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DIVISION ONE

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No. 68034-5-I

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

MICHAEL LEVITZ,

Appellant

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
CAPITAL ONE, NA, US BANK NATIONAL ASSOCIATION, as
Trustee for CHEVY CHASE FUNDING LLC MORTGAGE-BACKED
CERTIFICATES SERIES 2005-1, US BANK, NA as trustee for CCB
LIBOR 2005-1 SERIES TRUST, DOES 1 through XX inclusive, and
BISHOP WHITE MARSHALL & WEIBEL, PS, (f/k/a BISHOP WHITE
AND MARSHALL, PS),

Respondents.

Appeal from Superior Court for King County
The Honorable Dean S. Lum

APPELLANTS' OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

| | <u>Page</u> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. INTRODUCTION | 6 |
| II. ASSIGNMENTS OF ERROR | 7 |
| III. STATEMENT OF THE CASE | 8 |
| IV. SUMMARY OF ARGUMENT | 12 |
| V. LEGAL ARGUMENT | 14 |
| A. <u>Standard of Review</u> | 14 |
| B. <u>Mr. Levitz Has Standing to Raise Claims in Connection with the Deed of Trust</u> | 16 |
| 1. <i>The Property in Question Is and Was Community Property</i> | 16 |
| 2. <i>The Divorce Decree Had Not Been Vacated And Was In Effect and Operable at the Initiation of Foreclosure Proceedings</i> | 17 |
| 3. <i>The Status Quo Was in Effect After the Order Vacating the Divorce Decree, Which Established that the Recorded Claim of Spouse in Community Property Was in Effect and Operable</i> | 18 |
| C. <u>Violation of the Consumer Protection Act</u> | 21 |
| D. <u>Breach of the Covenant of Good Faith-Fair Dealing</u> | 25 |
| E. <u>Fraud and Misrepresentation</u> | 28 |
| 1. <i>The Assignment and Appointment Were Fraudulent</i> | 28 |

| | |
|--------------------------------------------------------------|----|
| 2. <i>MERS is Not an Authorized Party to a Deed of Trust</i> | 30 |
| VI. CONCLUSION | 32 |

TABLE OF AUTHORITIES

CASES

| | |
|----------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Ashcroft v. Iqbal</i> , 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009) | 15 |
| <i>Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 516, 799 P.2d 250 (1990) | 14 |
| <i>Badgett v. Security State Bank</i> , 116 Wash.2d 842, 807 P.2d 356 (1991). | 25 |
| <i>Bain v. Metropolitan Mortgage Group</i> , 175 Wn.2d 83, 285 P.3d 34 | 22, 28, 30 |
| <i>Blake v. Fed. Way Cycle Ctr.</i> , 40 Wn.App. 302, 310, 698 P.2d 578 (Wash. Ct. of App. Div. 2, 1985) | 22 |
| <i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 750, 888 P.2d 147 (1995) | 16 |
| <i>Carlile v. Harbour Homes, Inc.</i> , 147 Wn.App. 193, 194 P.3d 280 (2008), review granted in part, 210 P.3d 1019 (2009) | 28 |
| <i>Cervantes v. Countrywide Home Loans</i> , 656 F. 3d 1034, 1040 (9 th Cir. 2011) | 30 |
| <i>Cruz v. Beto</i> , 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) | 14 |
| <i>Davenport v. Washington Education Association</i> , 147 Wn. App. 704, 197 P.3d 686 (2008) | 15, 16 |
| <i>Edmonson v. Popchoi</i> , 256 P.3d 1223, 1227 (Wash. 2011) | 25 |
| <i>Emerick v. Cardiac Study Center, Inc.</i> , Court of Appeals No. 41597-6-II (2012) | 14 |

