

No. 45642-7-II

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

MARK A. VELASCO and DANIKA E. VELASCO,
and the marital community composed therein,

Appellants

v.

NORTHWEST TRUSTEE SERVICES, INC., WELLS FARGO BANK,
HSBC Bank USA, National Association as Trustee for WFMBS 2007-011, WELLS
FARGO HOME MORTGAGE, MERSCORP, INC., a Delaware Corporation,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Respondents.

Appeal from Superior Court for Lewis County
The Honorable Judge John Lawler

APPELLANTS' REPLY BRIEF

Jill J. Smith, WSBA #41162
Natural Resource Law Group, PLLC
2217 NW Market St., Suite 27
Seattle, WA 98107-4062
(206) 227-9800
Attorney for Appellant

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	4
II. LEGAL ARGUMENT	5
A. <u>MERSCORP Holdings, Inc. Is the Alter-Ego and Parent Company of Mortgage Electronic Registration Systems, Inc.</u>	5
B. <u>All Respondents Violated the Consumer Protection Act</u>	6
C. <u>Securitization is a Consumer Protection Act Violation and Borrower Has the Right to Challenge a Fraudulent Assignment</u>	12
D. <u>Respondents are Liable for Negligence</u>	13
E. <u>Quiet Title</u>	15
VI. CONCLUSION	16

TABLE OF AUTHORITIES

<i>Antilles Cement Corp. v. Fortuno</i> , 670 F.3d 310, 317 (1 st Cir. 2012)	13
<i>Bain v. Metro. Mortg. Group, Inc.</i> , 175 Wn.2d 83, 93, 285 P.3d 34 (2012)	9
<i>Commonwealth of Kentucky ex rel. Jack Conway, Attorney General v. MERSCORP Holdings, Inc. and Mortgage Electronic Registration Systems, Inc.</i> , Franklin Circ. Ct., Kentucky, Div. 1 No. 13-CI-00060, January 23, 2103	5
<i>Cosajay v. MERS</i> , U.S. Dist. Ct., Rhode Island Case No. 10-00442 (Order of Nov. 5, 2013, p. 9).	12-13
<i>Culhane v. Aurora Loan Services of Nebraska</i> , 708 F.3d 282 (1st Cir. 2013).	12-13
<i>Elder v. MERS, et al.</i> , Mason County Superior Ct. Case No. 13-2-00604-2, Order of April 7, 2014).	6
<i>Glaski v. Bank of America, N.A.</i> , 218 Cal. App. 4th 1079 (2013).	13

<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778 (1986).	11
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).	8
<i>Nueces County, Texas v. MERSCORP Holdings, Inc., Mortgage Electronic Registration Systems, Inc. et al.</i> , U.S. Dist. Ct. No. 1:12-CV-00131 (July 3, 2013).	5
<i>Nieuwejaar v. BANA, et al.</i> , Case No. 14-CV-00302-JCC Order of July 10, 2014	13
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	12
<i>People v. JP Morgan Chase Bank N.A.</i> , No. 2012/2768 (N.Y. Sup. Ct. Feb. 3, 2012).	5
<i>Price v. Northern Bond & Mortg. Co.</i> , 161 Wash. 690, 297 P. 786 (Wash. 1931)	11
<i>Reinagel v. Deutsche Bank National Trust Co.</i> 722 F.3d 700 (5 th Cir. 2013).	12
<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984).	8
<i>Walker v. Quality Loan Service Corp.</i> , 176 Wn. App. 294, 308 P.3d 716 (2013).	15
<i>Watson v. Emard</i> , 267 P.3d 1048, 165 Wn.App. 691 (2011)	8
<i>Woods v. Wells Fargo Bank, N.A.</i> , 733 F.3d 349 (1 st Cir. 2013).	12

STATUTES

RCW 7.28.010	15
RCW 19.86.020	8
RCW 61.24.031	8
RCW 61.24.135(2)	8
RCW 61.24.163	8
RCW 61.24.174	8

I. INTRODUCTION

Respondents pervasively mis-state or omit material facts. The Velascos took immediate action to communicate with Wells Fargo, who alleged it was the servicer of the loan and HSBC the beneficiary, shortly after the devastating flood caused a drastic reduction in their business income. Wells Fargo took advantage of this misfortune to thwart the Velascos' attempt to obtain a loan modification so their monthly payments would be more affordable, including telling the Velascos that they would be required to make a large balloon payment or be held in default. The Respondents sent the Velascos foreclosure notices immediately after they completed the first 90-day plan. Then, after almost two years of working in good faith with Wells Fargo to keep their loan on track, the Velascos were given another Notice of Trustee's Sale by Wells Fargo and Northwest Trustee Services, Inc. to begin foreclosure proceedings on the property.

