

No. 45037-2-II

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

RICHARD L. IRWIN

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP;  
EMC MORTGAGE CORPORATION; WELLS FARGO BANK, N.A.,  
SUCCESSOR BY MERGER TO WELLS FARGO BANK  
MINNESOTA, N.A., f/k/a NORWEST BANK MINNESOTA, N.A.  
SOLELY AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE  
INVESTMENTS II TRUST 2007-AR4, MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2007-AR4; JPMORGAN CHASE BANK,  
N.A.,

Respondents.

**OPENING BRIEF OF RESPONDENT  
NORTHWEST TRUSTEE SERVICES, INC.**

Submitted By:  
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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court properly dismissed Irwin's claims, with prejudice, for violation of the Consumer Protection Act; breach of the covenant of good faith and fair dealing; and fraud and misrepresentation.

## **II. STATEMENT OF THE CASE**

On or about June 21, 2007, Appellant Richard Irwin ("Irwin") and Miriam J. Irwin executed a promissory note (the "Note") in the amount of \$233,750.00, payable to GreenPoint Mortgage Funding, Inc. CP 3-4, 67-69, 83-91; Brief of Appellant at 8. Irwin secured repayment of the Note with a Deed of Trust. *Id.*; CP 92-118. On June 28, 2007, the Deed of Trust was recorded with the Pierce County Auditor, and encumbered real property located in Pierce County (the "Property"). *Id.*

On December 1, 2010, Irwin defaulted on the terms of the Note and Deed of Trust when he failed to make any further required loan payments. CP 71, CP 200-202.

On June 29, 2011, an Assignment of Deed of Trust in favor of Wells Fargo Bank, National Association as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc. Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR-4 ("Wells Fargo") was recorded under Pierce County Auditor's No. 201106290251. CP 4-5; Brief of Appellant at 9-10.

On or about September 12, 2012, as a result of Irwin's default, Northwest Trustee Services, Inc. ("NWTS"), as Wells Fargo's authorized agent, sent him a Notice of Default. CP 199-202<sup>1</sup>; Brief of Appellant at 10-11.

On September 13, 2012, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded under Pierce County Auditor's No. 201209130628. CP 71, 189-192; Brief of Appellant at 11-12.

On or about December 20, 2012, a Notice of Trustee's Sale was recorded under Pierce County Auditor's No. 201212201233. CP 227-231; Brief of Appellant at 12. This Notice set a sale date of March 22, 2013. *Id.* The Notice disclosed the original parties to the Deed of Trust and the subsequent assignment to Wells Fargo.<sup>2</sup> *Id.* Furthermore, the Notice disclosed Wells Fargo as the grantor of the Notice. *Id.* Despite recordation of the Notice, to date, no sale has taken place. CP 80.

On May 31, 2013, the Hon. Judge Stephanie A. Arend granted NWTS' Motion to Dismiss, and entered an order to that effect. CP 254-255. This appeal followed.

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<sup>1</sup> Under RCW 61.24.031, a Notice of Default may be issued by the trustee, beneficiary, or *an authorized agent*. NWTS acted in the latter capacity prior to its appointment as successor trustee.

<sup>2</sup> RCW 61.24.040(f)(1) requires disclosure of the original parties to the deed of trust along with any subsequent assignees.

### III. RESPONSE ARGUMENT

#### A. Standard of Review.

An order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 899, 249 P.3d 625, 626 (2010), citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

Under CR 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief can be granted. The gravamen of the court's inquiry is whether the plaintiff's claim is legally sufficient, which is answered by looking to the face of the pleadings. *Id.*; *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008). Dismissal is proper where the claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). Hypothetical facts must bear a logical relation to the claims raised in the complaint. See *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 116, 233 P.3d 861 (2010) (Johnson, J., dissenting). The court is "not required to accept a complaint's legal conclusions as true." *Rodriguez* at 717-18.

In addition to the pleadings, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to

dismiss.” *Id.* at 726. Submission of extraneous material normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn. App. 236, 239, 797 P.2d 521 (1990). However, “if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, [the] motion remains one under CR 12(b)(6).” *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987).

Here, the facts presented did not entitle Irwin to relief against NWTS, regardless of whether considered under CR 12(b)(6) or converted to summary judgment. As such, the trial court’s order should be affirmed for the reasons set forth below.

B. The trial court properly granted NWTS’ motion to dismiss Irwin’s CPA claim as Irwin failed to plead the essential elements of his claim.