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Fed. Trade Comm'n v. Sperry & Hutchinson Co.</i> , 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)), <i>review denied</i> , 104 Wn.2d 1005 (1985) | 22 |
| <i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001) | 31 |
| <i>Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2 nd 778, 780, 719 P. 2d (1986) | 21, 22 |
| <i>Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.</i> , 134 Wash. App. 210, 218, 135 P.3d 499 (2006) | 15-16 |
| <i>Holman v. Coie</i> , 522 Wash.App. 195, 522 P.2d 515 (1974) | 26 |
| <i>Klem v. Washington Mutual Bank</i> , No. 87105-1, Slip Op., p. 19 (Feb. 28, 2013) | 23 |
| <i>Leingang v. Pierce County Med. Bureau</i> , 131 Wash.2d 133, 150, 930 P.2d 288 (1997) | 22 |
| <i>Liebergesell v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980) | 26 |
| <i>Miller v. Othello Packers, Inc.</i> , 67 Wash.2d 842, 844, 410 P.2d 33 (1966) | 25 |
| <i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 50, 204 P.3d 885 (2009) | 22 |
| <i>Pedersen v. Bibioff</i> , 64 Wn. App. 710, 828 P.2d 1113 (1992) | 28 |
| <i>Postema v. Pollution Control Hearings Board</i> , 142 Wn.2d. 68, 122, 11 P.3d 726 (2000) | 15 |
| <i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) | 31 |
| <i>State v. Kaiser</i> , 161 Wn.App. 705, 719, 254 P.3d 850 (2011) | 24 |
| <i>State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.</i> , 87 Wash.2d 298, 305-09, 553 P.2d 423 (1976) | 22 |
| <i>Suleiman v. Lasher</i> , 48 Wn. App. 373, 376, 739 P.2d 712, <i>review denied</i> , 109 Wn.2d 1005 (1987) | 15 |

| | |
|------------------------------------------------------------------------------------------------|--------------------|
| <i>SW Sunsites Inc. v. Fed. Trade Comm'n</i> , 785 F.2d 1431, 1435 (9 th Cir. 1986) | 22 |
| <i>Tank v. State Farm Fire and Casualty Co.</i> , 105 Wash.App. 195, 522 P.2d 515 (1974) | 26 |
| <i>Tenore v. AT & T Wireless Servs.</i> , 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998) | 15 |
| <i>Trimble v. Wash. State Univ.</i> , 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000) | 14 |
| STATUTES | |
| RCW 7.04 | 31 |
| RCW 19.86.020 | 21 |
| RCW 19.86.093 | 21 |
| RCW 26.16 <i>et seq.</i> | 16 |
| RCW 26.16.030 | 17 |
| RCW 26.16.100 | 18, 21 |
| RCW 61.24.010(2) | 27 |
| RCW 61.24.010(4) | 25 |
| Washington Consumer Protection Act, RCW §19.86 <i>et seq.</i> | 21-24 |
| Washington Deed of Trust Act, RCW §61.24 <i>et seq.</i> | 25, 26, 29, 30, 31 |
| RULES | |
| CR 9(b) | 28 |
| CR 12(b)(6) | 15, 16 |
| CR 56(c) | 14 |

OTHER AUTHORITIES

| | |
|---------------------------------------------------------------|----|
| Restatement of Contracts § 472 (1932) | 26 |
| Restatement (Second) of Contracts § 205 cmt. a, cmt. d (1981) | 25 |
| Black's Law Dictionary 822, (4 th Ed. 1951) | 26 |

I. INTRODUCTION

The primary basis for the court's dismissal of Mr. Levitz's claims was that he did not have standing to bring the claims because he was merely a tenant in the property and had no ownership interest in the property. However, Mr. Levitz and Mrs. Inesa Levitz were married at the time the deed of trust and promissory note were executed, and the property, the family home, was owned, and the monthly mortgage was being paid for by both Mr. and Mrs. Levitz. In addition, Mr. Levitz was given express authority and *duty* by the Court in the divorce proceedings to be responsible for the mortgage and any issues related to a foreclosure, and recorded a Claim of Spouse in Community Property. The court should have found that Mr. Levitz had standing to raise the claims in the case at bar, and that the claims were properly stated in the Complaint.

For the reasons set forth above and throughout, Respondents are neither lawfully entitled to any form of payment from Mr. Levitz and lack standing to commence or sustain any form of collection or foreclosure action against Mr. Levitz. Mr. Levitz does not deny that a

balance is still owed on the Note, but that debt is not owed to these defendants/respondents.

II. ASSIGNMENTS OF ERROR

1. The trial court erred on June 12, 2012 when it granted the motion for summary judgment of the Defendants, entered judgment in favor of the Defendants, and dismissed Mr. Levitz's Consumer Protection Act, Fraud and Misrepresentation, and Breach of the Covenant of Good Faith and Fair Dealing claims with prejudice.

