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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

Winnie Lyons,

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for for Stanwich
Mortgage Loan Trust Series 2012-3, by Carrington Mortgage Services,
LLC; CARRINGTON MORTGAGE SERVICES, LLC; WELLS FARGO
BANK, N.A., a chartered national bank; WELLS FARGO BANK, N.A.,
as servicer; and NORTHWEST TRUSTEE SERVICES, INC., as Trustee,

Respondents.

**RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S
RESPONSE BRIEF**

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Trustee Services, Inc.

 ORIGINAL

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I. INTRODUCTION

The underlying issue in this case is how Respondent Northwest Trustee Services, Inc. (“NWTS”) responded to the various demands and cease and desist letters issued by Appellant Winnie Lyons (“Lyons”) regarding an alleged loan modification from a party who also allegedly had no interest in the loan. When NWTS retained counsel to investigate the matter and advised Lyons that it had to conduct its due diligence before discontinuing any sale, Lyons filed a lawsuit.

A review of the record and Washington case law will show that Judge White properly granted NWTS’ motion for summary judgment given that NWTS did not breach its duty of good faith owed to the borrower given its independent investigation into the allegations raised by Winnie Lyons. The Consumer Protection Act and Intentional Infliction of Emotional Distress claims based on the same underlying conduct were likewise properly dismissed.

Moreover, Lyons sets forth additional claims against NWTS under the Washington Deed of Trust Act, RCW 61.24, *et seq.* (“DTA”) pursuant to RCW 61.24.127(1)(c) and the *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 310–311, 308 P.3d 716 (2013) opinion which interprets that provision of the DTA. Applying the *Walker* opinion retroactively, Lyons has no standing to bring a cause of action under RCW

61.24.127(1)(c) pursuant to the statutory limitation placed on such actions by the legislature. Accordingly, summary judgment is appropriate as to the remaining DTA claims. For the reasons stated herein, this Court should affirm the trial court's ruling.

II. COUNTERSTATEMENT OF CASE

Nature of the Case

Lyons Loan Transaction. On or about August 24, 2007, in consideration for a mortgage loan, Winnie Lyons (hereinafter "Lyons" or "Winnie Lyons") executed a promissory note (the "Note") in the principal amount of \$450,000.00 payable to Wells Fargo Bank, N.A. ("Wells Fargo"). CP 6–7. Lyons also executed a deed of trust (the "Deed of Trust") encumbering a piece of real property located in King County, commonly known as 13205 12th Avenue Southwest, Burien, Washington, 98146 (the "Property"), as collateral for repayment of the loan. *Id.*

Adult Family Home Care. In 2005, Lyons incorporated Heritage Enterprise, Inc., an adult home care facility. CP 6. Plaintiff owns and operates the adult family home out of the Property. Appellant's Brief, Pg. 1. Lyons submitted a declaration stating under the penalty of perjury that she resides at 11421 SE 230th Place, Kent, WA 98081. CP 172.

Appointment of NWTS as Successor Trustee. On February 17, 2009, Wells Fargo recorded an Appointment of Successor Trustee naming

NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee. CP 59.

Default. Winnie Lyons fell into default under the terms of the Note and Deed of Trust by failing to make the monthly payment obligations. CP 149.

Beneficiary Declaration. On or about June 30, 2010, Wells Fargo executed a Beneficiary Declaration pertaining to Plaintiff's Note. CP 60. On July 8, 2010, NWTS received the Beneficiary Declaration from Wells Fargo. *Id.*

Notice of Trustee's Sale. On March 29, 2012, NWTS executed a Notice of Trustee's Sale designating July 6, 2012 as the date for the non-judicial foreclosure of the Property. CP 60. On March 30, 2012, NWTS recorded a Notice of Trustee's Sale concerning the Property under King County Auditor's No. 20120330001725. *Id.*

At the time the Notice of Trustee's Sale was executed and subsequently recorded, NWTS did not have any knowledge of any transfer in ownership of the Note or change in beneficiary status. CP 60.