The court properly dismissed Irwin’s Consumer Protection Act (“CPA”) claim because he failed to satisfy the five essential elements for a CPA claim: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). As the Washington Supreme Court clarified, a plaintiff “must produce evidence

on each element required to prove a CPA claim. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 119, 285 P.3d 34 (2012). Here, Irwin's CPA claim against NWTS focuses on one fact: that NWTS issued the Notice of Default prior to being appointed as successor trustee. Brief of Appellant at 22-23. However, Irwin cannot prove elements necessary to establish a violation of the CPA.

1. Pursuant to the Deed of Trust Act, NWTS was entitled to issue the Notice of Default as the beneficiary's agent; therefore, Irwin failed to identify any deceptive or unfair act.

To establish the first element of a CPA claim, the consumer must identify an unfair or deceptive act in one of two ways: he must establish either (1) that an act or practice has a capacity to deceive a substantial portion of the public, or (2) that the alleged act constitutes a *per se* unfair trade practice. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989) (quoting *Hangman Ridge*, 105 Wn.2d at 785-86) (emphasis added). A *per se* CPA violation may only be established by the Washington Legislature and requires a specific declaration by the legislature that violation of the statute affects the public interest or constitutes a *per se* violation of the CPA. *Hangman Ridge*, 105 Wn.2d at 787, 791. Here, Irwin did not plead a *per se* violation of the CPA.

Therefore, the only way Irwin can establish the first element of his CPA claim is by showing that NWTS engage in conduct that has a capacity to deceive a substantial portion of the public. *Saunders*, 113 Wn.2d at 344 (quoting *Hangman Ridge*, 105 Wn.2d at 785-86). “Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Comm. Ass’n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). But acts “performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997).

In the present case, existing law specifically allows the beneficiary to direct an “authorized agent” to issue a notice of default. RCW 61.24.031(1)(a); *See Bain*, 175 Wn.2d at 106 (“Washington law, and the deed of trust act itself, approves the use of agents.”); *See also Gossen v. JPMorgan Chase Bank*, 819 F. Supp.2d 1162, 1170 (W.D. Wash. 2011). The act of sending the Notice of Default as agent for the beneficiary is neither misleading, nor does it misrepresent something of material importance. In fact, the Washington Legislature specifically authorizes it, and Irwin failed to provide any contrary authority. RCW 61.24.031(1)(a).

In *Gossen*, the court addressed this identical issue (NWTS issuing a Notice of Default prior to recordation of the Appointment of Successor Trustee) and affirmed the plain language of RCW 61.24.031(1)(a): “The DTA...expressly allows the beneficiary (Chase) to direct an ‘authorized agent’ (NWTS) to issue the notice of default. By statute, then, an agent of the beneficiary may issue the Notice of Default.” *Gossen*, 819 F.Supp.2d at 1169-1170 (“[t]he Notice of Default makes clear that NWTS was not acting as trustee, but rather as the ‘duly authorized’ agent for Chase”). The facts in *Gossen* are virtually identical to the instant action in that prior to recordation of the Appointment of Successor Trustee, NWTS, as the duly authorized agent of the beneficiary, transmitted a Notice of Default to the borrowers. *Id.* at 1165. As in *Gossen*, the Notice of Default in the instant action specifically states it was issued by NWTS as Wells Fargo’s agent. The signature line reads as follows: “Wells Fargo Bank, N.A. successor by merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.A. solely as Trustee for Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4 By Northwest Trustee Services, Inc., its duly authorized agent.” Therefore, the fact that NWTS was appointed successor trustee one day later is irrelevant. NWTS issued the notice of default as the agent of Wells Fargo, which is permitted by Washington law.

Furthermore, Irwin failed to establish the first element of his CPA claim because the alleged unfair act relates to conduct directed at him personally, not the general public. Issuing the Notice of Default as agent for the beneficiary does not have the capacity to deceive any other member of the public, let alone a substantial portion of the public, when the notice was directed to Irwin, personally. Therefore, the trial court properly dismissed the CPA claim against NWTS because (1) it did not commit any deceptive or unfair act and (2) the act complained of could not deceive a substantial portion of the public.

2. Irwin failed to identify any impact on the public interest.

A successful CPA claim must also establish impact on the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged acts were committed. *Hangman Ridge*, 105 Wn.2d at 780. Because Irwin complains of a consumer transaction, the following factors are relevant:

(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

*Id.* at 790. Despite Irwin’s conclusory and unsupported allegations, he fails to sufficiently show that the public interest has been impacted by NWTS issuing the Notice of Default as agent for the beneficiary, rather than as successor trustee.