2. The trial court erred on June 12, 2012 when it granted the motion for summary judgment of the Defendants, entered judgment in favor of the Defendants, and dismissed Mr. Levitz's claims based on the finding that Mr. Levitz was a tenant of the property and did not have standing to bring these claims.¹

Issues Pertaining to Assignments of Error

1. Did the trial court erroneously grant the Defendants' motions under CR 12(b)(6) and CR 56 where Mr. Levitz demonstrated a genuine issue of material facts to allow the court to draw the reasonable inference that the Defendants were liable for the misconduct alleged and he was entitled to relief? (Assignment of Error No. 1)

2. Did the trial court erroneously grant the Defendants' motion for summary judgment where there remained a genuine issue of material

¹ Mr. Levitz also brought claims for Gross Negligence and Wrongful Foreclosure. This appeal is only seeking review of the dismissal of the Consumer Protection Act, Fraud and Misrepresentation, and Breach of the Covenant of Good Faith and Fair Dealing claims.

fact regarding the finding that Mr. Levitz was a tenant and did not have standing to bring the claims in the Complaint? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

On or about September 1, 2004, Mr. Levitz and Mrs. Inesa Levitz refinanced the home loan for the property located at 3718 East Alder Street, Seattle, Washington, 98122. (CP 4). Mr. and Mrs. Levitz were married in 1993 and this was their personal residence. (CP 106:2-4). The parties on the Deed of Trust were: Inesa Levitz (as borrower and grantor), Chevy Chase Bank, F.S.B. (as Lender), MERS (as beneficiary), and First American Title Insurance Company (as trustee). (CP 4, CP 205-206).

On April 19, 2010, Mr. Levitz executed a "Claim of Spouse in Community Real Property" claiming a spousal interest in the subject deed of trust, which was then held as community property in the name of his wife at that time, Inesa Levitz. (CP 4, CP 26). This document was recorded with King County on May 12, 2010 as instrument number 20100512000016. (CP 4). On October 27, 2010, a divorce decree was executed wherein all the rights under the Deed of Trust were awarded to Mr. Levitz. (CP 4, CP 263) (VRP 10:26-29, 11: 2-6). On November 10, 2010, Mr. Levitz filed for bankruptcy protection under Chapter 13 of Title 11 of the United States Code. (CP 4).

Paragraph 24 of the Deed of Trust for the subject property, recorded with King County as instrument number 20040920000911, declares that the Lender “may from time to time appoint a successor trustee to any Trustee appointed hereunder who has ceased to act.” (CP 4, CP 217) (emphasis added).

On July 1, 2009, MERS recorded an “Appointment of Successor Trustee” purporting to appoint Defendant Bishop, White & Marshall, P.S., as successor trustee under the subject deed of trust. (CP 5, 28-29). This assignment is recorded as instrument number 20090701002024. (CP 5, CP 28). MERS was not the lender and never held the Note. (CP 18:23-24, 19:14-21, 20:1-8, 238:5-8, 246:19-23) On or about July 17, 2009, Defendant Bishop, White & Marshall, P.S. (hereinafter “BWMW”) recorded a Notice of Trustee’s Sale for the subject property, purporting to secure an obligation in favor of MERS, who claimed to be acting solely as a nominee for Chevy Chase Bank, F.S.B. and its successors and assigns as beneficiary. (CP 5, CP 30-34). This Notice of Trustee’s Sale is recorded as instrument number 20090717001157. (CP 5, CP 30). No notice of default was issued prior to this Notice of Trustee’s Sale. (CP 239:5-7) (VRP 11:12-24).

On April 12, 2010, BWMW issued a Notice of Default on the subject property, which asserted that the “current beneficiary” was US

Bank, NA as trustee for CCB Libor Series 2005-1 Trust, that MERS was “nominee” for Capital One, N.A. Bank, F.S.B. and its successors and assigns, and that the “servicer” was Capital One, NA. (CP 5, CP 225-230). On June 10, 2010, BMW issued a “Notice of Foreclosure and Notice of Trustee’s Sale” stating that the Notice was a consequence of default(s) in the obligation to MERS as a nominee for Capital One N.A. and its successors and assigns. The Notice scheduled the sale for September 10, 2010. (CP 5).

On the same day, June 10, 2010, BMW recorded with King County a Notice of Discontinuance of Trustee’s Sale for the subject property recorded as instrument number 20100610000294. (CP 5, CP 35-36). On March 25, 2011, BMW recorded with King County an “Assignment of Deed of Trust,” purporting to assign from MERS (alleging MERS is the “beneficiary”) all beneficial interest under the subject deed of trust to “US Bank as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2005-1.” This assignment is recorded as instrument number 20110325000960. (CP 5-6, CP 37-38).

