

65975-8

65915-8

Case No. 65975-8

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DOUG WALKER, an individual,

Plaintiff-Appellant,

vs.

**QUALITY LOAN SERVICE CORP. OF WASHINGTON, a
Washington Corporation, et al.,**

Defendants-Respondents.

Appeal from an Order of the Snohomish County Superior Court
Case No. 09-2-09456-8

RESPONDENTS' BRIEF

McCarthy & Holthus, LLP
Albert H. Lin, Esq., WSB # 28066
Mary Stearns, Esq., WSB # 42543
19735 10th Ave. NE Suite N 200
Poulsbo, WA 98370
Telephone: (206) 319-9100
Facsimile: (206) 780-6862

Attorneys for Respondents,
Select Portfolio Servicing, Inc. and
Quality Loan Service Corporation of Washington, Inc.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUL 20 PM 1:23
16
95 DIV I

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 2

 I. STANDARD OF REVIEW 2

 II. WALKER CANNOT ESTABLISH ANY VIOLATION OF THE
 DEED OF TRUST ACT. 3

 A. Nothing in Washington Law Prohibits MERS From Being
 Designated as Beneficiary of a Deed of Trust. 4

 B. No Party Is Required to Produce the Promissory Note to
 Prove Standing to Pursue Nonjudicial Foreclosure. 9

 C. The Appointment of Successor Trustee Was Valid..... 10

 D. Quality Has Not Violated Any Statutory Duties..... 12

 E. Walker Has Not Established Prejudice. 14

 III. WALKER CANNOT PREVAIL ON ANY CLAIM UNDER THE
 FAIR DEBT COLLECTION PRACTICES ACT. 14

 A. Walker Has Not Shown that Respondents Engaged in Debt
 Collection..... 15

 B. Walker Has Not Established that Respondents Are Debt
 Collectors. 16

 C. Walker Has Not Established an FDCPA Violation. 18

IV. WALKER HAS NOT ESTABLISHED A VIOLATION OF THE
CONSUMER PROTECTION ACT. 19

A. No Deceptive Act Has Been Alleged..... 19

B. The Facts Do Not Show Any Public Impact..... 20

C. Grant Has Not Shown Injury or Causation. 21

V. WALKER HAS NOT ESTABLISHED A QUIET TITLE CLAIM.
..... 22

VI. APPELLANT IS NOT ENTITLED TO RECOVER
ATTORNEYS' FEES ON APPEAL. 23

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

1000 Virginia Ltd. P’ship v. Vertecs,
158 Wn.2d 566 (2006) 13

Amresco Independence Funding, Inc. v. SPS Props., LLC,
129 Wn.App. 532 (2005) 14

Berge v. Gorton,
88 Wn.2d 756 (1977) 3

Buse v. First Am. Title Ins. Co.,
2009 U.S. Dist. LEXIS 45119 (W.D. Wash. May 29, 2009)..... 7

Carpenter v. Longan,
83 U.S. 271 (1872)..... 11

Citicorp. Real Estate, Inc. v. Smith,
155 F.3d 1097 (9th Cir. 1998) 9

Cuddeback v. Land Fin. Servs.,
2011 U.S. Dist. LEXIS 31423 (W.D. Wash. Mar. 14, 2011) 17

Daddabbo v. Countrywide Home Loans, Inc.,
2010 U.S. Dist. LEXIS 50223 (W.D. Wash. May 20, 2010)..... 5

Derakshan v. MERS, Inc.,
2009 U.S. Dist. LEXIS 63176 (C.D. Cal. June 29, 2009) 6

Desimone v. Spence,
51 Wn.2d 412 (1957) 22

Diessner v. Mortg. Elec. Registration Sys.,

618 F. Supp. 2d 1184 (D. Ariz. 2009)	15, 17
<i>Earle v. Froedtert Grain & Malting Co.</i> ,	
197 Wash. 341 (1938).....	13
<i>Evans v. BAC Home Loans Servicing LP</i> ,	
2011 U.S. Dist. LEXIS 136282 (W.D. Wash. Dec. 10, 2010).....	23
<i>Ferguson v. Avelo Mortg. LLC</i> ,	
195 Cal. App. 4 th 1618 (2011)	5
<i>Fidelity & Dep. Co. v. Ticor Title Ins.</i> ,	
88 Wn. App. 64 (1997)	11
<i>Freeston v. Bishop, White & Marshall, P.S.</i> ,	
2010 U.S. Dist. LEXIS 28081 (W.D. Wash. Mar. 24, 2010)	9
<i>Fridde v. Epstein</i> ,	
21 Cal. Rptr. 2d 85 (Cal. App. 1993).....	8
<i>Gallegos v. Recontrust Co.</i> ,	
2009 U.S. Dist. LEXIS 6365 (S.D. Cal. Jan. 29, 2009).....	15
<i>Gomes v. Countrywide Home Loans</i> ,	
192 Cal. App. 4 th 1149 (2011)	5
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> ,	
109 Wn.2d 107 (1987).....	3
<i>Hangman Ridge Training Stables, Inc v. Safeco Title Ins. Co.</i> ,	
105 Wn.2d 778 (1986).....	19, 20
<i>Heintz v. Jenkins</i> ,	
541 U.S. 291 (1995).....	16
<i>Hulse v. Ocwen Fed. Bank, FSB</i> ,	

