

Case No. 71618-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BONITA D. LYON,
Appellant,
v.

QUALITY LOAN SERVICES CORP. OF WA, et al.,
Respondents.

Appeal from King County Superior Court
Case No. 13-2-16079-0 KNT, Hon. Andrea Darvas

RESPONDENT QUALITY LOAN SERVICE CORPORATION OF
WASHINGTON'S BRIEF

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STATE OF WASHINGTON
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STATEMENT OF THE CASE

Bonita Lyon obtained a \$182,800 loan from Pacific Community Mortgage, Inc. in 2006, and executed a Promissory Note and Deed of Trust securing the loan against residential property located in Renton, Washington. (CP 98-126, 180-181.) The Note and Deed of Trust were later transferred and assigned to Citibank, N.A. as Trustee for Bears Stearns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2006-5 (“Citibank”). (CP 128, 181.)

Lyon defaulted on her loan in May 2010. (*See* CP 134-137.) Quality Loan Service Corporation of Washington was appointed by Citibank as the successor Trustee of the Deed of Trust by an Appointment of Successor Trustee executed on November 14, 2011 and recorded on December 12, 2011. (CP 130-132.) On or about July 2, 2012, Quality sent Lyon a Notice of Default. (CP 181.) On or about July 25, 2012, Quality received a Declaration of Ownership from Citibank attesting that said entity is the actual holder of the Promissory Note secured by the Deed of Trust and that the promissory Note has not been assigned or transferred to any other person or entity. (CP 59.) Quality relied upon the Declaration of Ownership in advancing the foreclosure sale. (*See id.*)

Quality recorded a Notice of Trustee’s Sale on August 8, 2012, setting a sale date for December 7, 2012. (CP 60, 134-137, 181.) However the sale did not occur on that date, and it was not continued by the trustee. (CP 60.) As such, the Notice of Sale expired by operation of

law on December 7, 2012 when the sale was neither held nor postponed. *See* RCW 61.24.040(6).

Quality sent Plaintiff a second Notice of Default on or about October 4, 2012. (CP 60.) On December 18, 2012, Quality also recorded a new Notice of Trustee's Sale, setting a sale date of April 19, 2013. (CP 60, 139-142, 182.) However the sale again did not occur on that date. (CP 60.) On August 1, 2013, Quality recorded a Notice of Discontinuance as to each of the notices of sale. (CP 144-148.)

Plaintiff filed her Complaint on April 10, 2013, seeking to enjoin the foreclosure and for damages for violation of the Consumer Protection Act ("CPA"). (CP 189.) The trial court entered an order on May 3, 2013 enjoining Quality from conducting a trustee's sale, on the condition that Lyon posted a bond and made monthly payments into the court registry. (CP 190.) Both Citibank and Quality moved for summary judgment, and following a hearing on February 7, 2014, the court granted summary judgment for Defendants. (CP 192-196.)

STANDARD OF REVIEW

This Court reviews a summary judgment order de novo, performing the same inquiry as the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott v. Pac. W. Mt. Resort*, 119 Wn2d 484, 502,

834 P.2d 6 (1992). “A material fact is one that affects the outcome of the litigation.” *Owen*, 153 Wn.2d at 789.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Knox v. Microsoft Corp.*, 92 Wn.App. 204, 207, 962 P.2d 839 (1998). Once the moving party produces evidence showing the absence of disputed material facts, the burden shifts to the nonmoving party to produce admissible evidence setting forth facts showing a genuine issue for trial. CR 56(e). The nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Discover Bank v. Bridges*, 154 Wn.App. 722, 727, 226 P.3d 191 (2010) (citing *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

ARGUMENT

I. Plaintiff Did Not Establish Any Violation of the Consumer Protection Act.

Plaintiff assigns error to the trial court’s order dismissing her claim for violation of the Consumer Protection Act (“CPA”). (Opening Br. 5.) Plaintiff’s CPA claim was based on two contentions: First, Plaintiff alleged that Citibank did not have authority to foreclose because it was not the “beneficiary” as defined by RCW 61.24.005(2). (CP 188 ¶ 54.) Second, Plaintiff contended that the recording of a second Notice of Trustee Sale was a deceptive act. (CP 188 ¶ 53.) But because Lyon did

not produce evidence to establish the necessary elements of a CPA claim on either basis, the court properly granted summary judgment for Defendants.

A. The Undisputed Evidence Established Citibank's Authority to Foreclose.

As is discussed in Citibank's Response Brief, the undisputed evidence established that Citibank was the holder of the Promissory Note executed by Lyon. (CP 59, 188; *see* Citibank's Response Br. 7-8.) Plaintiff admitted as much. (*See* CP 188 ¶ 50.) Further, her Opening Brief cites to no evidence in the record that would demonstrate a genuine issue of material fact on this point. Washington law is clear that the holder of the note is the beneficiary under the DTA and has the power to direct the trustee to foreclose. RCW 61.24.005(2); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012); *Trujillo v. Nw. Trustee Servs., Inc.*, __ Wn.App. __, 326 P.3d 768, 776-777 (2014).