On April 15, 2011, BMW issued an “Amended Notice of Trustee’s Sale” setting the sale date for the subject property for June 10, 2011. (CP 6, CP 40-42, CP 133-142). This Notice of Trustee’s Sale

alleges that it is intended to secure an obligation in favor of MERS as nominee for Chevy Chase Bank, F.S.B., and its successors and assigns as beneficiary. (CP 6, CP 41). The Notice also alleges that the subject deed of trust was assigned to US Bank, NA as trustee relating to the Chevy Chase funding LLC Mortgage Backed Certificates, Series 2005-1 under Auditor's File No. 20110325000960. (CP 6, CP 41).

As set forth in paragraph 2.11 of the Complaint, this assignment was made from MERS to Defendant US Bank, allegedly divesting MERS of all its interest in the subject deed of trust as of March 25, 2011. (CP 5:22-6:2) Therefore, no obligation was secured in MERS' favor on April 15, 2011.

In February, 2011, MERS issued a directive to its members, of which Capital One and US Bank are included, not to initiate foreclosures in its name. Capital One and US Bank NA (in both their capacities as trustee for each herein-named mortgage-backed security) violated this directive by attempting to foreclose naming MERS as a beneficiary. (CP 6).

In February 2011, Mr. Levitz's bankruptcy case was voluntarily dismissed. (CP 6).

BWMW's Amended Notice of Trustee's Sale includes a duplicitous statement that US Bank NA is a "trustee" *relating to* the

Chevy Chase funding LLC Mortgage Backed Certificates, Series 2005-1. (CP 6). The common parlance, and legally binding language to be a trustee is “trustee *for*,” not “*trustee relating to*,” which is meaningless. Because of this duplicitous language, it is unclear what the relationship is between US Bank, NA and the alleged “Chevy Chase funding LLC Mortgage-Backed Certificates, Series 2005-1.” (CP 6).

A diligent search of the Securities Exchange Commission (SEC) records revealed that no such entity or security is registered with that federal agency, which is a requirement for all publicly traded securities. Therefore, this fraudulent party has no rights or interest in the subject deed of trust or Mr. Levitz’s property, including the right to be a beneficiary, the right to collect on the note, or the right to foreclose. (CP 6-7).

IV. SUMMARY OF ARGUMENT

Mr. Levitz has standing to bring the claims in the complaint based on three theories. First, Mr. Levitz recorded a Claim of Spouse in Community Property which is still in effect and operable. Second, The Divorce Decree was not vacated until after all foreclosure proceedings had been initiated, so at the time of the allegations in the complaint, Mr. Levitz was the proper party to bring claims related to the deed of trust. Third, even after the divorce decree was vacated, the *status quo* was

restored and the Claim of Spouse in Community Property is the status quo and gives Mr. Levitz standing to raise the claims in the Complaint.

All respondents violated the Consumer Protection Act because they committed unfair and deceptive acts that had a public interest impact, and which caused harm to Mr. Levitz and his son. The assignment of deed of trust and the appointment of successor trustee were not in compliance with the Deed of Trust Act, and the assignment to US Bank, NA as trustee for Chevy Chase funding LLC Mortgage-Backed Certificates, Series 2005-1 is invalid since the SEC has no record of any such security registered with the SEC.

All respondents breached the Covenant of Good Faith-Fair Dealing when they initiated foreclosure proceedings that they knew or should have known were not in compliance with the Deed of Trust Act. They knew or should have known at the time the foreclosure proceedings were initiated that Mr. Levitz had both a Claim of Spouse in Community Property recorded with the county, in addition to the divorce decree which was still in effect when all foreclosure proceedings were initiated. The divorce decree was only vacated *after* all foreclosure proceedings were initiated.

All respondents committed common law fraud & misrepresentation in the assignment of deed of trust and the appointment of successor trustee. The deed of trust was assigned by MERS to a non-existent mortgage-

backed security pool. The trustee failed to issue a Notice of Default before the first Notice of Trustee's Sale was issued. The decision of the court below should be reversed and the case remanded for further proceedings.