195 F. Supp. 2d 1188 (D. Or. 2002)	15, 16
<i>In re Tucker,</i>	
441 B.R. 638 (Bankr. W.D. Mo. 2010).....	6
<i>In re United Home Loans, Inc.,</i>	
71 B.R. 885 (W.D. Wash. 1987).....	10
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.,</i>	
162 Wn.2d 59 (2007)	21
<i>Klinger v. Wells Fargo Bank, NA,</i>	
2010 U.S. Dist. LEXIS 111683 (W.D. Wash. Oct. 20, 2010)	12
<i>Koegel v. Prudential Mutual Sav. Bank,</i>	
51 Wn.App. 108, 752 P.2d 385 (1998).....	14
<i>Landmark Nat’l Bank v. Kesler,</i>	
216 P.3d 158 (Kan. 2009).....	6
<i>Moon v. GMAC Mortg. Corp.,</i>	
2009 U.S. Dist. LEXIS 91933 (W.D. Wash. Oct. 2, 2009)	8
<i>N. Coast Enters. Inc. v. Factoria P’Ship,</i>	
94 Wn. App. 855 (1999)	2, 3
<i>Pantoja v. Countrywide Home Loans, Inc.,</i>	
640 F. Supp. 2d 1177 (N.D. Cal. 2009)	6
<i>Plein v. Lackey,</i>	
149 Wn.2d 214 (2003)	4
<i>Price v. N. Bond & Mortg. Co.,</i>	
161 Wash. 690 (1931).....	10
<i>Robinson v. Khan,</i>	

89 Wn. App. 418 (1998)	22
<i>Salmon v. Bank of Am. Corp.</i> ,	
2011 U.S. Dist. LEXIS 55706 (E.D. Wash. May 25, 2011).....	11
<i>Salmon v. Bank of America</i> ,	
2011 U.S. Dist. LEXIS 55706 (E.D. Wash. May 25, 2011).....	5
<i>Saunders v. Lloyd's of London</i> ,	
113 Wn.2d 330 (1989)	19
<i>Schaffer v. Sunnyside-Yakima Oil Co.</i> ,	
125 Wash. 689 (1923).....	8
<i>Scott v. Wells Fargo Home Mortg.</i>	
(2003) 326 F. Supp. 2d 709	17
<i>Silvas v. GMAC Mortgage, LLC</i> ,	
2009 U.S. Dist. LEXIS 118854 (D. Ariz. Dec. 1, 2009)	5
<i>Suleiman v. Lasher</i> ,	
48 Wn. App. 373 (1987)	3
<i>Udall v. T.D. Escrow Serv. Inc.</i> ,	
159 Wn.2d 903 (2007)	7
<i>Vawter v. Quality Loan Service Corp.</i> ,	
707 F. Supp. 2d 1115 (W.D. Wash. 2010).....	5, 9
<i>Wallis v. IndyMac Fed. Bank</i> ,	
717 F. Supp. 2d 1195 (W.D. Wash. 2010).....	9
<i>Wash. State Grange v. Brandt</i> ,	
136 Wn. App. 138 (2006)	22
<i>Wilson v. Draper & Goldberg</i> ,	

443 F.3d 373 (4 th Cir. 2006)	16
<i>Yank v. Juhrend,</i>	
729 P.2d 941 (Ariz. Ct. App. 1986).....	8
Statutes	
15 U.S.C. § 1692a(6)	15, 17
15 U.S.C. § 1692a(6)(F)(iii)	17
RCW § 61.24.005 et seq.	3
RCW § 61.24.005(2).....	11
RCW § 61.24.010(3).....	12
RCW § 61.24.030(7)(a)	13
RCW § 61.24.031	7
RCW § 65.08.070	11
RCW § 7.28.010	22
Other Authorities	
RESTATEMENT (SECOND) OF CONTRACTS § 7	8

INTRODUCTION

Despite his substantial default on his home loan, Appellant Doug Walker filed a Complaint and Amended Complaint in Snohomish County Superior Court seeking to enjoin the pending nonjudicial foreclosure proceedings. The sole basis for Appellant's Amended Complaint was his belief that Mortgage Electronic Registration Systems, Inc. did not have the authority to act a beneficiary of the Deed of Trust and execute an Assignment of its interest in the Deed of Trust. The court properly granted Respondents' Motion for Judgment on the Pleadings on Appellant's causes of action for Wrongful Foreclosure, violation of the Fair Debt Collection Practices Act, violation of the Consumer Protection Act, and Quiet Title, because the facts alleged in the Amended Complaint did not entitle Appellant to any relief.

STATEMENT OF THE CASE

Appellant Doug Walker obtained a \$280,000.00 loan from Credit Suisse Financial Corporation on or about February 28, 2007. He executed a promissory note ("Note") and a Deed of Trust to secure the Note with real property known as 22306 56th Avenue West, Mountlake Terrace, Washington ("Property"). (CP 127 ¶ 3.1, 162.) The Deed of Trust identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, as nominee for the lender and the lender's successors and assigns. (CP 162 ¶ (E).)