3. Irwin failed to allege any damages caused by NWTS.

Finally a CPA claim must sufficiently establish a causal link between the alleged unfair act or deceptive practice and the purported injury. *Hangman Ridge*, 105 Wn. 2d at 793. Post *Hangman Ridge*, the Washington Supreme Court clarified this requirement by imposing a proximate cause standard: “A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007).

Here, Irwin has not satisfied this requirement because he has not identified any injury he allegedly suffered that was proximately caused by any conduct of NWTS. In fact, Irwin failed to provide any evidence of injury in his complaint, and his appellate brief is equally void of any alleged injury caused by NWTS. CP 9-10; Brief of Appellant at 27. As a matter of fact, Irwin’s brief does not mention NWTS once in his entire section on damages under the CPA. *Id.* Irwin’s CPA claim failed to satisfy

the injury and causation elements because he has not identified any actual injury, much less any alleged injury that was proximately caused by NWTS' conduct. The trial court properly dismissed his CPA claim.

C. Irwin cannot allege breach of good faith and fair dealing or violation of the DTA against NWTS for the first time on appeal.

Irwin may not allege breach of good fair and fair dealing or a violation of the Deed of Trust Act against NWTS for the first time on appeal. *See Washington Federal Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53, 56 (2013); *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 510, 182 P.3d 985 (2008). "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Id.*

Irwin did not plead breach of the covenant of good faith and fair dealing against NWTS in his complaint. CP 8:20-22. In fact, Irwin's complaint explicitly excluded NWTS: the claim was made "As to all Defendants Except Northwest Trustee Services, Inc." *Id.* Therefore, any alleged breach may not be raised now.

Similarly, Irwin failed to plead a violation of the DTA against NWTS based upon its good faith requirement. CP 1-11. Irwin alleged three causes of action in his complaint; however, a violation of the DTA by NWTS was not one of them. *Id.* Given that Irwin failed to plead both breach of good faith and fair dealing and violation of the DTA as to

NWTS, he may not raise them for the first time on appeal.

D. The court properly dismissed Irwin's fraud claim against NWTS as it was insufficiently plead and failed as a matter of law.

1. Irwin failed to identify in his complaint a false, material fact; reliance thereon; or damages that he suffered.

Irwin's complaint failed to plead a cause of action for fraud as it must be plead with particularity. CR 9(b); *Adams v. King County*, 164 Wn. 2d 640, 662, 192 P.3d 891 (2008). "Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud." *Id.* The court goes on to list the elements of fraud: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Id.* Irwin's complaint includes one paragraph in which he alleges that the defendants' actions were fraudulent, but it does not specify which defendant, which actions, the dates of those actions, or if the fraud is based on a written notice, which notice. CP 7:¶ 37. Irwin simply failed to identify a false, material fact. Even if the court had been able to decipher what Irwin thought was the false, material fact, he failed

to plead an injury attributable to his alleged reliance. Based upon Irwin's insufficient pleading, the court properly dismissed his fraud claim.

2. Irwin's brief more specifically pleads fraud, but it still fails as a matter of law.

Irwin's appellate brief attempts to cure the defect in his complaint by actually identifying the alleged false, material facts communicated by the defendants.<sup>3</sup> Brief of Appellant 34-35. With respect to NWTS, Irwin makes one allegation; he states that NWTS sent a notice of trustee's sale dated December 11, 2012, "wherein it alleged that the sale would be performed to secure an obligation in favor of MERS solely as nominee for GreenPoint Funding, Inc. even though GreenPoint had no interest in the Note at least as of June 29, 2011, when the Assignment of Deed of Trust was recorded with Pierce County." *Id.* Irwin's new, clarified fraud claim still fails as a matter of law.

RCW 61.24.040(1)(f)(I) requires a Notice of Trustee's Sale to substantially include the following information describing the *original* Deed of Trust:

NOTICE IS HEREBY GIVEN that the undersigned Trustee will on the . . . . day of . . . . ., . . . ., at the hour of . . . . o'clock . . . . M. at . . . . . [street address and location if inside a building] in the City of . . . . ., State of Washington, sell at public auction to the highest and best bidder, payable at the time

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<sup>3</sup> As previously noted, "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Federal Sav. v. Klein*, 311 P.3d at 56.

of sale, the following described real property, situated in the County(ies) of . . . . ., State of Washington, to-wit:

[If any personal property is to be included in the trustee's sale, include a description that reasonably identifies such personal property]

which is subject to *that certain Deed of Trust* dated . . . . ., . . . . ., recorded . . . . ., . . . . ., under Auditor's File No. . . . ., records of . . . . . County, Washington, from . . . . ., as Grantor, to . . . . ., as Trustee, *to secure an obligation in favor of* . . . . ., *as Beneficiary*, the beneficial interest in which was assigned by . . . . ., under an Assignment recorded under Auditor's File No. . . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

(Emphasis added.)