Service Transfer. On April 12th, 2012, NWTS received correspondence informing NWTS that the loan would be service released to Carrington Mortgage Services, LLC (hereinafter "Carrington") effective May 1, 2012. CP 60. As a result of the service transfer, on May 1, 2012,

NWTS created a new internal file with a separate internal file number. CP 60.

Demand to Discontinue Foreclosure Sale. On April 26, 2012, counsel for Winnie Lyons contacted NWTS and demanded that the foreclosure sale be discontinued immediately. CP 97. The demand to discontinue the sale was based on two allegations.

First, that Wells Fargo no longer had any beneficial interest in the loan as the loan was sold on March 29, 2012. CP 97. Second, that Wells Fargo tendered a loan modification offer to Winnie Lyons which was accepted. *Id.* at 97–98. Counsel for Winnie Lyons was allegedly advised by Wells Fargo of this offer on April 5, 2012. CP 98.

On June 11, 2012 and June 18, 2012, counsel for Winnie Lyons again contacted NWTS and demanded a discontinuance or cancellation of the nonjudicial foreclosure. CP 99–100. On June 14, 2012, counsel for Winnie Lyons sent NWTS a cease and desist letter demanding the discontinuance of the sale due to a loan modification extended by Wells Fargo. CP 122–123.

NWTS Investigates the Allegations Raised by Winnie Lyons.

Presented with the contradictory dispute that an entity that was no longer had any beneficial interest in a loan as of March 29, 2012, extended a loan modification to the borrower in April of 2012, NWTS conducted its own

independent investigation into the matter and refused to unilaterally discontinue the trustee's sale immediate as demanded. NWTS forwarded the dispute to its counsel who advised counsel for Winnie Lyons that NWTS needed to research the issue by conducting due diligence before the foreclosure sale would be discontinued. CP 100-101.

Discontinuance of Trustee's Sale. On June 21, 2012, in response to NWTS' investigative communications pertaining to the allegations raised by counsel for Winnie Lyons, Carrington advised NWTS that the foreclosure should be canceled due to a trial loan modification. On June 21, 2012, a Notice of Discontinuance of Trustee's Sale was executed by NWTS and recorded under King County Auditor's No. 20120621001500. CP 60.

Service of Lawsuit. On June 26, 2012, NWTS was served with the Summons and Complaint, initiating the underlying lawsuit.

Summary Judgment Hearing

On May 31st, 2013, through counsel, Winnie Lyons and NWTS appeared before Judge Jay V. White of the King County Superior Court to present oral argument relating to NWTS' Motion for Summary Judgment. On June 10th, 2013, Judge White granted NWTS' Motion for Summary Judgment and dismissed Winnie Lyons' claims with prejudice. CP 187-188.

Winnie Lyons contends that in granting NWTS' Motion for Summary Judgment, Judge White relied solely upon *Vawter v. Quality Loan Service Corp.*, 707 F.Supp. 2d 1115 (W.D. Wash. 2010) ("*Vawter*"). However, this contention is at odds with Judge White's statements at the summary judgment hearing. The Verbatim Report of Proceedings will show that Judge White acknowledged that NWTS did conduct an independent review of the allegations raised by Winnie Lyons and that the 3-month investigation was not unreasonable given NWTS' responsibilities to both the borrower and the beneficiary. Verbatim Report of Proceedings, Pg. 26–27.

III. ARGUMENT

A. Standard of Review

Summary judgment rulings are reviewed de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Summary judgment is appropriate where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2010). The evidence and inferences from the evidence are construed in favor of the nonmoving party. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008).

It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court. *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. The purpose of RAP 9.12 "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Wash. Fed'n of State Employees*, 121 Wn.2d at 157.

B. The Court Should Exercise its Discretion Pursuant to RAP 2.5(a) and Refuse to Review the First Claim of Error

The first issue and assignment of error presented on appeal is whether the trial court erred when it granted summary judgment in favor of NWTs "when that decision was based on an order issued by a U.S. District Court judge which is in direct contravention of the decisions of this Court and the laws of Washington state." Appellate Brief, Pg. i.