V. LEGAL ARGUMENT

A. Standard of Review

The court reviews summary judgment de novo. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000), *Emerick v. Cardiac Study Center, Inc.*, Court of Appeals No. 41597-6-II (2012). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The court considers all facts submitted and the reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.*

For a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). Dismissal of actions under CR 12 is appropriate

only if it appears beyond a doubt that the Plaintiff can prove no set of facts, consistent with the complaint, which would entitle the Plaintiff to relief. *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987). A CR 12(b)(6) motion should be granted “sparingly and with care” and “only in the unusual case in which plaintiff includes factual allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC.*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006), citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

A claim is factually plausible when it contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009). This court held that “we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Davenport v. Washington Education Association*, 147 Wn. App. 704, 715, 197 P.3d 686 (2008), citing *Postema v. Pollution Control Hearings Board.*, 142 Wn.2d. 68, 122, 11 P.3d 726 (2000). The court reviews “questions

of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the Plaintiff.” *Davenport*, 147 Wn. App. At 715. Ultimately, “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support a Plaintiff’s claim.” *Holiday Resort Community Ass’n. v. Echo Lake Associates, LLC.*, 134 Wn.App. 210, 218, 135 P.3d 499 (2006) citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

B. Mr. Levitz Has Standing to Raise Claims in Connection with the Deed of Trust

1. The Property in Question Is and Was Community Property

Mr. and Mrs. Levitz were married at the time this refinance took place. They were married in 1993. The property was originally purchased during the marriage, in 1999. The Deed of Trust and Note for the refinance were executed in 2004, during the marriage. Washington is a community property state. RCW 26.16 *et seq.* This statute provides that property “acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of

disposition as the acting spouse or domestic partner has over his or her separate property, *except*:...

(3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.

(4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.

RCW 26.16.030, (3), (4). (emphasis added).

2. *The Divorce Decree Had Not Been Vacated and Was In Effect and Operable at the Initiation of Foreclosure Proceedings*

All three Notices of Trustee's Sale were issued *prior* to the Order vacating the divorce decree. (See Timeline, *infra*). The Notices of Trustee's Sales were issued in July 2009, June 2010, and April 2011. This case was filed in May 2011. The court's Order vacating the divorce decree was entered in July 2011. The Court of Appeals stayed the case in the trial court on January 24, 2012 (CP 272) pending an appeal challenging the vacating of the divorce decree. Thus, at all material times pertaining to the foreclosure and Notices of Trustee's Sale, the Court's Decree of Dissolution still stood and was operable. On this basis, Mr. Levitz had the right and the duty to manage issues

related to the Deed of Trust including foreclosure issues. The allegations in the complaint all took place before the court's order vacating the decree of dissolution. Even if the court rejects this theory, the court should find that the *status quo* that was restored was the Claim of Spouse in Community Property.

3. *The Status Quo Was in Effect Which Established that the Recorded Claim of Spouse in Community Property Was In Effect and Operable*

Mr. Levitz recorded a Claim of Spouse in Community Property pursuant to 26.16.100 to protect his interests in the property.² The fact that Dr. Levitz purchased or re-financed the property in her own name does not change the fact that the real estate is community property, with each spouse having equal (50/50) interest in the ownership and disposition of the property. Clearly Mr. Levitz was not a tenant, and the court was in error in rejecting Mr. Levitz's standing to bring claims regarding foreclosure of the property and challenges to the Deed of Trust.

² "A spouse or domestic partner having an interest in real estate, by virtue of the marriage relation or state registered domestic partnership, the legal title of record to which real estate is or shall be held by the other, may protect such interest from sale or disposition by the other spouse or other domestic partner, as the case may be, in whose name the legal title is held, by causing to be filed and recorded in the auditor's office of the county in which such real estate is situated an instrument in writing setting forth that the person filing such instrument is the spouse or domestic partner, as the case may be, of the person holding the legal title to the real estate in question, describing such real estate and the claimant's interest therein: and when thus presented for record such instrument shall be filed and recorded by the auditor of the county in which such real estate is situated, in the same manner and with like effect as regards notice to all the world, as deeds of real estate are filed and recorded..." RCW 26.16.100.