Appellant failed to repay the loan was required, so Select Portfolio Servicing, Inc. ("SPS"), as assignee of the original lender, began

nonjudicial foreclosure of the Property. SPS recorded an Appointment of Successor Trustee on May 28, 2009, substituting Quality Loan Service Corporation of Washington (“Quality”) as Trustee of the Deed of Trust. (CP 128 ¶ 3.3, 453-454.) Shortly thereafter, a Corporate Assignment of Deed of Trust was recorded, demonstrating transfer of beneficial interest under the Deed of Trust to SPS. (CP 128 ¶ 3.4, 156.)

Walker did not cure the default on his loan, so Quality recorded a Notice of Trustee’s Sale on July 21, 2009, setting a sale of the Property for October 23, 2009. (CP 128 ¶ 3.6, 158-160.) In an attempt to avoid the sale, Walker filed a Complaint in Snohomish County Superior Court on October 2, 2009, (CP 204-273), and later filed an Amended Complaint on October 28, 2009, (CP 124-182). The court entered a Temporary Restraining Order enjoining the trustee’s sale during the pendency of the action, conditioned on Walker making monthly payments into the registry of the court. (CP 117-118.)

Quality and SPS filed a Motion for Judgment on the Pleadings pursuant to CR 12(c) on the basis that Walker was not entitled to relief on any of the causes of action raised in his Amended Complaint. (CP 54-69.) The Motion was granted by the court on August 6, 2009. (CP 4-5.) This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

An order granting judgment on the pleadings under CR 12(c) is reviewed de novo. *N. Coast Enters. Inc. v. Factoria P’Ship*, 94 Wn. App.

855, 858 (1999) (citations omitted). “In reviewing an order entering judgment on the pleadings, [the Court] examine[s] the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief.” *Id.* at 859 (citing *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 258 (1984)). “Although generally raised at different times during the pretrial period, a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings generally raise identical issues.” *Suleiman v. Lasher*, 48 Wn. App. 373, 376 (1987). The Court presumes the well-pled facts in the complaint are true, but it is not required to accept as true any legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120 (1987); *N. Coast Enters.*, 94 Wn. App. at 861. “[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper.” *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977).

II. WALKER CANNOT ESTABLISH ANY VIOLATION OF THE DEED OF TRUST ACT.

The process of nonjudicial foreclosure in Washington is governed by the Deed of Trust Act, located at RCW § 61.24.005 et seq. These statutes contain the complete statutory framework governing nonjudicial foreclosures. The Deed of Trust Act was enacted to further three goals: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles.” *Plein v. Lackey*, 149

Wn.2d 214, 225 (2003). As long as the trustee complies with the Act's procedural requirements, the beneficiary of a trust deed may foreclose on the property without the need for judicial action. The burden is on the borrower challenging the foreclosure to seek judicial relief.

Appellant contends the pending foreclosure is improper for two reasons: First, he asserts that MERS cannot be designated as beneficiary in a deed of trust as nominee for the lender or the lender's successors. (Opening Br. 7-8.) Second, he contends the Appointment of Successor Trustee was invalid because it was executed by SPS. (Opening Br. 16.) Underlying both of these arguments is Walker's belief that a party claiming to be beneficiary of a deed of trust must produce the original note to prove it is entitled to pursue nonjudicial foreclosure. (Opening Br. 8, 14, 17-18.) Contrary to Appellant's assertions, no such requirement exists under Washington law, and Walker's arguments are nothing more than an improper attempt to add requirements into the Deed of Trust Act that do not otherwise exist. Each of Walker's arguments should be rejected for the reasons discussed below.

A. Nothing in Washington Law Prohibits MERS From Being Designated as Beneficiary of a Deed of Trust.

The majority of Walker's Opening Brief is devoted to his argument that MERS was not a proper beneficiary of the Deed of Trust, and as a result, he believes the Assignment of Deed of Trust to SPS and SPS's appointment of Quality as successor Trustee were both invalid. (Opening Br. 7-9, 28-31.) These arguments are not supported by Washington law.

The Deed of Trust, which Appellant admits voluntarily signing, designates MERS as the beneficiary, as nominee for the original lender and the lender's successors. Specifically, the Deed of Trust states as follows:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument but, if necessary to comply with law or custom, *MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.*

(CP 164 (emphasis added).) Interpreting identical language, Washington courts have found that MERS was properly designated as beneficiary, and in that capacity, MERS can assign its interest in the Deed of Trust. *See, e.g., Salmon v. Bank of America*, 2011 U.S. Dist. LEXIS 55706, at *17 (E.D. Wash. May 25, 2011); *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1125 (W.D. Wash. 2010); *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 U.S. Dist. LEXIS 50223, at *17-18 (W.D. Wash. May 20, 2010).