Lyons sets forth two arguments. First, Lyons contends the trial court erred in relying on *Vawter* given the holding of the Washington Court of Appeals in *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 310–311, 308 P.3d 716 (2013) ("*Walker*"). Appellate

Brief, Pg. 19–22. Second, Lyons argues the trial court erred in disregarding the 2009 legislative amendments to RCW 61.24.127(1)(c).

Lyons cites to the hearing transcript and notes that NWTs' arguments contradict the *Walker* opinion and the 2009 amendments to the DTA. Appellant's Brief, Pg. 21. However, Lyons fails to address a key temporal issue. The summary judgment hearing took place on May 31, 2013. The *Walker* opinion was issued by the Washington Court of Appeals, Division One, on August 26, 2013, approximately 3 months after the summary judgment hearing and approximately 2 months after the trial court denied the Motion for Reconsideration. CP 219. Additionally, the *Walker* opinion is the first case to interpret RCW 61.24.127(1)(c) as allowing for a cause of action for damages under the DTA where no nonjudicial foreclosure occurs.

As set forth by this Court, "Arguments or theories not presented to the trial court will generally not be considered on appeal." *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992). While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Id.* at 291. (citing *Bennett v. Hardy*, 113 Wn. 2d 912, 917, 784 P.2d 1258 (1990)).

In this case, Lyons raises the new arguments on appeal based on case law that did not exist when the trial court issued its summary judgment ruling. Lyons never argued that RCW 61.24.127(1)(c) creates a cause of action for damages under the DTA against the trustee. Similarly, the trial court did not have an opportunity to consider the holding in *Walker* as that holding predated the summary judgment hearing. Accordingly, this Court should refuse to review this claim of error pursuant to RAP 2.5(a).

C. Lyons Has No Standing to Pursue a Cause of Action Under RCW 61.24.127(1)(c)

Even setting aside RAP 2.5(a), Lyons' arguments in relation to a pre-foreclosure sale cause of action for damages against NWTs rely upon *Walker* and more specifically, RCW 61.24.127(1)(c). A review of the DTA and *Walker* reveals that Lyons is not in the in the class of borrowers RCW 61.24.127(1)(c) was meant to protect.

Walker establishes that a borrower has an actionable claim against a trustee for a material violation of the DTA even where no foreclosure sale occurs based on RCW 61.24.127(1)(c):

“Because the legislature recognized a presale cause of action for damages in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred.” *Id.* at 314.

Walker v. Quality Loan Serv. Corp. of Wash., 176 Wn. App. 294, 314, 308 P.3d 716 (2013).

Importantly, the state legislature set forth express limitations on the applicability of RCW 61.24.127. Specifically, a claim under RCW 61.24.127(1) applies only to foreclosures of owner-occupied residential real property. RCW 61.24.127(3).

A review of the statutory definition of “owner-occupied” and “residential real property” provides guidance as to why Lyons cannot afford herself of the protections set forth under RCW 61.24.127(1)(c).

The DTA defines “owner-occupied” as property that is the principal residence of the borrower. RCW 61.24.005(10). In this case, Lyons submitted a declaration stating under oath, that she resides at 11421 SE 230th Place, Kent WA 98081. CP 172. This Kent property is a separate property than the Property that was subject to the nonjudicial foreclosure at issue which is located in Burien. Accordingly, as the Property is not “owner-occupied”, RCW 61.24.127(1)(c) is not applicable.

“Residential real property” is defined as property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit. RCW 61.24.005(13). The Lyons declaration shows that not only does she not reside at the Property, the Property is

being used for commercial purposes – to operate an Adult Family Home business. CP 172–173.

Notably, the DTA does not define “single-family residence”. As set forth by the Supreme Court, “Absent specially enacted definitions, we give words in statutes and ordinances their ordinary meaning.” *Western Telepage Inc. v. City of Tacoma Dep’t of Financing*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000). In this case, the adult family home clearly is not a single-family residence given the nature of Lyons’ adult home care business. A resident in an adult family home is defined by statute as one who is not related to the provider. RCW 70.128.010. The adult home care facility not only contains a single family (assuming *arguendo* that Lyons does reside in the Property), it contains care home residents who are not related to Lyons. Accordingly, the Property is not a “single-family residence” when giving that term its ordinary meaning.