The Respondents strategically omitted numerous material facts in their responses. By intentionally causing the Velascos to fall further and further into arrears on the loan, Respondents intentionally made it more difficult for the Velascos to obtain a satisfactory loan modification. The Velascos filed suit in 2011 after realizing that Wells Fargo was not dealing in good faith with them and they were determined to keep their home. In April 2013, NWTS sent yet another NOD, in preparation for yet another Notice of Trustee's Sale.

The Velascos presented evidence of damages, and it is difficult to comprehend defendants' position that the Velascos presented no admissible

evidence of damages. The Declaration of Mark Velasco included numerous exhibits that demonstrated damages (time and money spent sending faxes and applying for loan modifications on several occasions; time and money spent on filing a claim with the OCC and the Dept. of Financial Institutions); hiring legal counsel; falling further into arrears because of Wells Fargo's failure to provide a permanent loan modification making the possibility of a loan modification more and more remote.

II. LEGAL ARGUMENT

A. MERSCORP Holdings Is the Alter-Ego and Parent Company of Mortgage Electronic Registration Systems, Inc.

As to Respondents' comment in FN 3 of their brief, this point should be disregarded. MERS is the alter-ego of MERSCORP Holdings, Inc., and has been held as such in numerous cases. MERS, Inc. is a wholly-owned subsidiary of MERSCORP. MERS, Inc. only obtains its authority to act from MERSCORP Holdings, Inc., its parent company. Courts routinely attribute the acts of MERS to MERSCORP Holdings. *Nueces County, Texas v. MERSCORP Holdings, Inc. Mortgage Electronic Registration Systems, Inc., et al.*, U.S. Dist. Ct. No. 1:12-CV-00131 (July 3, 2013); *Commonwealth of Kentucky ex rel. Jack Conway, Attorney General v. MERSCORP Holdings, Inc. and Mortgage Electronic Registration Systems, Inc.*, Franklin Circ. Ct., Kentucky, Div. 1 No. 13-CI-00060, January 23, 2103; *People v. JP Morgan Chase Bank N.A.*, No. 2012/2768 (N.Y. Sup. Ct. Feb. 3, 2012). The court in one recent case in Mason County Superior Court refused to dismiss MERSCORP, Inc. based on the fact that MERSCORP, Inc. is the parent

company of MERS, and that the only reason for the existence of MERSCORP, Inc. is to administer the MERS System. *Elder v. MERS, et al.*, Mason County Case No. 13-2-00604-2, Order of April 7, 2014.

MERSCORP Holdings operates a database and tracking system known as Mortgage Electronic Registration System. It is nothing more than that – a database used to avoid recording statutes. MERSCORP is the parent company operating this database. Therefore, all claims made against MERS, Inc. are also made against MERSCORP Holdings, Inc. and Appellant is not required to state separate sets of facts solely against MERSCORP Holdings.

B. All Respondents Violated the Consumer Protection Act

The three-month moratorium was not really a moratorium at all but an illusory moratorium where Wells Fargo demanded a \$14,000.00 payment at the end of those three months. This was no “assistance” at all as respondents characterize it, nor was the \$14,000.00 payment requirement disclosed to the Velascos prior to Wells Fargo granting them a “moratorium.” The Velascos could have made the regular payments at the end of those three months, but not the \$14,000.00 demand. It was the Velascos who requested to be evaluated for a loan modification.

Wells Fargo again misstates the facts when they claim no new foreclosure of the property was ever scheduled (p. 1, ¶2 Respondent’s Brief). NWTS sent a notice of default at Wells Fargo’s/HSBC’s request on April 10, 2013, which re-initiated foreclosure proceedings even while this case was still in litigation. While a Notice of Trustee’s Sale was not issued after that NOD, the NOD is the

initial document to begin foreclosure proceedings, and the required precursor to the Notice of Trustee's Sale. Therefore, new foreclosure proceedings had begun in 2013.

The Velascos have NOT lived on the property for free for over five years. They have expended funds to cover legal fees, the costs of applying several times for a loan modification, and the stress and uncertainty of not knowing from one month to the next whether the bank would foreclose on their property. All these facts are in dispute, as the superior court acknowledged, but failed to recognize these facts and the facts raised in the opening brief are material facts.