Numerous courts outside of Washington, applying similar nonjudicial foreclosure statutes, have reached the same conclusion. *See, e.g., Gomes v. Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1157-58 (2011); *Ferguson v. Avelo Mortg. LLC*, 195 Cal. App. 4th 1618, 1625-26 (2011); *Silvas v. GMAC Mortgage, LLC*, 2009 U.S. Dist. LEXIS 118854, *8 (D. Ariz. Dec. 1, 2009) (“MERS [is] empowered to act on behalf of

whoever was the equitable owner of the rights in the Deed of Trust”); *In re Tucker*, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010) (“The language of the recorded Deed of Trust clearly authorizes MERS to act on behalf of the Lender in serving as the legal title holder to the beneficial interest under the Deed of Trust and exercising any of the rights granted to the Lender there under.”). As one court explained, “MERS is the named beneficiary in the Deed of Trust. By signing the Deed of Trust, Plaintiff agreed that MERS would be the beneficiary and act as nominee for the lender. . . .” *Derakshan v. MERS, Inc.*, 2009 U.S. Dist. LEXIS 63176, at *18 (C.D. Cal. June 29, 2009). Walker explicitly authorized MERS to act at the beneficiary, and he cannot now assert that MERS did not have the power to act as beneficiary and assign its rights in the Deed of Trust to SPS. *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1189-90 (N.D. Cal. 2009) (rejecting plaintiff’s attempt to “ignore the plain language of the Deed of Trust” and finding that MERS had power to foreclose because deed of trust explicitly named MERS as beneficiary).

Finding no support for his position in Washington law, Walker instead cites to cases from other jurisdictions applying those states’ statutes. For instance, he relies heavily on *Landmark Nat’l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), in which the Kansas Supreme Court found MERS was not a necessary party to bring a judicial foreclosure complaint under Kansas foreclosure statutes. *Kesler*, 216 P.3d at 535, 545. Reviewing and interpreting Kansas law, the court found the trial court had not abused its discretion in finding MERS was not a necessary party to the

foreclosure, and thus refusing to set aside a default judgment that had been entered. *Id.* at 542. Not only does *Kesler* involve interpretation of a different state's law, but the procedural posture of that action was so different from the present case as to render it entirely inapplicable to the proceedings here. The present case involves a nonjudicial foreclosure, whereas the *Kesler* court was concerned with the proper parties to a judicial action. Likewise, Walker's reliance on bankruptcy court opinions discussing MERS' standing to seek affirmative relief in under the Bankruptcy Code do not support his contention that MERS could not be named as nominal beneficiary in the Deed of Trust. (*See* Opening Br. 14.)¹

Furthermore, Walker's contention that MERS cannot act as nominal beneficiary for the benefit of the note holder is a rejection of basic agency principles recognized by statute and the Washington Supreme Court. RCW § 61.24.031 specifically permits the "beneficiary or authorized agent" to take foreclosure actions. Further, the Washington Supreme Court has upheld the application of agency principles to authorize actions under the Deed of Trust Act. *Udall v. T.D. Escrow Serv. Inc.*, 159 Wn.2d 903, 913 (2007); *see also Buse v. First Am. Title Ins. Co.*, 2009 U.S. Dist. LEXIS 45119 at *5-6 (W.D. Wash. May 29, 2009) (finding trustee may act through an agent in performing its duties under

¹ It should also be noted that one of the cases Walker relies on, *In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008), was reversed on appeal, *In re Hwang*, 438 B.R. 661 (C.D. Cal. 2010), and is no longer good law.

Deed of Trust Act); *Moon v. GMAC Mortg. Corp.*, 2009 U.S. Dist. LEXIS 91933, at *17-18 (W.D. Wash. Oct. 2, 2009) (same).

Finally, even if it was true that MERS did not have authority to assign the Deed of Trust to SPS as Walker contends, (Opening Br. 8, 14), the only party that would have standing to challenge MERS' assignment would be the note holder itself, not Appellant. The legal effect of a transaction having been performed by an agent without a principal's authority is to render the transaction "voidable," not invalid or void. See RESTATEMENT (SECOND) OF CONTRACTS § 7 ("[A] principal is free to affirm or to disavow the unauthorized promises of its agent, and thus contracts entered into by the agent acting beyond the scope of his authority are not void but are voidable by the principal."). And where a contract was entered into by an agent without authority, it is the *principal* that has the power to disaffirm the unauthorized act, or to ratify the act and be bound thereby. *Schaffer v. Sunnyside-Yakima Oil Co.*, 125 Wash. 689, 693 (1923); *Yank v. Juhrend*, 729 P.2d 941, 943 (Ariz. Ct. App. 1986); *Fridde v. Epstein*, 21 Cal. Rptr. 2d 85, 89 (Cal. App. 1993). Thus, even if Walker were correct that the holder of the underlying obligation did not authorize MERS to assign the Deed of Trust to SPS, the note holder is the party with the option either to cancel the assignment or to ratify it. Thus, Walker cannot prevail on any cause of action seeking to void the Assignment of Deed of Trust to SPS.