Going beyond the DTA, the Washington Residential Landlord-Tenant Act, RCW 59.18 *et seq.*, (“Landlord-Tenant Act”) defines the term “single-family residence” as:

“[A] structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it shall be deemed a single-family residence if it has direct access to a street and shares neither heating facilities nor hot water equipment, nor any other essential facility or service, with any other dwelling unit.”

RCW 59.18.030(20) (emphasis added). The Landlord-Tenant Act defines a “dwelling unit” as:

“[A] structure or that part of a structure which is used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, including but not limited to single-family residences and units of multiplexes, apartment buildings, and mobile homes.”

RCW 59.18.030(5). Applying the Landlord-Tenant Act’s definition of “single-family residence” to the Property at issue, the Property fails to qualify as a single-family residence. RCW 59.18.030(20) requires the structure to be used as a single dwelling unit. However, with an adult family home with multiple clients, the Property contains multiple dwelling units. Portions of the Property are necessarily used as a sleeping place by multiple residents of the adult care facility. Accordingly, the Property contains multiple dwelling units and thus is not a “single-family residence”.

Similarly, the Shoreline Management Permit and Enforcement Procedures regulations codified under Chapter 173-27 of the Washington Administrative Code define a “single-family residence” as “a detached dwelling designed for and occupied by one family including those structures and developments within a contiguous ownership which are a normal appurtenance.” WAC 173-27-040(2)(g) (emphasis added).

As set forth above, the Property is not “Residential real property” as that term is defined by RCW 61.24.005(13) as it does not qualify as a single-family residence, residential condominium unit, or a residential cooperative unit. Lyons can establish no set of facts that would show the Property is subject to the Condominium Act RCW 64.34, *et seq.* As an adult care facility, the property is not a residential cooperative unit subject to RCW 35.83, *et seq.* As an adult care facility, the Property is governed by RCW 70.128, *et seq.*

Notably, the borrower’s seeks injunctive relief, which directly violates the statutory limitation set forth in RCW 61.24.127(1)(b). CP 25. Similarly, RCW 61.24.127(1)(d) also prohibits a borrower who files such a claim from recording a lis pendens.¹

The *Walker* opinion holds that a borrower has an actionable claim against a trustee who materially violates the DTA even in the absence of a foreclosure sale. *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. at 314. However, this holding is based on the legislature’s recognition of a presale cause of action for damages in RCW 61.24.127(1)(c). *Id.* The trial court’s judgment should be affirmed as RCW 61.24.127(3) dictates that RCW 61.24.127 as a section does not

¹ A review of the King County real property records shows that a lis pendens was recorded with the King County Auditor on June 28, 2012 as Ins. No. 20120628000047.

apply to the Lyons foreclosure given that the Property is not “owner-occupied residential real property”.

D. The Trial Court Properly Granted Summary Judgment on the Deed of Trust Act Claims

Lyons argues that the trial court erred in finding there was no genuine issue of material fact as to whether NWTS complied with the DTA. Specifically, Lyons alleges that NWTS violated the DTA by relying on a defective beneficiary declaration prior to issuing the notice of foreclosure sale. Appellant’s Brief, Pg. 27–28. Second, Lyons alleges NWTS knew of Wells Fargo’s “non-authority because Ms. Lyons provided NWTS with evidence of its non-authority.” *Id.* at 28. Even setting aside the statutory bar against the DTA claim under RCW 61.24.127(3), the trial court properly granted summary judgment.

i. NWTS Satisfied RCW 61.24.030(7)

Lyons alleges that NWTS relied on a defective beneficiary declaration in violation of RCW 61.24.030(7). Appellant’s Brief, Pg. 32–33. Notably, Lyons relies on unpublished federal opinions from the Western District of Washington to support her claim. However, a review of the beneficiary declaration at issue, the record, and Washington case law reveals that NWTS did comply with the statutory prerequisites to issuing a notice of trustee’s sale under RCW 61.24.030.