As a result, NWTS was mandated to state “MERS as nominee for GreenPoint Funding, Inc.” in the notice of sale because that identification was stated in the *original* Deed of Trust. CP 92-118. Had NWTS *not* included this information about MERS and GreenPoint’s prior capacity, it may have violated the Deed of Trust Act. Statutory compliance should not lead to Irwin, or any other appellant, automatically establishing elements necessary to prove a claim for fraud. This tension between adhering to one law, yet almost violating another as a result, cannot be the Court’s desired outcome.

At no time did NWTS represent that MERS or GreenPoint were the current beneficiary, or that MERS or GreenPoint were attempting to foreclose. To the contrary, the notice of sale represents that the beneficial

interest in the Deed of Trust was assigned to Wells Fargo Bank, National Association as Trustee for the Certificateholders, Series 2007-AR-4. CP 227-231.

While Irwin's complaint failed to state a fraud claim upon which relief could be granted, his appellate brief fails to provide a more successful set of facts. The court's decision to dismiss Irwin's claim of fraud should be affirmed.

#### **IV. CONCLUSION**

Irwin's CPA and fraud claims were insufficiently plead and properly dismissed. With respect to his claims against NWTs for breach of the covenant of good faith and fair dealing and violation of the DTA, Irwin cannot raise new claims on appeal. This Court should affirm the ruling below in its entirety.

DATED this 3<sup>th</sup> day of February, 2014.

**RCO LEGAL, P.S.**

By:   
Lauren Davidson Humphreys, WSBA  
No. 41694

Of Attorneys for Respondent  
Northwest Trustee Services, Inc.

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

RICHARD L. IRWIN, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 NORTHWEST TRUSTEE SERVICES, INC.; )  
 MORTGAGE ELECTRONIC )  
 REGISTRATION SYSTEMS, INC., a/k/a )  
 MERSCORP; EMC MORTGAGE )  
 CORPORATION; WELLS FARGO BANK, )  
 N.A., SUCCESSOR BY MERGER TO WELLS )  
 FARGO BANK MINNESOTA, N.A., SOLELY )  
 AS TRUSTEE FOR STRUCTURED ASSEST )  
 MORTGAGE INVESTMENTS II TRUST )  
 2007-AR4, MORTGAGE PASS-THROUGH )  
 CERTIFICATES SERIES 2007-AR4; )  
 JPMORGAN CHASE BANK, N.A., )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

No. 45037-2-II

**DECLARATION OF SERVICE**

The undersigned makes the following declaration:

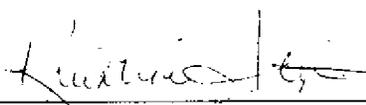
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on February 3, 2014 I caused a copy of the **Opening Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

<p>1 Jill J. Smith  2 Natural Resource Law Group, PLLC  2217 NW Market St., Suite 27  3 Seattle, WA 98107</p> <p>4 Attorneys for Appellant</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile</p>
<p>5 Fred B. Burnside  6 Hugh McCullough  7 Davis Wright Tremaine, LLP  1201 Third Ave., Suite 2200  8 Seattle, WA 98101-3150</p> <p>9 Attorneys for Respondents Mortgage Electronic  10 Registration Systems, Inc.; EMC Mortgage  11 Corporation; Wells Fargo Bank, N.A., as Trustee for  12 Structured Asset Mortgage Investments II Trust  2007-AR4; and JPMorgan Chase Bank, N.A.</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile</p>

13 I declare under penalty of perjury under the laws of the state of Washington that the foregoing is  
14 true and correct.

15 Signed this 23<sup>rd</sup> day of February, 2014.

17   
18 \_\_\_\_\_  
19 Kristine Stephan, Paralegal

# ROUTH CRABTREE OLSEN

**February 03, 2014 - 1:08 PM**

## Transmittal Letter

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Reply to Response to Personal Restraint Petition

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# ROUTH CRABTREE OLSEN

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### Transmittal Letter

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