Moreover, no CPA cause of action can be stated against Quality Loan Service because it was entitled to rely on the beneficiary's declaration. Quality submitted evidence – unrebutted by Plaintiff – that on or about July 25, 2012, Quality received a Declaration of Ownership from Citibank attesting that said entity is the actual holder of the Promissory Note secured by the Deed of Trust, and that the promissory Note has not been assigned or transferred to any other person or entity. (CP 59.) RCW 61.24.030(b) provides that “Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the

beneficiary's declaration as evidence of proof" that the beneficiary is the holder of the note and is therefore entitled to foreclose. *See also Trujillo*, 326 P.3d at 781. While Plaintiff's Complaint alleged that Quality violated its duty of good faith by "deferring to Citibank's wishes," (*see* CP 187 ¶ 47), she presented no evidence to the trial court to substantiate this claim or demonstrate any way in which Quality failed to exercise its independent discretion. The fact that Quality was appointed as successor trustee by Citibank and initiated foreclosure at its request does not compel the conclusion that the trustee violated its duty to act fairly and impartially in conducting the foreclosure. *See, e.g., Trujillo*, 326 P.3d at 781.

B. The Second Notice of Trustee Sale Did Not Violate the Deed of Trust Act.

The thrust of Plaintiff's argument is that by issuing a second Notice of Trustee's Sale on December 18, 2012 before recording a notice of discontinuance of the first sale date, Quality violated the provisions of the Deed of Trust Act, and thus committed a deceptive practice under the CPA. (Opening Br. 12-13.) This contention is not supported by the DTA.

First, as a matter of law, the sale under the first Notice of Trustee's Sale lapsed before Quality issued the second Notice of Trustee's Sale. The initial sale set for December 7, 2012 did not occur on that date and it was not continued by the trustee. (CP 59 ¶ 8.) While the DTA permits a trustee to postpone a trustee's sale for up to 120 days from the original sale date, the statute does not require such postponements. RCW 61.24.040(6) ("The trustee has no obligation to, but may . . . continue the

sale for a period or periods not exceeding a total of one hundred twenty days . . .”). Thus, although Quality was authorized to postpone the sale to another date, it was not required to do so. (CP 59 ¶ 8.) A sale postponement must be made by both public proclamation at the time and place fixed for sale and written notice of continuance. RCW 61.24.040(6). The evidence in the record demonstrates that the December 7, 2012 sale did not occur, was not continued, and no postponement was made. (CP 59 ¶ 8.) Instead, Quality issued a new Notice of Trustee’s Sale, setting a new sale date for April 19, 2013. (CP 59 ¶ 9.)

Plaintiff cites to no legal authority that would render it impermissible for a trustee to issue a second notice of sale after a prior sale date has been cancelled. She attempts to argue that the second Notice of Trustee’s Sale was improper because the first Notice of Trustee’s Sale had not expired by operation of law, as less than 120 days had passed from the date initially set for sale. But Plaintiff misreads RCW 61.24.040(6), which, as addressed above, merely permits but does not require a trustee’s sale date to be continued. Plaintiff also argues that the first Notice of Trustee’s Sale did not expire until the Notice of Discontinuance was recorded on August 1, 2013. (Opening Br. 13.) Again, this contention is unsupported by legal authority. Under RCW 61.24.090, the trustee is required to record a notice of discontinuance of trustee’s sale only “if the default is cured and the obligation and the deed of trust reinstated” by payment of an amount necessary to cure the default. RCW 61.24.090(6). There is no statutory requirement that a trustee record a notice of

discontinuance of sale any time a sale date is cancelled and not postponed. Rather, a sale that is neither held in compliance with RCW 61.24.040-070, nor postponed in compliance with RCW 61.24.040(6), terminates by operation of law. Here, the sale was neither conducted nor continued under the First Notice of Sale on the initial sale date of December 7, 2012, at which point it terminated as a matter of law. There was no requirement that it be discontinued under RCW 61.24.090(6). With the termination of the December 7 sale under the first Notice of Sale, Quality recorded the second, December 18, 2012 Notice of Sale. There was no time period during which more than one trustee's sale was pending for the subject property. Plaintiff failed to demonstrate any violation of the Deed of Trust Act that would give rise to a cause of action under either the DTA or, by extension, the CPA.

C. Plaintiff Did Not Establish the Elements of a CPA Claim.

In addition, the trial court properly granted summary judgment for Quality Loan Service on Plaintiff's CPA claim because Plaintiff failed to establish proof of the necessary elements. To prevail on a CPA claim, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff's business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Failure to satisfy even one of the elements is fatal to a CPA claim. *Id.* at 793.

1. *No Deceptive Act or Practice*

A plaintiff can meet the first element in only two ways: either by identifying a statute that renders the act a *per se* unfair act, or by showing the act is “deceptive” and “has a capacity to deceive a substantial portion of the public.” *Id.* at 785-86; *Sanders v. Lloyd’s of London*, 113 Wn.2d 330, 344 (1989). Plaintiff cites no statute that would render the issuance of a second notice of trustee’s sale a *per se* unfair act. As the Supreme Court explained in *Hangman Ridge*, only the Legislature may declare a statutory violation to be a *per se* unfair practice. *Hangman Ridge*, 105 Wn.2d at 787.