The trial court's reasoning that the CPA claim was "derivative" of other claims was in error. (VRP 43:9-13). The Appellants' Consumer Protection Act claims were independent claims that are not derivative of any other claims. Therefore, the trial court's dismissal was in error on this point and should be reversed. The trial court reasoned that since it found that Respondents acted lawfully in the foreclosure process, the Velascos' CPA claims failed. (VRP 43:9-13). Under the trial court's reasoning, in the context of non-judicial foreclosures, borrowers would never have a remedy for violations of the Deed of Trust Act or the CPA, so long as the foreclosing entity made the bare assertion that it had the authority to foreclose. This would render the procedures required under the Deed of Trust Act and the Consumer Protection Act meaningless.

1. *Respondents' Actions Were Unfair and Deceptive*

It is again, unfair, deceptive, and disingenuous to take issue with the fact that Mr. Velasco withdrew from the mediation because Mr. Velasco was told

several times by Wells Fargo that they could not offer a loan modification because the investor wouldn't allow it. See ¶45, Velasco Declaration, Exh. CC to Declr., even though their own PSA allows modification of the mortgage. Respondents can't have it both ways.

The Deed of Trust Act, as amended in 2011, defines certain unfair and deceptive acts when it declares: "It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031." RCW 61.24.135(2), *Watson v. Northwest Trustee Services, Inc.*, WA Court of Appeals, Division 1, No. 69352-2-I, pp. 3-4 (March 18, 2014). The court must liberally construe the CPA "so that its beneficial purposes may be served." RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

The Supreme Court in *Klem v. Washington Mutual Bank* emphasized 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 in addition to the deceptive act being a per se violation of a statute. To the extent that the court dismissed the case on this basis, the court was in error.

a. *Naming MERS as a Beneficiary on the Deed of Trust was Unfair and Deceptive*

As a matter of law, and under the facts of this case, MERS is not a lawful beneficiary on a Deed of Trust in Washington. MERS did not have any authority under the Washington Deed of Trust Act to assign the Deed of Trust to HSBC Bank USA, National Association, as Trustee for WFMBS 2007-11. The Supreme Court in *Bain*, held: “While we are unwilling to say it is per se deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively the first element is met.” *Bain* at 117.

b. *Northwest Trustee Services, Inc.’s actions were unfair and deceptive*

NWTS’s argument in their response brief do nothing to absolve them of liability under the CPA. The specific facts were set forth in Appellants’ Opening Brief. The actions of NWTS parallel the actions of MERS in the case at bar. The DOTA is very clear in its mandate that “No person, corporation or association may be both trustee and beneficiary under the same deed of trust.” RCW 61.24.020. The trial Court erred when it found that since they were “separate entities” the requirements of the trustee being separate from the beneficiary of the deed of trust were met. (VRP 43:3-8). This is circular reasoning and caters to a self-serving document. The premises (Jeff Stenman is acting for both MERS and NWTS) provides no independent ground for the conclusion (because Jeff Stenman declares it is legal for him to act for both MERS and NWTS).

The trustee is not merely an agent for the beneficiary. It must act as the neutral party who has a good faith duty to all parties, including the borrower. To act simply as the agent for the beneficiary would be a conflict of interest because an agent owes a duty of loyalty to the principle, so it would be impossible and unlawful for the trustee to act in a neutral manner when acting as agent for the beneficiary.

The court determined that a trustee's failure to fulfill its duty to the borrower constituted a "deceptive act" under the CPA. *Klem*, 176 Wn.2d at 787. NWTS failed to fulfill its duty to the Velascos by sending the Notice of Default before the Appointment of Successor Trustee was recorded. This is a failure to act in an impartial manner. NWTS also failed to fulfill its duty to the Velascos when Jeff Stenman signed documents as both the beneficiary's representative and a representative of the Trustee, when the beneficiary and the trustee cannot be the same party.