B. No Party Is Required to Produce the Promissory Note to Prove Standing to Pursue Nonjudicial Foreclosure.

There is no requirement in the Deed of Trust Act, or anywhere else in Washington law, for a foreclosing beneficiary to produce the original note to the borrower to prove its standing to foreclose. Hence, courts have overwhelmingly and repeatedly rejected the “show me the note” argument advanced by borrowers such as Walker. *See, e.g., Salmon*, 2011 U.S. Dist. LEXIS 55706, at *16; *Freeston v. Bishop, White & Marshall, P.S.*, 2010 U.S. Dist. LEXIS 28081, at *14 (W.D. Wash. Mar. 24, 2010) (citing *Diessner v. Mortg. Elec. Reg. Sys.*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009)); *Wallis v. IndyMac Fed. Bank*, 717 F. Supp. 2d 1195, 1200 (W.D. Wash. 2010). Walker repeatedly complains that Respondents have not offered evidence to prove possession of the original Note. (*See, e.g.,* Opening Br. 14, 16.) Nevertheless, Walker’s desire to review the original Note is not sufficient for the Court to create a requirement that does not exist under Washington law.

Walker is attempting to turn the statutory *nonjudicial* foreclosure procedure into a judicial process in which the foreclosing beneficiary is required to produce proof to a court that it has standing to foreclose. This is not what was contemplated by the Deed of Trust Act. *See Vawter*, 707 F. Supp. 2d at 1121 (explaining foreclosure under the Deed of Trust act as “streamlined procedures that avoid the burdens associated with petitioning a court.”); *Citicorp. Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1105 (9th Cir. 1998) (explaining that nonjudicial foreclosure involves sale of

property securing a defaulted obligation “without recourse to the courts”). Because there is no currently-existing duty for any party to produce the original note or other proof of ownership prior to advancing a trustee’s sale, Walker has failed to demonstrate any violation of the Deed of Trust Act.

C. The Appointment of Successor Trustee Was Valid.

Walker further contends the foreclosure was deficient because the Corporate Assignment of Deed of Trust, which evidenced the transfer of beneficial interest to SPS, was recorded after SPS issued the Appointment of Successor Trustee. (Opening Br. 16-17.) This contention is not sufficient to state a cause of action because there is no requirement under Washington law for an assignment of a deed of trust to be recorded before foreclosure can be initiated. “An assignment of a deed of trust and note is valid between the parties whether or not the assignment is ever recorded. Recording of the assignments is for the benefit of third parties; it has no bearing on the rights as between assignor and assignee.” *In re United Home Loans, Inc.*, 71 B.R. 885, 891 (W.D. Wash. 1987) (internal citation omitted). Assignments are recorded in order to protect the assignee beneficiary from any potential claims by other parties claiming to hold the beneficial interest, not to give borrowers notice of a transfer of the deed of trust or the note. *See Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 698 (1931); *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn. App. 64, 66-67

(1997) (explaining that if the owner of a mortgage assigns it to two different assignees, the first to record its interest prevails).

The “beneficiary” is the party entitled to foreclose under the deed of trust. A “beneficiary” is defined as the “holder of the instrument or document evidencing the obligations secured by the deed of trust,” i.e., the holder of the promissory note. RCW § 61.24.005(2). The recording of an assignment of a deed of trust is not necessary or sufficient to confer standing to foreclose because the security follows the note, rather than the other way around. *Fidelity*, 88 Wn. App. at 68; *see also Carpenter v. Longan*, 83 U.S. 271, 275 (1872). Consequently, assignments have no particular bearing on who is entitled to foreclose, and instead the focus is on actual transfer of the note. As such, there exists today no specific requirement that an assignment of the beneficial interest under a deed of trust be recorded.

Further, RCW § 65.08.070 bears directly on real property conveyances and recordation, and it provides only that “a conveyance of real property, when acknowledged by the person executing the same . . . *may* be recorded in the office of the recording officer of the county where the property is situated.” RCW § 65.08.070 (emphasis added). Although an assignment *may* be recorded, there is no statutory requirement that it *must* be recorded. *See Salmon v. Bank of Am. Corp.*, 2011 U.S. Dist. LEXIS 55706, at *21-22 (E.D. Wash. May 25, 2011) (rejecting borrowers’ argument that an assignment of deed of trust must be recorded before foreclosure is initiated). Hence, Walker’s argument that SPS lacked the

ability to initiate foreclosure or to appoint a substitute trustee before the Assignment of Deed of Trust was recorded on July 16, 2009 is completely misplaced.

D. Quality Has Not Violated Any Statutory Duties.

In a further attempt to find a violation of the Deed of Trust Act, Appellant contends that Quality breached its fiduciary duties to Walker by failing to demand that SPS produce proof that it holds the Note. (Opening Br. 17.) Contrary to Walker's argument, Quality does not owe him any fiduciary duties. Prior to 2008, RCW § 61.24.010 imposed a fiduciary duty on a trustee to act for both the borrower and the beneficiary. However, the statute was amended in 2008 to remove this requirement and replace it with the much lower good faith standard. RCW § 61.24.010(3), (4); *Klinger v. Wells Fargo Bank, NA*, 2010 U.S. Dist. LEXIS 111683, at *10-11 (W.D. Wash. Oct. 20, 2010). Accordingly, Quality does not owe any fiduciary duties to Walker, and any claim for breach of fiduciary duty must fail.