Because neither DTA nor any other statute makes the issuance of a second notice of sale a *per se* CPA violation, Plaintiff can only satisfy this element by showing the conduct “has a capacity to deceive a substantial portion of the public.” *Id.* Plaintiff has made no such showing. Indeed her only allegation is that for a two-month period she did not “definitively” know on which date – December 7, 2012 or April 19, 2013 – the property would be sold. (Opening Br. 19; RP 10:11-13.) As an initial matter, this contention is not well taken because by the time the second sale date was set, the December 7, 2012 date had already passed and therefore Plaintiff was not left to wonder whether the property would be sold on that date. But in addition, Plaintiff’s alleged uncertainty about which sale date would go forward for a period of two months does not have the “capacity to deceive a substantial portion of the public.”

2. No Public Interest Impact

Ordinarily, a private dispute such as a breach of contract will not be found to affect the public interest. *Hangman Ridge*, 105 Wn.2d at 790. Rather, to state a CPA claim, a “private plaintiff must show that his lawsuit would serve the public interest.” *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 605 (2009). In order to meet the “public interest” test under the CPA, the Plaintiff must show that “the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion ... [this is what] changes a factual pattern from a private dispute to one that affects the public interest.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 80 (2007). Here, Plaintiff argues only that Quality’s business is to conduct foreclosures throughout Washington. (Opening Br. 20.) That is true. But that does not satisfy the public interest element of the CPA because Plaintiff has presented no evidence to show that the acts complained of here – issuing a second notice of sale shortly after the date initially noticed for trustee’s sale – have a real or substantial potential to affect a large number of consumers, or a likelihood that a large number of other consumers will be injured in the same fashion. Plaintiff’s alleged uncertainty about the date her rental property would be sold does not implicate a public interest impact, but rather impacts only her own affairs.

3. No Injury to Plaintiff’s Business or Property

In an attempt to demonstrate injury, Plaintiff contends that she has spent time and expenses to litigate the present case. (Opening Br. 20-21.)

Notably, Plaintiff cites to no evidence in the record to substantiate any of her alleged injuries. Moreover, litigation costs expended to prosecute a CPA claim do not satisfy the injury element of the claim. *See Panag v. Farmers Inc. Co. of Wash.*, 166 Wn.2d 27, 62 (2009) (finding investigation expenses arising from uncertainty about the nature of an alleged debt were sufficient to establish injury, but consulting with an attorney and prosecuting a CPA claim were not). Lyon acknowledged at the hearing on Defendants' summary judgment motions that her only alleged injury was the time and money she spent to prosecute her CPA claim. (RP 18:8-16.) Because this is not a cognizable injury that would satisfy the elements of the claim, summary judgment was properly granted to Defendants.

II. Discontinuance of the Trustee's Sale Did Not Violate the Preliminary Injunction.

Plaintiff devotes a large portion of her Opening Brief to the argument that Quality's discontinuance of the trustee's sale violated the preliminary injunction entered by the court on May 3, 2013. (Opening Br. 12-17.) The preliminary injunction order at issue granted Plaintiff's request for "an injunction to enjoin the trustee's sale" pending further order of the court. (CP 190.) Plaintiff believes that the preliminary injunction order meant more than it said, such that it prohibited Quality both from conducting the trustee's sale *and* from discontinuing the trustee's sale. (Opening Br. 15.) But in interpreting the scope of the judge's order, this Court must look to the plain language of the order and

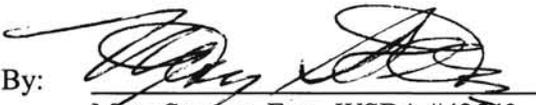
read it in light of the judge's intent. *See City of Vancouver v. Pub. Emp't Relations Comm'n*, 180 Wn.App. 333, 352-353, 325 P.3d 213 (2014) (discussing interpretation of agency orders). Here the judge made her intent and meaning behind the preliminary injunction order clear, as she explained: "An injunction simply requires something or prohibits something. And in your case the injunction prohibited the foreclosure in the trustee sale on the condition that you make the payments into the registry of the court. That's all the injunction did." (RP 11:10-16.) Because the court did not enjoin Quality from cancelling the trustee's sale or issuing a notice of discontinuance, Plaintiff's arguments are without merit.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision granting Quality Loan Service Corporation of Washington's motion for summary judgment.

Dated: July 23, 2014

Respectfully Submitted,
McCarthy & Holthus, LLP

By: 
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CERTIFICATE OF SERVICE

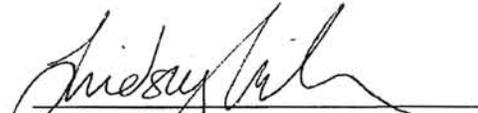
I certify that on July 24, 2014 I served a copy of the foregoing document, described as **RESPONDENT QUALITY LOAN SERVICE CORPORATION OF WASHINGTON'S BRIEF**, on the following persons by U.S. First Class Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Seattle, Washington.

Dated: July 24, 2014



Lindsay Wilson
Legal Assistant, McCarthy & Holthus, LLP

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