In the case at bar, these roles become blurred and run afoul of the entire purpose of the Deed of Trust Act. It is unlawful for the trustee to also be a "vice-president" of the beneficiary. RCW 61.24.020. The title "vice-president" indicates that the person is acting as an officer for the corporation and owes that corporation a fiduciary duty. In the instant case, Jeff Stenman, an officer at Northwest Trustee Services owes that entity a fiduciary duty. Therefore, NWTS failed to fulfill its duty to the Velascos by failing to be independent, and by having directors also acting as officers for MERS. This is a deceptive act that meets the first element of the Washington Consumer Protection Act.

c. Wells Fargo's and HSBC's Actions were Deceptive

The facts were set forth in Appellants' Opening Brief. An assignment of a mortgage is not effective until recording. RCW 61.16.020; see *Price v. Northern Bond & Mortg. Co.*, 161 Wash. 690, 696, 297 P. 786 (Wash. 1931) (where the assignment of a mortgage is not recorded, purchaser has right to assume no assignment has been made). MERS did not even have the legal authority to transfer the deed of trust. This collusive process used MERS, Northwest Trustee Services and Wells Fargo to essentially prevent the Velascos from being able to identify who the owner of the note was, prevent direct communication with the lender, and served the purpose of creating a default that the Velascos could not cure.

In addition, Wells Fargo's actions were unfair and deceptive during the loan modification program. The Velascos attempted to modify their mortgage seeking the proper means to catch up on the payments that became more difficult due to the floods. In each attempt, Wells Fargo claimed that the "investors" would not allow for a modification. (CP 200-211). In fact, the Pooling and Servicing Agreement (PSA) specifically authorizes the servicer to enter into loan modifications. (VRP 27:3-16, CP 209, 296). They now claim that the Velascos should not have withdrawn from the mediation, even though they claim the loan cannot be modified.

2. The Velascos Suffered Damages From Respondents' Acts

As the court in *Hangman Ridge* concluded, "the injury need not be great, but it must be established." And as the Supreme Court noted in *Panag v. Farmers*

Insurance Co. of Washington, “ ‘Injury’ is distinct from ‘damages.’” Monetary damages need not be proved; unquantifiable damages may suffice.” *Panag*, 166 Wn.2d at 58. Because of the unfair and deceptive acts of Wells Fargo, HSBC, Northwest Trustee Services and MERS, the Velascos suffered damage to credit, loss of credit opportunities, loss of business opportunities and potential loss of their home to foreclosure, which is still a looming possibility.

The Velascos presented evidence of damages, and it is difficult to comprehend defendants’ position that the Velascos presented no admissible evidence of damages. The Declaration of Mark Velasco included numerous exhibits that demonstrated damages (time and money spent sending faxes and applying for loan modifications on several occasions; time and money spent on filing a claim with the OCC and the Dept. of Financial Institutions); hiring legal counsel; falling further into arrears because of Wells Fargo’s failure to provide a permanent loan modification making the possibility of a loan modification more and more remote).

C. Recent Federal Law Supports Plaintiffs’ Position That Borrowers Have Standing to Challenge the Transfer of the Note

Other courts have followed the precedents in *Culhane*, *Woods*, and *Reinagle*. In Rhode Island, a U.S. District Court held that a homeowner had standing to challenge an assignment on similar grounds in *Cosajay v. MERS, et al.*

Because Ms. Cosajay challenges her foreclosure on the ground that it was void due to an invalid assignment to a non-existent entity, and the First Circuit in concluded that homeowners have a “leally cognizable right” to protection against illegal foreclosures, the court finds that she has demonstrated “a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant’s actions, and a likelihood that prevailing in

the action will afford some redress for the injury.” *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 317 (1st Cir. 2012)

Cosajay v. MERS, R.I. Dist. Ct. Case No. 10-00442, (Order of Nov. 5, 2013, p. 9).

The court found Ms. Cosajay had standing to pursue her claims. The court also held that it was an “extreme and incongruous argument” that would allow Ms. Cosajay no relief because she is not a party to the assignment. The First Circuit rejected the defendants’ argument in *Culhane*, finding that a bar on standing based solely on whether plaintiff is a party to the assignment “paint[s] with too broad a brush.” *Culhane*, 708 F.3d at 290.

In addition, the U.S. District Court, W-WA has declined to hold that a borrower cannot challenge an assignment based on the securitization argument, despite cases cited by respondents, which the court could have chosen to follow. In *Nieuwejaar v. BANA*, the court declined to reach the issue of whether loan securitization is a violation of the CPA. “Because...the Court finds that there is a proper basis for the CPA claims that does not rest on loan securitization, the Court does not reach the issue of whether loan securitization is a violation of the CPA.” *Nieuwejaar v. BANA, et al.*, Case No. 14-CV-00302-JCC Order of July 10, 2014, p. 12. This court could find, as the court in *Glaski* and the federal cases cited in the Appellants’ Opening Brief found, that a borrower does have standing to challenge the assignment based on securitization, and that securitization, at minimum is a violation of the CPA.