Furthermore, Walker has not demonstrated any way that Quality breached its statutory duties. Although Walker believes Quality should be required to produce proof that SPS has the legal right to pursue foreclosure, no such requirement existed in the Deed of Trust Act at the time the foreclosure of the Property was commenced. RCW § 61.24.030(7), which was added to the code effective July 26, 2009, now requires a trustee to have "proof that the beneficiary is the owner of any

promissory note or other obligation secured by the deed of trust” before commencing foreclosure. RCW § 61.24.030(7)(a), *enacted by* S.B. 5810, 61st Leg., 1st Sess. (Wash 2009). However, at the time the foreclosure in the present case was commenced and the Notice of Trustee’s Sale was issued on July 17, 2009, the Deed of Trust Act contained no such requirement.

Walker’s complaint that Quality did not obtain evidence to support SPS’s claim to be beneficiary is essentially an attempt to apply RCW § 61.24.030(7) retroactively to the foreclosure in the present case. However, Walker has not provided any reason why the legislative amendment should be applied retroactively to invalidate the Notice of Trustee’s Sale that was previously issued. Statutes are presumed to operate prospectively only and cannot be construed to operate retroactively unless the Legislature clearly indicates it intends retroactive application. *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 344 (1938); *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 584 (2006) (stating a statute may only be applied retroactively if the legislature so intended, it cures a preexisting ambiguity in the statute, or it is remedial and does not affect a substantial or vested right). Because Walker has not identified any statutory duties existing under the Deed of Trust Act at the time of the foreclosure which were violated by Quality, he cannot prevail on any claim for violation of the Act.

E. Walker Has Not Established Prejudice.

Even assuming that Walker could show a technical error under the Deed of Trust Act, he nonetheless failed to state a viable claim because he has not show he was prejudiced by any purported error. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn.App. 532, 537 (2005) (“Despite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale.”); *Koegel v. Prudential Mutual Sav. Bank*, 51 Wn.App. 108, 752 P.2d 385, 387-89 (1998) (declining to set aside trustee’s sale despite trustee’s failure to comply with the statutory notice requirements because plaintiff had not shown prejudice). Walker does not dispute that he defaulted on his loan payments. Further, he has not pleaded any facts that would demonstrate any of the purported errors he alleges have resulted in specific prejudice. Accordingly, no cause of action for violation of the Deed of Trust Act can be stated.

III. WALKER CANNOT PREVAIL ON ANY CLAIM UNDER THE FAIR DEBT COLLECTION PRACTICES ACT.

Walker’s Amended Complaint contends that Quality violated the Fair Debt Collection Practices Act (“FDCPA”) by making “false and misleading representations” about the authority of MERS and SPS to pursue nonjudicial foreclosure. (CP 131 ¶ 5.2.) Although not raised in the Amended Complaint, Walker’s Opening Brief also attempts to charge SPS with violation of the FDCPA. (*See* Opening Br. 22; CP 131.) The trial court did not err in finding Respondents were entitled to judgment on this

cause of action because neither Quality nor SPS are subject to the FDCPA, and even if they were, the facts do not demonstrate any violation.

A. Walker Has Not Shown that Respondents Engaged in Debt Collection.

The FDCPA regulates the practices a debt collector may employ in the course of collecting “debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). No cause of action can be stated under the facts alleged in Walker’s Amended Complaint because the actions complained of – pursuing nonjudicial foreclosure pursuant to a deed of trust – do not constitute debt collection. Courts within the Ninth Circuit have repeatedly confirmed that nonjudicial foreclosure is not the collection of a debt within the meaning of the FDCPA. *See, e.g., Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Diessner v. Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009); *Gallegos v. Recontrust Co.*, 2009 U.S. Dist. LEXIS 6365, at *7-8 (S.D. Cal. Jan. 29, 2009).

Rather than discussing the numerous Ninth Circuit authorities finding the FDCPA inapplicable to nonjudicial foreclosure, Walker instead cites *Wilson v. Draper & Goldberg*, in which the Fourth Circuit found an attorney conducting foreclosure under Virginia law could be a debt collector under the FDCPA. (*See* Opening Br. 19.) Notably, the facts in *Wilson* that led the Fourth Circuit to that conclusion involved a letter sent from the foreclosure attorney to the debtor demanding payment

of money directly to the attorney. *Wilson v. Draper & Goldberg*, 443 F.3d 373, 376-77 (4th Cir. 2006). No such facts are present in this case.

Courts in the Ninth Circuit that have found nonjudicial foreclosure is *not* debt collection under the FDCPA have highlighted the important distinction between foreclosure and demands for payment: “Foreclosing on a trust deed is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.” *Hulse*, 195 F.Supp.2d at 1204. Because foreclosure is not debt collection under the FDCPA, “any actions taken . . . in pursuit of the actual foreclosure may not be challenged as FDCPA violations.” *Id.*

Because the only actions that Walker contends Quality and SPS took involved pursuing nonjudicial foreclosure, and because these actions do not constitute debt collection under the FDCPA, Walker’s FDCPA cause of action fails at the outset.

B. Walker Has Not Established that Respondents Are Debt Collectors.

Additionally, a plaintiff attempting to state a cause of action under the FDCPA must allege facts demonstrating the defendant fits within the statutory definition of a “debt collector.” *Heintz v. Jenkins*, 541 U.S. 291, 294 (1995). The FDCPA defines a “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any

business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).