The timing of the actions taken in this case is a material fact erroneously overlooked by the trial court. The following is the applicable timeline:

January 27, 1993 – Dr. and Mr. Levitz were married

April 1999 – The home was purchased during the marriage

September 1, 2004 – The home was refinanced during the marriage (the subject Deed of Trust)

July 17, 2009 – BMW issued the first Notice of Trustee's Sale

August 20, 2009 – Mr. Levitz filed a Petition for Dissolution of Marriage

May 12, 2010 – Mr. Levitz recorded a Claim of Spouse in Community Property with King County for the subject real property

June 10, 2010 – BMW issued the second Notice of Trustee's Sale

October 27, 2010 – Divorce Decree was entered by Commissioner Watness, which awarded all the rights under the Deed of Trust to Mr. Levitz

November 10, 2010 – Mr. Levitz filed for bankruptcy

February 2011 – Mr. Levitz's bankruptcy was voluntarily dismissed

April 15, 2011 – BMW issued the Amended Notice of Trustee's Sale

May 27, 2011 – The case at bar was filed in King County Superior Court, No. 11-2-18864-7

July 14, 2011 – Judge Fleck entered an Order vacating the October 27, 2010 order.

The trial court asked counsel for US Bank at the hearing on June 12, 2012:

DL: Currently the dissolution ...dissolution decree has been vacated.

JK: Correct.

DL: The...to the extent...so the formal interest that the Plaintiff had in the property was via the now vacated dissolution decree?

JK: That is correct.

DL: So as far as you're concerned, your position is we're back to the status quo ante?

JK: That is correct.

VRP 3:26-33.

The Appeals court had not yet issued its decision as of the date of the hearing in this case, so the stay was still in effect. The court erred in presuming that the *status quo ante* was only based on the divorce decree. In addition to the stay, the *status quo ante* was actually the recorded Claim of Spouse in Community Property, which was recorded over five months prior to the vacated divorce decree. Nowhere in the record is there any order, statement, claim or defense that the Claim of Spouse in Community Property was to be invalidated or vacated. The July 14, 2011

order only vacated the divorce decree; it did not undo a recorded claim filed pursuant to 26.16.100. This court should find that the Claim of Spouse in community property is still in effect and creates a basis for standing for Mr. Levitz to bring the claims in the case at bar, and establishes that Mr. Levitz is not simply a tenant.

C. Violation of the Consumer Protection Act

To sustain a claim for unfair and deceptive business practices under the Washington Consumer Protection Act (CPA), Plaintiff must establish: (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest (5) and caused injury to Plaintiff in his or her business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986); RCW 19.86.020; RCW 19.86.093. The CPA does not define the term “unfair.” To determine whether an action was unfair, Washington courts consider three criteria from the Federal Trade Commission Act:

(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).”

Blake v. Fed. Way Cycle Ctr., 40 Wn.App. 302, 310, 698 P.2d 578 (quoting *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)), *review denied*, 104 Wn.2d 1005 (1985).

The Supreme Court of Washington also recently addressed Consumer Protection Act violations in *Bain v. Metropolitan Mortgage Group, Inc.* In summarizing the Court of Appeals, the *Bain* Court stated the following:

To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has “the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wash.2d at 785 [719 P.2d 531]. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986)). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 305-09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997).

Bain v. Metropolitan Mortgage Group, Inc., 285 P.3d 34, 49-50, 185 Wn.2d 83 (2012).

Mr. Levitz's Complaint alleged that all respondents engaged in a pattern and practice of deceptive and unlawful notices that resulted in

unfair, deceptive, and illegal foreclosure proceedings. Even if the information was accurate, it had the capacity to deceive. Specifically, these actions include “robo-signed” documents, an unauthorized Assignment of the Deed of Trust, an unauthorized and untimely Appointment of Successor Trustee, an untimely notice of default, Notice of Trustee’s Sale and Amended Notice of Trustee’s Sale. The facts stated in Mr. Levitz’s complaint sufficiently establish numerous claims that would allow a Court to draw the reasonable inference that respondents are liable under the Consumer Protection Act for their alleged misconduct.

It is clear that it is not necessary for an act or practice to be a per se violation of the Deed of Trust Act to state a Consumer Protection Act claim. The Supreme Court in *Klem* made clear that, “To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute, but in violation of public interest.” *Klem v. Washington Mutual Bank*, No. 87105-1, Slip Op. 16 (Feb. 28, 2013). In other words, an act or practice may be unfair or deceptive if it has the capacity to deceive and it is not a requirement

that the specific unfair or deceptive act be defined in a statute as a per se violation of a statute for that act or practice to violate the CPA.

The Washington Court of Appeals recently held that “To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public. Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law that we review de novo.” *State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011).

