

690345

69034-5

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL -1 PM 1:08

69034-5
No. 69034-5-I

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUL 2 1 2013

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

MICHAEL LEVITZ,

Appellant

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
CAPITAL ONE, NA, US BANK NATIONAL ASSOCIATION, as
Trustee for CHEVY CHASE FUNDING LLC MORTGAGE-BACKED
CERTIFICATES SERIES 2005-1, US BANK, NA as trustee for CCB
LIBOR 2005-1 SERIES TRUST, DOES 1 through XX inclusive, and
BISHOP WHITE MARSHALL & WEIBEL, PS, (f/k/a BISHOP WHITE
AND MARSHALL, PS),

Respondents.

Appeal from Superior Court for King County
The Honorable Dean S. Lum

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	4
A. <u>No Defendant Provided Any Counter-Authority to Establish That the Property in Question is Not Community Property</u>	4
1. <i>Mr. Levitz is the Owner of the Property as Community Property and Is Not a Tenant</i>	5
2. <i>Mr. Levitz Recorded a Claim of Spouse in Community Property</i>	5
3. <i>Mr. Levitz Was Awarded Ownership and Possession of the Property in the Divorce Decree</i>	6
B. <u>Deed of Trust Act Violations</u>	7
C. <u>Violation of the Consumer Protection Act</u>	9
D. <u>Breach of the Covenant of Good Faith-Fair Dealing</u>	10
E. <u>Fraud and Misrepresentation</u>	11
III. ATTORNEY’S FEES AND COSTS ON APPEAL	11
VI. CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 285 P.3d 34 (2012). 9, 11

Danaxas v. Sandstone Court of Bellevue, LLC, 63 P.3d 125, 148 Wn.2d 654, 671 (Wash. 2003) 11-12

Klem v. Washington Mutual Bank, No. 87105-1, Slip Op., p. 19 (Feb. 28, 2013) 9

STATUTES

RCW 26.16.030	4
RCW 26.16.030(3)	5
RCW 26.16.030(8)	5
RCW 26.16.100	6
RCW 61.24.010(2)	11
RCW 61.24.010(4)	10
RCW 61.24.030(8)	7
RAP 18.1(b)	11

I. INTRODUCTION

The trial court incorrectly granted summary judgment to all defendants because:

- Mr. Levitz has a provable interest in the real property in question in this case, and the record in the case below substantiates this position.

- Mr. Levitz is the owner-occupant of the property and under any theory available under the Deed of Trust Act or theory of ownership or occupancy, the Notice of Default should have been provided to Mr. Levitz by Bishop White, and it was not.

- CCB Libor 2005-1 Series Trust is not a security registered with the Securities and Exchange Commission (SEC), so it is a fraudulent entity and is not and cannot be a proper beneficiary of the Deed of Trust.

II. LEGAL ARGUMENT

A. NO DEFENDANT PROVIDED ANY COUNTER-AUTHORITY TO ESTABLISH THAT THE PROPERTY IN QUESTION IS NOT COMMUNITY PROPERTY

While respondents attempt to emphasize that only Dr. Levitz signed the note and deed of trust and therefore none of them have any duty to Mr. Levitz, they provide no counter-authority to overcome the statutory mandate that property “acquired after marriage...by...either husband or wife or both, is community property.” RCW 26.16.030.

1. **Mr. Levitz is the Owner of The Property as Community Property, and is Not a Tenant**

The community property statute gives a “like power of disposition as the acting spouse...has over his or her separate property” but neither person shall encumber the community real property “without the other spouse...joining in the execution of the deed or other instrument by which the real estate is ... encumbered, and such deed or other instrument must be acknowledged by both spouses...” RCW 26.16.030(3). Because the statute contemplates that an encumbrance, such as a re-financing of the home, must be executed and acknowledged by both spouses, Mr. Levitz has the like power of disposition as Dr. Levitz over the deed of trust in question, and Mr. Levitz is likewise a co-borrower or co-grantor of the deed of trust. Therefore, Bishop White did have a duty to notify Mr. Levitz of the Notice of Default and Notices of Trustee’s Sales, and they failed to do so. RCW 61.24.030(8).¹