Prior to recording a notice of trustee's sale, the DTA imposes a duty upon the trustee to obtain proof of a beneficiary's standing to enforce the terms of the note and deed of trust. *See* RCW 61.24.030(7)(a). The statutory provision reflects the requirement that a trustee obtain proof that the beneficiary has the necessary standing as beneficiary to direct the trustee to proceed with the nonjudicial foreclosure.

While the statute does not require an exclusive form of proof, the statute provides one way a trustee can satisfy this obligation – by obtaining a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust satisfies the trustee's obligation to obtain such proof. *Id.*

This requirement reflects the general definition of a beneficiary as the holder of the Note. Similarly, in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012) ("*Bain*"), the Washington Supreme Court interpreted the term "beneficiary" and came to the conclusion that the beneficiary had to be the holder of the note: "Other portions of the deed of trust act bolster the conclusion that the legislature meant to define "beneficiary" to mean the actual holder of the promissory note or other debt instrument." *Id.* at 101.

Importantly, as set forth by *Bain*, “beneficiary” is keyed to Article 3 of the Uniform Commercial Code (“UCC”). *See, e.g., Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).² Under the UCC, a “holder” with respect to a negotiable instrument means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. *See* RCW 62A.1-201(a) (21)(A).

In this case, prior to recording the Notice of Trustee’s Sale, NWTS received on beneficiary declaration on July 8th, 2010 executed by Wells Fargo Bank, N.A. CP 60. The beneficiary declaration states:

“Wells Fargo Bank, NA, is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation.” CP 90.

Lyons argues that this beneficiary declaration is defective and relies on an unpublished order issued by the Western District of Washington in *Beaton v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. Lexis (W.D. Wash., March 26, 2013). However, a review of the beneficiary declaration in conjunction with the statutory requirements of the DTA and case law establishes that it is valid.

²“The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions and thus a beneficiary must either actually possess the promissory note or be the payee... We agree. This accords with the way the term “holder” is used across the deed of trust act and the Washington UCC.”

First, RCW 61.24.030(7)(a) states that a declaration made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note satisfies the trustee's obligation to obtain proof of ownership of the note. Here, the beneficiary declaration clearly states that Wells Fargo Bank, N.A. is the actual holder of the promissory note or other obligation secured by the deed of trust. CP 90.

Second, obtaining a beneficiary declaration under RCW 61.24.030(7)(a) is not the exclusive manner in which a trustee can satisfy RCW 61.24.030(7). Lyons takes issue with the fact that the beneficiary declaration incorporates RCW 62A.3-301. Article 3 of the UCC sets forth three specific categories of a "person entitled to enforce" a negotiable instrument: (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). RCW 62A.3-301.

Notably, in relation to RCW 62A.3-301, the beneficiary declaration relied upon by NWTs prior to issuing the Notice of Trustee's Sale is qualified in that it states Wells Fargo Bank, N.A. "...has requisite authority under RCW 62A.3-301 to enforce said obligation." CP 90 (emphasis added). The beneficiary declaration does not set forth a blanket reliance on the UCC. The declarant specifically limits the declaration to

requisite authority under RCW 62A.3-301. As set forth by *Bain*, RCW 61.24.010(5), and RCW 61.24.030(7)(a), only a holder of the note has the requisite authority to act as a beneficiary. The beneficiary declaration is not defective as the declarant strictly limits reference to the UCC to narrow the scope of which categories of a “person entitled to enforce instrument” are covered by the declaration.

Finally, while Lyons alleges the beneficiary declaration was outdated or that it did not specifically reference the property, the DTA does not set forth any such requirement. To the extent the Anderson declaration states that the beneficiary declaration contains no loan number, the loan number was redacted prior to filing with the court in order to comply with the privacy requirements set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5511. CP 90.