Walker’s Amended Complaint only identifies one action that Quality has ever taken: the issuance of a Notice of Trustee’s Sale on July 17, 2009. (*See* CP 128 ¶ 3.6.) Likewise, the Amended Complaint only identifies one action taken by SPS: the issuance of an Appointment of Successor Trustee on May 22, 2009. (*See* CP 128 ¶ 3.3.) Neither of these contentions are sufficient to establish that Quality or SPS regularly collect or attempt to collect consumer debts owed to another. *See* 15 U.S.C. § 1692a(6).

Furthermore, Walker cannot establish that SPS is a debt collector because the Amended Complaint’s allegations demonstrate that SPS was attempting to collect its own debt rather than a debt owed to “another.” *See* 15 U.S.C. § 1692a(6)(F)(iii). Courts have acknowledged that “creditors, mortgagees, and mortgage servicing companies are not debt collectors and are statutorily exempt from liability under the FDCPA.” *Scott v. Wells Fargo Home Mortg.*, 326 F. Supp. 2d 709, 718-19 (E.D. Va. 2003); *see also Diessner*, 618 F. Supp. 2d at 1188; *Cuddeback v. Land Fin. Servs.*, 2011 U.S. Dist. LEXIS 31423, at *3-4 (W.D. Wash. Mar. 14, 2011). In an attempt to avoid this rule, Walker asserts that SPS may have acquired the loan after the loan was already in default. (Opening Br. 22.) However, no facts are pled in the Amended Complaint that would

demonstrate this was the case. Walker bears the burden of pleading facts that would be sufficient to establish each of the elements of a cause of action, and because he failed to do so, the trial court did not err in granting judgment on the pleadings for Respondents.

C. Walker Has Not Established an FDCPA Violation.

Even if Walker had shown that Quality and SPS were debt collectors, he nonetheless failed to establish a viable claim under the FDCPA because the facts do not demonstrate any violation of the statute. Walker contends that Respondents made false representations that SPS was entitled to foreclose. (*See* Opening Br. 20-21.) As discussed above, the facts do not demonstrate any error in the foreclosure proceedings, and Walker has not shown any way in which SPS's pursuit of foreclosure was wrongful. Hence, he has not shown any violation of § 807 (codified at 15 U.S.C. § 1692e) by taking an action not legally authorized. Further, Walker admits executing the Deed of Trust to secure his \$280,000.00 loan with real property, and he does not contend that the loan was paid as agreed. (CP 127 ¶ 3.1.) Instead, he concedes that he defaulted on the loan. (*See* Opening Br. 21-22.) Thus, he has not demonstrated that Respondents violated § 808 (codified at 15 U.S.C. § 1692f) by falsely representing the character or legal status of the debt. Without identifying any actions that either Quality or SPS has taken in violation of a specific provision of the FDCPA, no cause of action can be stated.

IV. WALKER HAS NOT ESTABLISHED A VIOLATION OF THE CONSUMER PROTECTION ACT.

The elements of a claim under Washington’s Consumer Protection Act (“CPA”), RCW § 19.86 set seq., are as follows: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the plaintiff’s business or property; and (5) that injury is causally linked to the unfair or deceptive act. *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. Walker has not established any (a) unfair or deceptive act or practice, (b) impacting public interest, (c) or injury.

A. No Deceptive Act Has Been Alleged.

A plaintiff can meet the first CPA element in only two ways, either by showing “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.’” *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge*, 105 Wn.2d at 785-86). To show a “per se unfair trade practice,” the plaintiff must demonstrate the defendant took an action in violation of a statute which includes a “specific legislative declaration of public interest impact.” *Hangman Ridge*, 105 Wn.2d at 791. Walker contends that Respondents committed a per se unfair trade practice based on the violations of the Deed of Trust Act and the FDCPA alleged elsewhere in his Amended Complaint. (Opening Br. 23, 25.) As discussed above, no cause of action can be

stated for violation of either statute, because neither the Assignment of Deed of Trust nor the Appointment of Successor Trustee violated Washington law in any way. Because these contentions fail to support the underlying causes of action, they likewise fail to provide a basis for Walker's CPA claim.

B. The Facts Do Not Show Any Public Impact.

Additionally, a plaintiff asserting a CPA claim must show that the act complained of impacts the public interest. *Hangman Ridge*, 105 Wn.2d at 788. The Court must consider this element in light of the context in which the alleged act was committed. *Id.* at 780. Because Walker complains of a consumer transaction, the following factors are relevant:

(1) Were the alleged acts committed in the course of the 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. Walker's only attempt to demonstrate public impact is a generalized and conclusory statement that the facts alleged in this case have "been repeated in the foreclosures of other properties throughout the State of Washington." (Opening Br. 25.) However, this general statement does not show public impact. Walker's CPA claim is based solely on the

assertion that in connection with one home loan secured with a deed of trust to a single piece of property, SPS represented that it is the current beneficiary and is entitled to foreclose. Appellant has not shown any way in which this one foreclosure, initiated after he stopped making his mortgage payments, impacts the public interest. Further, the he has not shown any likelihood of repetition of the complained-of conduct. Walker's allegations fall short of demonstrating a pattern or practice of Quality or SPS that is likely to be repeated in the future. Accordingly, he has failed to meet the public interest element of a CPA claim.