2. **Mr. Levitz Recorded a Claim of Spouse in Community Property**

The court found, and respondents agreed, that the *status quo ante* should have been restored during the stay of the vacating of the

¹ “That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor.” RCW 61.24.030(8) (2012).

dissolution decree pending appeal. The *status quo ante* should have been found to be both: 1) that Mr. Levitz had a community property interest pursuant to the Community Property statute, and 2) the fact that he recorded a claim of spouse in community property, which the statute contemplates and specifically allows. The court erred in finding that the *status quo ante* was only based on the divorce decree that had been vacated, even though the decision vacating the decree was under appeal at the time of the hearing in the court below.

The Claim of Spouse in Community Property was recorded over five months prior to the vacated divorce decree. Nowhere in the record is there any evidence that the Claim of Spouse in Community Property was to be invalidated, vacated, or rescinded. The Claim of Spouse in Community Property was recorded pursuant to 26.16.100 and was not rescinded or vacated by order of the court in the divorce decree or in the vacating of the divorce decree.

3. **Mr. Levitz Was Awarded the Ownership and Possession of the Property in the Divorce Decree**

At the time of the summary judgment/motion to dismiss hearing in the court below, the court of appeals decision had not yet been rendered in the dissolution case, and the trial court's stay pending appeal was still in effect which stayed the vacating of the terms of the decree. The terms

of the decree awarded all the rights under the Deed of Trust to Mr. Levitz.

B. DEED OF TRUST ACT VIOLATIONS

Having established that Mr. Levitz is the co-borrower and co-grantor under the Community Property statute, Bishop White had a duty to serve him with the Notice of Default pursuant to RCW 61.24.030(8).

The court should disregard Bishop White's circular argument that "It is difficult to discern how any claims can arise from alleged failure to receive prefatory notice of an event that did not occur." Brief of Respondent Bishop White, p. 15. Clearly the respondents fully intended to perform a trustee's sale of the property because *three* notices of Trustees' sales were issued, so it is disingenuous to claim that they should not be required to give a borrower notice of something they fully intended to perform only because that trustee's sale was later withdrawn. In fact, the sale was withdrawn only after and in response to the filing of this lawsuit. Without this lawsuit, it is highly likely the sale would not have been withdrawn.

MERS recorded an "Appointment of Successor Trustee" allegedly appointing Defendant Bishop, White & Marshall, P.S., as successor trustee under the subject deed of trust. (CP 5, 28-29). MERS was not the lender and never held the Note. (CP 18:23-24, 19:14-21, 20:1-8, 238:5-8,

246:19-23). On July 17, 2009, BMWW recorded a Notice of Trustee's Sale for the subject property, allegedly securing an obligation in favor of MERS, who claimed to be acting solely as a nominee for Chevy Chase Bank, F.S.B. and its successors and assigns as beneficiary. (CP 5, CP 30-34). No Notice of Default was issued prior to this Notice of Trustee's Sale.

On April 12, 2010, BMWW issued a Notice of Default on the subject property, which asserted that the "current beneficiary" was US Bank, NA as trustee for CCB Libor Series 2005-1 Trust, that MERS was "nominee" for Capital One, N.A. Bank, F.S.B. and its successors and assigns, and that the "servicer" was Capital One, NA. (CP 5, CP 225-230). On June 10, 2010, BMWW issued a "Notice of Foreclosure and Notice of Trustee's Sale" stating that the Notice was a consequence of default(s) in the obligation to MERS as a nominee for Capital One N.A. and its successors and assigns.

No such entity or security known as "CCB Libor Series 2005-1 Trust" is registered with the SEC, which is a requirement for all publicly traded securities. Therefore, this fraudulent party has no rights or interest in the subject deed of trust or Mr. Levitz's property, including the right to be a beneficiary, the right to collect on the note, or the right to foreclose. (CP 6-7).

Capital One N.A. is merely the servicer, not the beneficiary, so even if MERS could be a “nominee,” it could only be acting in some limited agency capacity for the *beneficiary*, not the *servicer*. Therefore, MERS violated the Deed of Trust Act because it is not a party to the deed of trust yet is claiming to have the capacity to make assignments and to appoint a successor trustee.