Overall, the beneficiary declaration provides two separate sources of information. First, it states that Wells Fargo Bank, N.A. is the actual holder of the promissory note or other obligation evidencing the loan. Second, it states that Wells Fargo Bank, N.A. has the required authority under the UCC to enforce the negotiable instrument. As set forth by the DTA and Washington case law, the requisite authority is strictly limited to the holder status. As such, both statements provide proof of holder status to NWTS. Following, as the DTA allows for a trustee to satisfy RCW

61.24.030(7)(a) by obtaining a declaration as to the beneficiary's status as holder, the beneficiary declaration complies with the DTA.

ii. The Record Establishes NWTS Did Not Violate the Duty of Good Faith

Lyons sets forth a variety of allegations as to why NWTS failed to act impartially in carrying out the nonjudicial foreclosure. Appellant's Brief, Pg. 34. Notably, the legal theory that NWTS failed to act as an impartial trustee given the loan modification issues was not pleaded in the Complaint, which focuses solely on the issuance of the Notice of Trustee's Sale.

As set forth by Washington case law, a complaint must be properly amended under CR 15(a) to assert new legal theories. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827 (2004). But a complaint generally cannot be amended through arguments in a response brief to a motion for summary judgment. *Kirby*, 124 Wn. App. at 472. Regardless, analyzing Lyons' allegations as well as the record itself reveals that the trial court properly granted summary judgment on this issue.

A review of the Anderson Declaration establishes that Lyons takes issue with how NWTS responded to her communications regarding Wells Fargo's interest in the loan as well as the loan modification dispute. *See* CP 96–101. It is important to note that while Lyon's contends she

requested a postponement of the sale, the record and the Anderson declaration establish that the only request made to NWTs was to discontinue the nonjudicial foreclosure. CP 97, 99, 100–101.

As established by *Klem v. Washington Mutual Bank et al.*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (“*Klem*”), a trustee owes a duty of good faith and impartiality to both the borrower and the beneficiary. In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985). If the trustee acts only at the direction of the beneficiary then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction. *Klem*, 176 Wn.2d at 791.

While Lyons takes concern with NWTs’ refusal to discontinue the sale upon the unilateral demand and threat of a lawsuit, *Klem* clearly establishes that as a third party neutral, a trustee cannot unilaterally act on the direction of either side. A trustee must conduct its own independent investigation into the facts alleged by either side. As set forth by *Cox*, a trustee must “ensure that the rights of both the beneficiary and the debtor are protected.” *Cox v. Helenius*, 103 Wn.2d at 389,

Lyons acknowledges that NWTS retained counsel to investigate the matter. CP 101. Lyons also acknowledges that NWTS refused to discontinue the sale as it needed to conduct its own due diligence and investigate the matter. CP 100–101. As argued to the trial court, where NWTS performed its own due diligence in investigating the allegations raised by Lyons, there is no genuine issue of material fact as to whether NWTS exercised its own independent discretion in investigating the matter through counsel before taking action in discontinuing the sale. The trial court acknowledged this investigation in its ruling. Verbatim Report of Proceedings, Pg. 26–27.

Ultimately, Lyons takes issue with the fact that NWTS refused to immediately discontinue the sale. However, RCW 61.24.010(4) and *Klem* require a trustee to conduct its own investigation. If a trustee is presented with a contract dispute regarding a loan modification, it must investigate and perform its due diligence. This was explained to Lyons by counsel for NWTS. CP 100–101.

Moreover, NWTS was advised by Lyons in April 26, 2012 that Wells Fargo no longer had a beneficial interest in the loan as of March, 29, 2012. CP 98. NWTS was also advised by a cease and desist letter dated June 14, 2012 that Wells Fargo extended a loan modification in April 5, 2012. CP 100. Finally, NWTS was advised on June 11, 2012 that a

\$10,000 payment to Wells Fargo was debited from Lyons' bank account in May, 2012 under the terms of the alleged loan modification. CP 99.

NWTS was presented with contradictory statements. How could Wells Fargo, an entity which allegedly had no interest in the loan as of March 29, 2012, extend a loan modification in April of 2012 and then debit payments from Lyons account in May of 2012? On the other hand, Wells Fargo and Carrington, the subsequent loan servicer, had not given NWTS a directive to discontinue the foreclosure. CP 99. Accordingly, NWTS had to retain counsel and investigate the matter. In accordance with the duty of good faith owed to both sides, it could not just unilaterally discontinue the sale without doing its own investigation of the facts before making a decision.