Respondent BMWW engaged in these unfair and deceptive business practices as per se violations of their statutory responsibilities under the Act. Respondents MERS, Capital One, and US Bank as Trustee for two mortgage-backed security pools also engaged in bad faith by naming MERS as a beneficiary under the Deed of Trust, when MERS has given nothing for value and is not the lender. The foregoing acts and practices, all of which have been alleged as facts in Mr. Levitz’s Complaint, have caused substantial harm to Mr. Levitz and other

borrowers because these actions are and can continue to be repeated with the public.

D. Breach of Covenant of Good Faith-Fair Dealing

The Deed of Trust Act, RCW 61.24 *et seq.*, mandates that the trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010(4).³ A basic principle of contract law dictates that in every contract there is an implied covenant of good faith and fair dealing. “An implied covenant of good faith inheres in every contract.” *Edmonson v. Popchoi*, 256 P.3d 1223, 1227 (Wash. 2011), citing *Miller v. Othello Packers, Inc.*, 67 Wash.2d 842, 844, 410 P.2d 33 (1966). The duty of good faith requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” Restatement (Second) Of Contracts § 205 cmt. a (1981); *see id.* cmt. d (“[B]ad faith may be overt or may consist of inaction.”).

Good faith and fair dealing duties are implied in every contract. *Badgett v. Security State Bank*, 116 Wash.2d 842, 807 P.2d 356 (1991). Good faith and fair dealing duties obligate the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id.*

³“(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”

Good faith and fair dealing are defined as honesty and lawfulness of purpose. *Tank v. State Farm Fire and Casualty Co.*, 105 Wash.2d 381, 715 P.2d 1133 (1986). Good faith and fair dealing involve: “[a]n honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with an absence of all information, notice or benefit or belief of facts which render transaction unconscientious.” *Holman v. Coie*, 522 Wash.App. 195, 522 P.2d 515 (1974) quoting Black’s Law Dictionary 822 (4th ed. 1951). These duties include a duty to disclose relevant facts while negotiating. *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). Withholding such facts is considered fraudulent concealment. *Id*; also see Restatement of Contracts § 472 (1932).

The Trustee, Bishop White Marshall and Weibel, violated this provision of the Deed of Trust Act, and the remaining respondents breached the implied covenant of good faith and fair dealing that inheres in every contract. Respondents knew or should have known that Mr. Levitz has a rightful claim of interest in the property, and the Divorce Decree and Temporary Order were in effect at the time defendants initiated foreclosure proceedings. These orders restrict alienation of the property by both parties to the divorce, and awarded control of the real property to Mr. Levitz.

Mr. Levitz also recorded a spousal claim of property with King County. The Decree and Temporary Order were vacated on July 14, 2011. The Court of Appeals upheld the order to vacate on procedural grounds, but did not make a ruling on any substantive issues. Nevertheless, the analysis, *supra*, applies regarding maintaining the *status quo* of the Claim of Spouse in Community Property. The respondents made a bad faith attempt to foreclose on property that would cause harm to the Levitz's son in violation of the court orders that were in place at the time the foreclosure proceeding was initiated.

Respondents also engaged in bad faith by attempting to foreclose when they had no legal right to do so. Although a recording of an Assignment of the Deed of Trust may not be required by statute, a recording of an Appointment of Successor Trustee is required by statute to be effective, and to give the successor trustee the powers of the original trustee. RCW 61.24.010(2). Simply put, if the Appointment has not been recorded, the Appointment has no effect and the "successor trustee" is not a trustee and is not empowered to take the actions of a trustee. Simply executing an Appointment of Successor Trustee without recording does not give effect to the Appointment. The parties cannot privately waive the terms of the statute and claim that because there may

be some agency arrangement, they are entitled to alter the requirements of the statute. *Bain*, 285 P.3d at 175.

E. Fraud and Misrepresentation

A pleading for fraud merely requires facts be sufficient to present a question of fraud. *Pedersen v. Bibioff*, 64 Wn. App. 710, 828, P.2d 1113 (1992). Pleadings are sufficient where the term “fraud” is used in the complaint and defendant is apprised of a transaction where fraud is alleged. *Id.* The elements of fraud that a plaintiff must establish at trial are (1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that it be acted upon by the plaintiff; (6) plaintiff’s ignorance of the falsity; (7) plaintiff’s justified reliance; and (8) damages. *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 194 P.3d 280 (2008), *review granted in part*, 210 P.3d 1019 (2009). Civil Rule 9(b) states that malice, intent, knowledge, and other conditions of the mind may be averred generally. These elements of fraud are elements of *proof* required to sustain the claim at trial, not elements that must be stated in the complaint.