C. CONSUMER PROTECTION ACT VIOLATIONS

In reply to Respondents’ arguments in response, Mr. Levitz re-states his arguments from his opening brief.

To clarify the argument on the issue of “robo-signing,” the Supreme Court found that this specific act may form the basis of a Consumer Protection Act claim, as defendant Bishop White admits. Brief of Respondent Bishop White, p. 22. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013)²; *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012)³. In fact, since the court in *Bain* warned that robo-signing may form the basis of a meritorious CPA claim, they must have contemplated that unsuspecting consumers of mortgage loans

² “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).

³ “Also, while not at issue in these cases, ...issu[ing] assignments without verifying the underlying information, ...could well be the basis of a meritorious CPA claim.” *Bain*, 175 Wn.2d at 118 n.18.

would be deceived by such actions, and as such, would have standing to challenge a robo-signed document affecting their mortgage. Certainly they could not be contemplating that a trustee, bank, beneficiary, transferee, mortgage-backed security pool, investor, trustee for an investor, nominee, or MERS would complain of robo-signing as unfair and deceptive. The only party they could have been contemplating as a victim of robo-signing and Plaintiff in a CPA case would have been the borrower/grantor on a deed of trust, the party who stands to lose the property at a trustee's sale.

D. BREACH OF THE COVENANT OF GOOD FAITH-FAIR DEALING

In reply to Respondents' arguments in response to this appeal, Mr. Levitz re-states his arguments from his opening brief on this claim.

All respondents engaged in bad faith by attempting to foreclose when they had no legal right to do so. The Trustee is required to act in good faith towards the borrower,⁴ and the remaining respondents are required to act in good faith in contracting with the borrower. A recording of an Appointment of Successor Trustee is required by statute

⁴ RCW 61.24.010(4) "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."

to be effective, and to give the successor trustee the powers of the original trustee. RCW 61.24.010(2). Simply put, if the Appointment has not been recorded, the Appointment has no effect and the “successor trustee” is not a trustee and is not empowered to take the actions of a trustee. Simply executing an Appointment of Successor Trustee without recording does not give effect to the Appointment. The parties cannot privately waive the terms of the statute and claim that because there may be some agency arrangement, they are entitled to alter the requirements of the statute. *Bain*, 285 P.3d at 175.

E. FRAUD AND MISREPRESENTATION

In reply to Respondents’ arguments in response to this appeal, Mr. Levitz re-states his arguments from his opening brief on this claim. The specific fraudulent acts of the appellants have been set forth and legal analysis provided in Appellant’s opening brief, and will not be restated here in the interests of brevity.

III. ATTORNEY’S FEES

Should Mr. Levitz prevail on appeal, he hereby requests reasonable attorney’s fees and costs of appeal. The Rules of Appellate Procedure require that the party seeking attorney’s fees “devote a section of the brief to the request for the fees or expenses.” RAP 18.1(b). *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 63 P.3d 125, 148 Wn.2d

654, 671 (Wash. 2003). In the trial court in *Denaxas*, the Seller was awarded attorney's fees on summary judgment. But the Supreme Court in *Denaxas* found that the "Seller requested attorney's fees on appeal but did not receive them because they were not the prevailing party." *Id.* But none of the parties requested attorney's fees on the appeal to the Supreme Court, so even though the Supreme Court reversed the Court of Appeals and ruled in favor of Seller, the court did not grant attorney's fees and costs of appeal to Seller because he failed to request them in the appeal brief to the Supreme Court. *Id.*

In the case at bar, none of the respondents requested attorney's fees or costs on appeal, so even if the defendants are the prevailing party, none of them should be awarded attorney's fees or costs of appeal.

IV. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motion for summary judgment and motion to dismiss, and remand for further proceedings consistent with the Court's opinion. Attorney's fees and costs on appeal should be awarded to Mr. Levitz.

Signed and dated this 1st day of July, 2013.



Jill Smith, WSBA #41162

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division I, and properly served to the counsel listed below, on July 1st, 2013.

ATTORNEYS FOR RESPONDENTS

John A. Knox
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380

Ann T. Marshall
David A. Weibel
Bishop, White, Marshall & Weibel, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101



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