C. Grant Has Not Shown Injury or Causation.

Finally, Walker must also must plead and prove a causal link between the alleged deceptive practice and his purported injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 81-82 (2007). Hence, he must demonstrate facts showing that but for Quality's and SPS's allegedly false representations that they were entitled to foreclose, he would not have been harmed. *Id.* Here, no such facts are alleged. Walker contends generally that he incurred "out-of-pocket expenses for postage, parking, and consulting an attorney." (Opening Br. 27.) These facts are not tied to any specific conduct by either Quality or SPS. Without any facts to show he suffered injuries that are directly attributable to specific, deceptive actions by Respondents, Walker's claim for violation of the CPA fails.

V. WALKER HAS NOT ESTABLISHED A QUIET TITLE CLAIM.

An action to quiet title is governed by RCW § 7.28.010. A quiet title claim is equitable in nature and will properly lie only where the plaintiff demonstrates he is equitably entitled to remove a cloud on title. *Robinson v. Khan*, 89 Wn. App. 418, 422 (1998). “The plaintiff in an action to quiet title must succeed on the strength of his own title and not on the weakness of his adversary.” *Desimone v. Spence*, 51 Wn.2d 412, 415 (1957) (citations omitted); *see also Wash. State Grange v. Brandt*, 136 Wn. App. 138, 153 (2006). Walker has failed to state a cause of action for quiet title because he has not alleged any facts demonstrating he holds title to the Property that is superior to the beneficiary of the Deed of Trust. He admits that he obtained the loan in 2007 and executed the Deed of Trust as security for the loan. (CP 127 ¶ 3.1.) He has not presented any facts showing that he repaid the debt, or that he has the ability to repay it. Nevertheless, he seeks a judicial declaration that the Deed of Trust is unenforceable, thus allowing him to retain ownership of the Property without repaying any of his debt. This inequitable result cannot be allowed. Without demonstrating that he has repaid the indebtedness, Walker cannot quiet title to the Property free and clear of the Deed of Trust. As one Washington court has explained:

The logic of such a rule is overwhelming. Under a deed of trust, a borrower’s lender is entitled to invoke a power of sale if the borrower defaults on its loan obligations. As a result, the borrower’s right to the subject property is contingent upon the borrower’s satisfaction of loan obligations. Under these circumstances, it would be

unreasonable to allow a borrower to bring an action to quiet title against its lender without alleging satisfaction of those loan obligations.

Evans v. BAC Home Loans Servicing LP, 2011 U.S. Dist. LEXIS 136282, at *10-11 (W.D. Wash. Dec. 10, 2010). Walker has not repaid the loan that he secured with the Deed of Trust to the Property. Accordingly, he cannot state a superior claim to the Property, and his quiet title claim was properly dismissed.

VI. APPELLANT IS NOT ENTITLED TO RECOVER ATTORNEYS' FEES ON APPEAL.

Appellant asks the Court to award him attorneys' fees and costs incurred on appeal. (Opening Br. 31.) In support of this request, he cites Paragraph 26 of the Deed of Trust. (*Id.* at 32.) But Paragraph 26 provides for recovery of "reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." (CP 172.) The present appeal is not an action to "construe or enforce any term" of the Deed of Trust. Instead, this action concerns purported violations of statutory provisions including the Deed of Trust Act and FDCPA. Because the present action does not fall within the scope of the imitated attorneys' fees provision in the Deed of Trust, there is no contractual basis for awarding fees.

CONCLUSION

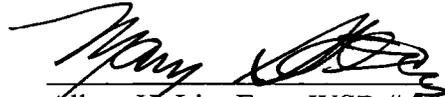
For the foregoing reasons, the Court should affirm the order of the trial court granting Respondents' Motion for Judgment on the Pleadings pursuant to CR 12(c). The facts alleged by Walker demonstrate that no

cause of action can be stated, as Respondents have not violated any of the statutory provisions that form the basis of Walker's Amended Complaint.

Dated: July 19, 2011

Respectfully Submitted,
McCarthy & Holthus, LLP

By:


Albert H. Lin, Esq., WSB # 28066
Mary Stearns, Esq., WSB # 42543
Attorneys for Respondents,
Select Portfolio Servicing, Inc. and
Quality Loan Service Corporation of
Washington, Inc.

CERTIFICATE OF SERVICE

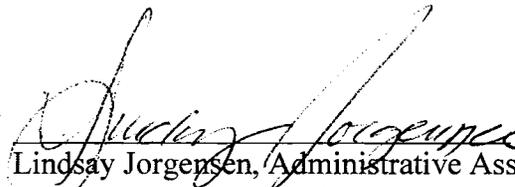
I certify that on July 19, 2011, I served a copy of the foregoing document, described as **RESPONDENTS' BRIEF** on the following persons by U.S. First Class Mail:

Richard Llewelyn Jones
2050 112th Ave., N.E., Suite 230
Bellevue, WA 98004

Rhonna Kollenkark
John Andrew Solseng
Robinson Tait, PS
710 2nd Ave., Suite 710
Seattle, WA 98104

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 Poulsbo, Washington.

Dated: July 19, 2011


Lindsay Jorgensen, Administrative Assistant
McCarthy & Holthus, LLP