Lyons alleges that NWTS somehow failed to act impartial because it knew she filed for a bankruptcy in 2011. Appellant's Brief, Pg. 34. The fact that a borrower files for bankruptcy a year before the foreclosure does not implicate a trustee's duty of good faith. The DTA expressly contemplates situations where a borrower files for bankruptcy during a nonjudicial foreclosure. *See* RCW 61.24.130(4).

Moreover, the allegation that NWTS knew Lyons engaged in a loan modification also fails to create a genuine issue of material fact as to whether NWTS acted impartially. Even assuming NWTS knew that Lyons

intended to apply for a loan modification, unless Lyons cured the default under the terms of the loan, Wells Fargo Bank, N.A. was entitled to proceed with the nonjudicial foreclosure. Notably, the DTA expressly contemplates a situation where a borrower applies for a loan modification during the foreclosure itself. RCW 61.24.163(4).

Finally, there is no genuine issue of material fact as to whether NWTS (1) knew that Wells Fargo was not the beneficiary when it issued the Notice of Trustee's Sale, or (2) whether Wells Fargo was the holder when the Notice of Trustee's Sale was issued.

Lyons alleges that the undisputed facts show that Wells Fargo was not the beneficiary when NWTS recorded the notice of trustee's sale on March 29, 2012. Appellant's Brief, Pg. 27. In support of this legal conclusion, Lyons cites to a message dated April 12, 2012 (after the Notice of Sale was issued) advised NWTS of a service transfer. CP 79.

This argument fails for multiple reasons. First, as a temporal matter, it does not establish that NWTS knew that Wells Fargo was not the beneficiary when it issued the Notice of Trustee's Sale as the message postdates the notice itself.

Second, a service transfer does not effect a change in beneficiary status. A servicer's role is to service a loan and to accept and process loan payments. *See Walker*, 176 Wn. App. at 315. A beneficiary is a term that is

defined by case law and by statute as the holder of the Note. *See* RCW 61.24.005(2); RCW 62A.1-201(a) (21)(A); *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d at 104. Lyons sets forth no factual allegations, as opposed to legal conclusions, which establish that there was a genuine issue of material fact as to whether Wells Fargo was the beneficiary when NWTS recorded the Notice of Trustee's Sale.

Overall, even assuming Wells Fargo was not the beneficiary, there is no genuine issue as to whether NWTS knew that Wells Fargo was not the beneficiary when it recorded the Notice of Trustee's Sale. Finally, it is undisputed that NWTS exercised its independent discretion in the nonjudicial foreclosure process. While Lyons takes issue with the fact that NWTS did not immediately discontinue the nonjudicial foreclosure process, the duty of good faith requires impartiality to both sides. Accordingly, the trial court properly granted NWTS' motion for summary judgment.

E. The Trial Court Properly Granted Summary Judgment as to the Consumer Protection Act Claim given NWTS' Exercise of Independent Discretion

In support of the Consumer Protection Act, RCW 19.86, *et seq.*, ("CPA") claim, Lyons alleges NWTS failed to discontinue the sale upon demand and acted unilaterally on its own accord. Appellant's Brief, Pg. 43. Moreover, NWTS disregarded its duty to act impartially and choose

only to honor the beneficiary's instructions not to postpone or discontinue the sale prior the filing of the law suit. *Id.* at 43–44. A review of the record and Washington consumer protection law reveals that summary judgment was appropriate as there was no genuine issue as to whether NWTs committed an unfair or deceptive act or practice.

To state a prima facie claim under the CPA, a plaintiff must “establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to satisfy even one of the elements is fatal to a CPA claim. *Sorrel v. Eagle Healthcare*, 110 Wn.App. 290, 298, 38 P.3d 1024 (2002).

Plaintiffs can satisfy the “unfair or deceptive act or practice” element in two ways: they may show either that an act or practice (i) “has a capacity to deceive a substantial portion of the public,” or (ii) that “the alleged act constitutes a per se unfair trade practice.” *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989).