1. *Assignment and Appointment Were Fraudulent*

Mr. Levitz alleged that respondents made a fraudulent appointment and a fraudulent assignment to unauthorized and/or illegal

parties. Additionally, Mr. Levitz has reason to believe that the signatures verifying the assignment and appointment may also be fraudulent. The names “Jeffrey R. Huston,” Vice President of MERS, and “Monica Hadley” as Assistant Secretary of MERS, signing for MERS as “Beneficiary,” and “Monica Hadley” signing as Assistant Vice President for US Bank, NA as Trustee for CCB Libor Series 2005-1 Trust may well be “robo-signers.” Consequently, Mr. Levitz must be afforded the opportunity to pursue these allegations through proper discovery.

Defendants have provided no evidence whatsoever that Jeffrey R. Huston and Monica Hadley did review the documents they are attesting to, nor any evidence that they are even natural persons. Many robo-signers are known to be fictitious names of persons who do not even exist. These documents were not timely recorded in accordance with the Deed of Trust Act in a manner that would provide them with authorization to act as a beneficiary or a trustee, because the documents were recorded after the defendants took the actions of a beneficiary or a trustee.

According to the SEC, no such entity or security known as “CCB Libor Series 2005-1 Trust” is registered with that federal agency, which is a requirement for all publicly traded securities. Nor have

respondents come forward with proof that this is a legally registered security. Therefore, this fraudulent party has no rights or interest in the subject deed of trust or Mr. Levitz's property, including the right to be a beneficiary, the right to collect on the note, or the right to foreclose.

A party cannot vary the terms of legislation and public policy by a private contract. The Washington Supreme Court in *Bain* rejected the notion that the courts should give effect to a contractual modification of a statute. *Bain v. Metropolitan Mortg. Group, Inc.* 285 P.3d 34, 175 Wn.2d 83, 108 (Wash. 2012). The Court held that "The legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals." *Id.* The court in *Bain* also found that "Nowhere in *Cervantes*⁴ does the Ninth Circuit suggest that the parties could contract around the statutory terms." *Id.* at 105.

2. MERS is Not an Authorized Party to a Deed of Trust

MERS contends that it may escape the requirements of the Deed of Trust Act by creating a deed of trust that uses a third party "nominee"

⁴ *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011).

as the beneficiary.⁵ However, in plenary statutes such as the Deed of Trust Act, where the legislature has expressed Washington's public policy on how foreclosures must occur, parties may not vary the terms by contract. In *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001), the Washington Supreme Court reviewed Washington's former Arbitration Act⁶ and determined that the defendants would not be allowed to contractually alter its terms. The Court held that because the Act was an expression of public policy by the Legislature it must be applied as a whole and without "common law" alternatives to its provisions. *Id.* at 885. Not only would this violate the legislature's stated public policy, but also because the parties would be invoking the powers of the state to enforce the arbitration decision, they must provide the rights and responsibilities contained in the statutory procedure to arrive at that decision.⁷ *Id.* at 897.

The Deed of Trust Act is also a plenary statute and a comprehensive expression of public policy. Like arbitration decisions, a non-judicial foreclosure is likely to require state powers to enforce the result though an eviction or unlawful detainer action. The Legislature has

⁵ The term "nominee" is not found in the Deed of Trust Act, RCW 61.24 *et seq.*, negotiable instruments law or Washington real property law in general.

⁶ RCW 7.04

⁷ See also *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (A contractual agreement "that violates public policy may be void and unenforceable.").

set forth in extensive detail the manner in which non-judicial foreclosures may proceed and parties should not be allowed to vary these procedures by contract. A party cannot take the actions of a successor trustee until the Appointment of Successor Trustee is recorded with the County and cannot alter this requirement of the statute by claiming that some alleged private agency arrangement allows them to circumvent that requirement.

VI. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motion for summary judgment and motion to dismiss, and remand for further proceedings consistent with the Court's opinion. Costs on appeal should be awarded to Mr. Levitz.

Signed and dated this 29th day of April, 2013.



Jill Smith, WSBA #41162

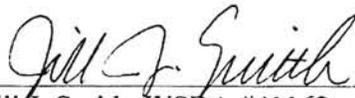
CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division I, and properly served to the counsel listed below, on April 29th, 2013.

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