still the "beneficiary" of record and had yet to assign the Note and Deed of Trust (wrongfully or otherwise) to SELECT PORTFOLIO?

As a direct and proximate result of Respondents' misconduct, Mr. Walker has been damaged and his property interests are continually being threatened, as alleged in Paragraph 4.8 of the Amended Complaint herein and this matter should

be remanded back to the trial court, where Mr. Walker can establish his damages.
CP 131.

C. FDCPA CLAIMS

Respondents argue that the Fair Debt Collection Practices Act (*15 USC 1962, et seq.*) (hereinafter “FDCPA”) does not apply to them because they are not a “debt collector,” an argument explicitly rejected in another foreclosure case by the 4th Circuit, which reasoned that a debt remained a debt even after foreclosure proceedings commence. See *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006). The logic behind the 4th Circuit decision is unassailable as the Notice of Trustee’s Sale contains express demands for payment of sums then due and the initiation of the foreclosure itself was meant to recover an underlying debt. Accordingly, if Respondents cannot demonstrate they owned and held Mr. Walker’s Note prior to any alleged default, the provisions of the FDCPA apply to them.

Moreover, the Fifth Circuit has held that the definition of “debt collector does not include consumer’s creditors, mortgage servicing company, or an assignee of a debt, provided debt was not in default at the time debt was assigned.” *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985). Further, District Courts have held that the FDCPA treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Bailey v. Security Nat’l Servicing Corp.*, 154 F.3d

384, 387 (7th Cir. 1998); *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir. 1997); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d Cir. 2000); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996). Based upon this case law, the purchaser of a debt in default is a "debt collector" for purposes of the FDCPA, even though it owns the debt and is collecting for itself. See *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 171-74 (3d Cir. 2007).

Turning to the facts of the present dispute, the Notice of Trustee's Sale of July 17, 2009 that Mr. Walker's arrears amounts to \$14,699.45. CP 158. Clearly, Mr. Walker's debt was allegedly in default when the subject Note and Deed of Trust was transferred to SELECT PORTFOLIO on July 6, 2009, therefore making it and its agent QLS "debt collectors" under the FDCPA. See *15 U.S.C. § 1692a(6)(F)(iii)*

D. DAMAGES AND CAUSATION UNDER CPA CLAIM

Based upon the Complaint, Plaintiffs' have alleged a number of acts of misrepresentation, fraud and irregularities in these proceedings upon which to claim injury under the CPA. The *Bain* court specifically noted that violation of the FDCPA could establish injury and damage, particularly where the foreclosing party did not have "possession and ownership of the Note."⁴ *Bain* at page 119.

⁴ The FDCPA specifically states as a declaration of purpose that it is designed to "protect consumers" across the nation. *15 USC 1692(a)* and *(e)*. This statement of purpose is analogous, if not synonymous, with the public interest declaration as described in *Hangman Ridge*.

Significant to the facts of the present controversy, the *Bain* court noted that assignment of the note and deed of trust without verification of the underlying information that results an “incorrect or fraudulent transfer” could establish an injury. *Bain* at page 118, footnote 18. Finally, injury to person’s business or property is broadly construed and in some instances where “no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill or impacts to one’s creditworthiness would suffice for this element of the *Hangman Ridge* test.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). In any event, based upon the foregoing, Mr. Walker’s allegation that he “has suffered injury and damages as a direct and proximate result of Defendants’ misconduct” is amply supported by the facts, the record and *Bain*. By the trial court’s dismissal of his claims, Mr. Walker has been denied an opportunity to prove his damages.

E. QUIET TITLE CLAIM

While MERS’ Assignment of Deed of Trust purports to assign the Deed of Trust, it also purports to assign the subject note, which all parties acknowledge MERS could not do since it never held the note at any time relevant to this cause of action. CP 156. This is relevant because any assignment of the security without the underlying debt is void under commercial law. In other words, separation of the Note from the Deed of Trust results in the Note being

unsecured.⁵ Restatement (Third) of Property (Mortgages) 5.4 reporters' note, at page 386 (1997). This reasoning was addressed and adopted in theory by the *Bain* court, at page 112. The remedy for the lender, should the true and lawful owner and holder of the subject Note and Deed of Trust ever come forward, would be the establishment of an equitable mortgage. *Bain* at page 112-113.

It is Mr. Walker's contention that the naming of MERS as "beneficiary" at the outset of the transaction irrevocably split the Note from the Deed of Trust. In the alternative, if MERS never owned and held the subject Note or the Deed of Trust, it could not assign the same. By assigning the subject Deed of Trust to SELECT PORTFOLIO without the subject owning and holding the Note, MERS irrevocably split the Note from the Deed of Trust, rendering the later void. Accordingly, a void lien on Plaintiffs' property should be judicially vacated and Plaintiffs' title quieted. This would not leave the true and lawful owner and holder of the obligation without recourse as they could seek an equitable mortgage. *Bain* at page 112-113.

⁵ See *Carpenter v. Longan*, 83 U.S. 271 (1872), which stated the rule succinctly:

"The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

Carpenter at 274. See also *Kelley v. Upshaw*, 39 Cal.2d 179 (1952) ("purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity"); *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (B.A.P. 9th Cir.1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest.").

F. ATTORNEY FEES AND COSTS.

Finally, Mr. Walker respectfully requests an award of taxable costs and reasonable attorney's fees on appeal, pursuant to *RAP 18.1*. Mr. Walker is entitled to attorney's fees pursuant to the terms of Paragraph 26 of the parties' Deeds of Trust. CP 137-151, 162-174

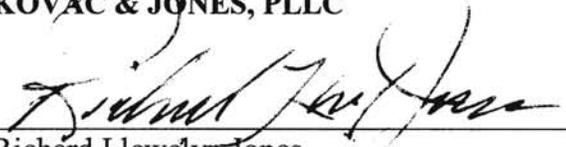
G. CONCLUSION

Mr. Walker has consistently asserted that MERS is not a lawful beneficiary, within the terms of *RCW 61.24.005(2)*, because it never held the subject Promissory Note. This assertion has been affirmed by the Washington Supreme Court in *Bain*. It follows that if MERS did not have the authority to act, the Assignment of Deed of Trust is void. Accordingly, any act taken by any party named herein in reliance on MERS' Corporate Assignment of Deed of Trust would also be void and subject to claims under the Washington Consumer Protection Act or Fair Debt Collections Practices Act, as alleged in the Mr. Walker's Complaint. Each of these allegations is supported by the record that has been adduced to date, establishes causes of action for which relief can be granted and is supported by *Bain*. Given the *Bain* decision, Mr. Walker is entitled to his day in court. Accordingly, the trial court erred in dismissing Mr. Walker's claims, pursuant to *CR 12(c)*, and Mr. Walker requests this Court vacate the trial court's Order of August 6, 2010 and remand the matter back to the trial court for a trial on the merits.

Furthermore, Mr. Walker respectfully renews his request for an award of his costs and reasonable attorney's fees incurred on appeal, pursuant to *RAP 18.1*

REPECTFULLY SUBMITTED this 18th day of December, 2012.

KOVAC & JONES, PLLC



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on December 19, 2012, I arranged for service of the forgoing Supplemental Reply Brief on the following parties:

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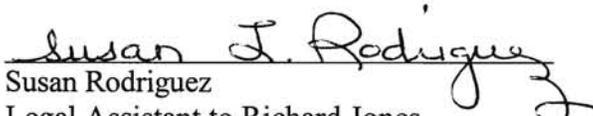
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