The question when determining whether an act or practice is deceptive for purposes of a CPA action is whether the conduct has the capacity to deceive a substantial portion of the public. *Hangman Ridge*,

105 Wn.2d at 785. Importantly, “Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Perry v. Island Sav. & Loan Ass’n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984).

To establish a “per se” violation of the CPA, a claimant must prove: “(1) [T]he existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect.” *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn.App. 384, 393, 589 P.2d 1265 (1979).

As Lyons does not cite to a per se violation of the CPA, she must establish that there is a genuine issue of material fact as to whether NWTS’ conduct constituted an unfair or deceptive act or practice. The record provides guidance.

As set forth above, NWTS refused to unilaterally rely on the directives and instructions communicated by Lyons. It is undisputed that NWTS conducted its own investigation into the allegations raised by Lyons. CP 100–101.

On June 19, 2012, counsel for Lyons threatened to file a lawsuit if the sale was not discontinued. CP 102. However, as trustee’s sale was set for July 6, 2012 and NWTS had a few weeks to continue its investigations

into the allegations. Moreover, NWTS had an obligation of fairness to both sides and could not unilaterally discontinue the sale until it completed its investigation.

Lyons alleges that on or around May 21, 2012, Carrington Mortgage Services, LLC (“Carrington”) wished to cancel the foreclosure and honor the Wells Fargo loan modification. CP 9–10. However, Lyons also alleges Carrington directed NWTS to continue with the nonjudicial foreclosure. CP 99. Nonetheless, Lyons still filed a lawsuit against Carrington alleging among other claims, breach of the loan modification.

Importantly, the record is devoid of any evidence that Lyons informed NWTS of Carrington’s position as to whether the loan should be in foreclosure. It was only through NWTS’ own investigation that it eventually was able to confirm with Carrington on June 21, 2012 that the foreclosure should be cancelled. NWTS first learned of the lawsuit when it was served five-days later, on June 26th, 2012, the same day the lawsuit was faxed to NWTS by Lyons.

Overall, the trial court properly granted summary judgment as Lyons cannot establish an unfair or deceptive act or practice. NWTS’ actions in conducting its own investigation into a contract dispute and refusing to take the direction from only one side clearly establishes compliance with the duty of good faith owed to both sides. Moreover,

such due diligence cannot constitute conduct that has the capacity to deceive a substantial portion of the public as it is specific to Lyons. Accordingly, the trial court's decision should be affirmed.

F. The Trial Court Properly Granted Summary Judgment on the Intentional Infliction of Emotional Distress Claim

The elements of the tort of intentional infliction of emotional distress are “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). The trial court must make an initial determination as to whether the conduct may reasonable be regarded as so “extreme and outrageous” as to warrant a factual determination by the jury. *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979).

The trial court properly granted summary judgment on the Intentional Infliction of Emotional Distress (IIED) claim as Lyons failed to establish that NWTS' conduct was so extreme as to satisfy the extreme and outrageous element of an outrage claim. Where a trustee conducts its own due diligence in verifying a borrower's allegations, such conduct cannot reasonably be regarded as sufficiently extreme and outrageous to warrant a factual determination by the jury.

As explained by the Washington Supreme Court in *Klem*, a trustee cannot fail to exercise its independent discretion as an impartial third party given its duties to both parties. *Klem v. Washington Mutual Bank et al.*, 176 Wn.2d at 790. As trustee, NWTS could not act partially towards the borrower and unilaterally discontinue the sale upon demand of the borrower without conducting its own due diligence and investigation into the allegations raised. Complying with statutory duties owed under the DTA cannot give rise to a genuine issue as to whether such compliance constitutes extreme and outrageous conduct. Accordingly, the trial court properly granted summary judgment in favor of NWTS.

IV. CONCLUSION

For the reasons stated above, the Court should affirm the trial court's order granting summary judgment to NWTS.

Dated at Bellevue, Washington this 22nd day of November, 2013.

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By: 

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Lyons v. U.S. Bank National Association, et al.
Case No: 89132-0
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