D. Respondents Are Liable for Negligence

1. *The Independent Duty Rule Does Not Bar Appellants’ Claim*

Appellants re-state their argument asserting that the independent duty rule does not bar Appellants' claim of negligence. Here, in addition to Defendants' contract duties, Plaintiffs have shown that they have property damages that are traceable to the Defendants' independent duty to refrain from unfair and deceptive business practices under the CPA. Plaintiff's damages include, but are not limited to a clouded title, damage to credit, and a decrease in the value of Plaintiff's property. Thus, Plaintiffs can demonstrate that they have remedies in tort.

2. *Defendants Breached A Statutory Duty Under the CPA to Act in a Fair and Transparent Manner*

While these defendants may assert that they are under no duty or requirement to offer the Velascos a loan modification, if they are going to engage in the loan modification process, that process must be performed in a fair and transparent manner and within the intent and letter of the HAMP laws and regulations. *See generally, Corvello v. Wells Fargo*, 728 F.3d 828 (9th Cir. 2013). Wells Fargo and HSBC allowed documents to be recorded (Notices of Default, Notices of Trustee's Sale, Appointment of Successor Trustee, and Assignment of the Deed of Trust) and actions to be taken in accordance with those recorded documents that were in violation of the Deed of Trust Act and the Consumer Protection Act. This knowing and willful conduct that is clearly in violation of the Deed of Trust Act and the Consumer Protection Act falls well below the standard of care that a lender and beneficiary should uphold.

These Respondents breached their duties to the Velascos, the Velascos suffered damages as a result, and Respondents' breach of their duties were the

proximate cause of those damages. The court should find that there remains a genuine issue of material fact and as a matter of law, and the trial court was in error in granting summary judgment to the Respondents on the claim of negligence.

E. Suit To Quiet Title Was Dismissed in Error

An action to quiet title is an equitable proceeding “designed to resolve competing claims of ownership.” RCW 7.28.010 requires Walker to bring an action to quiet title against “the person claiming the title or some interest” in real property in which he has a valid interest. “A ‘plaintiff in an action to quiet title must prevail, if he prevails at all, on the strength of his own title, and not on the weakness of the title of his adversary.’ ” *Walker*, 176 Wn.App. at 322 (internal citations omitted).

A deed of trust is issued in Washington to secure a promissory note for the mortgage. The property, evidenced by the deed, serves as collateral for the Note. When the Note is sold into a mortgage-backed security pool, it is converted into a stock and fully discharged. The Velascos’ Deed of Trust secures a promissory note, (CP 125) and if the promissory note is destroyed through permanent conversion, then the Deed of Trust secures nothing. As the Title owner, the Velascos have an obligation to defend their title. The Deed of Trust also states: “Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and the Property is unencumbered except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of

record.” CP 14, 126. This does not require the Court to order the forgiveness of the debt, it simply requires declaratory relief by the court that the Velascos have superior title over parties who have sold the loan off to a security pool and have fractionalized the loan in a pyramid scheme that was intended to fail from the outset.

Therefore, the Velascos can show the strength of their title, as opposed to simply pointing out defects in Respondents’ title claims, and the dismissal of a quiet title action should be reversed.

VI. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motions for summary judgment, and remand for further proceedings.

Signed and dated this 5th day of September, 2014.

/s/ Jill J. Smith
Jill Smith, WSBA #41162
Natural Resource Law Group, PLLC
2217 NW Market St., Suite 27
Seattle, WA 98107-4062
(206) 227-9800
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division II, and properly served to the counsel listed below, on September 5, 2014.

Abraham Lorber
Ronald Beard
Lane Powell PC
1420 Fifth Ave., Suite 4200
Seattle, WA 98111

John Thomas
RCO Legal PS
511 SW 10th Ave., Suite 400
Portland, OR 97205

ATTORNEYS FOR RESPONDENTS

/s/ Jill J. Smith

Jill J. Smith, WSBA #41162

NATURAL RESOURCE LAW GROUP

September 05, 2014 - 3:30 PM

Transmittal Letter

Document Uploaded: 456427-Reply Brief.pdf

Case Name: Velasco v. Wells Fargo et al.

Court of Appeals Case Number: 45642-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jill J Smith - Email: jill.smith@naturalresourcelawgroup.com

A copy of this document has been emailed to the following addresses:

jjsattorney@gmail.com
lorbera@lanepowell.com
jthomas@rcolegal.com
jjsattorney@gmail.com
beardr@lanepowell.com