74602-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 74602-2-1

JOHN PHILLIP HALL,

Appellant,

v.

JP MORGAN CHASE BANK, a national bank, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005-PR4 Trust, WAMU MORTGAGE PASS_THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, a foreign trust,

Respondents.

REPLY BRIEF OF APPELLANT JOHN HALL

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 27 PM 4:43

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I. INTRODUCTION

Appellant John Hall, petitioner below, submits this reply brief in support of his appeal of the trial court's orders.

II. REPLY TO COUNTERSTATEMENT OF FACTS

As a general observation, in its responsive brief, respondent Chase Bank overstates the Court's order of dismissal and inaccurately and incompletely describes factual elements of the appellant Mr. Hall's claims. Respondent Chase imputes broad and specific findings to the trial court's order, namely that the FFA claim was dismissed because not all borrowers were present and that "Appellant failed to produce evidence on each element required to prove a CPA claim." CP 5-6 As the minute entry for the summary judgment hearing also indicates, the Court did not in fact make such specific and broad findings and the respondent's assertions go beyond the Court's actual oral ruling as well. CP 10

With respect to Mr. Hall's claims, he did allege violations of the FFA at RCW 61.24.165(6) and the CPA and attempted to add claims regarding misrepresentations by Chase. CP 446-448, 54-64, 74-153. Chase also claims in its answering brief that it did treat Mr. Hall as "*a* borrower," but this assertion is belied by the fact that it did not even review his loan modification application at the FFA mediation, claiming at

the same time that it had no obligation or ability to negotiate with him because he was not the borrower on the note.

III. REPLY ARGUMENT

A. Broad Interpretation of FFA Best Achieves Legislative Intent; Respondent's Suggested Statutory Interpretation Would Result in Inconsistent Application of the Law.

This Court is being asked, in part, to determine what obligations a lender or its representative has to an individual in Mr. Hall's position, namely a spouse who has received a property pursuant to a decree of dissolution, as anticipated by amendments to the FFA at RCW 61.24.165(6). Given that the FFA was specifically amended to address situations such as this and the stated intent of the statute to "avoid foreclosure whenever possible," this Court should find that individuals in appellant's position can individually engage with a lender without requiring the participation of an ex-spouse. RCW 61.24.005

In the interpretation of the statute respondent Chase asks this Court to accept, application of the law would be extremely inconsistent, resulting in situations such as the present case where a disgruntled ex-spouse could effectively deny a homeowner the relief he or she may need by refusing to participate in mediation or provide a power of attorney. Given the statutory intent, a broad reading of this statute is necessary to best give the

statute its intended effect of reducing the incidence of home foreclosure for the largest number of Washington residents.

Further, this case can be distinguished from the scenario upon which respondent Chase places inapposite emphasis, namely that this Court is being asked to require a lender to accept a loan assumption application from the ex-spouse of a borrower. Again, Mr. Hall is not asking the Court to impose an affirmative obligation on a lender to accept a loan assumption sought by an ex-spouse, merely that someone in his position at least be given an opportunity to have his or her own loan modification application reviewed on its own merits in good faith. By its own admission, respondent Chase asked for and received a financial application from the appellant, but then sought to stand behind a claimed procedural obstacle without actually reviewing the merits of his application. This conduct makes a mockery of the statutory amendment requiring that someone who received a property in a dissolution be treated as a "borrower" and allows a lender to sidestep the statute at the whim of an ex-spouse.

Additionally, the FFA guidelines are of general application for the myriad circumstances a named borrower may not be able to attend a mediation. This Court should not allow a convenient interpretation of these general guidelines, permitting a proxy through a power of attorney,

to supersede the plain language of the statute that an ex-spouse must be treated as a borrower. If one of the intents of the amended statute is to facilitate loan modifications by an ex-spouse, this Court should interpret the statutory language broadly.

B. Appellant Hall Did Allege Specific Violations of the FFA and These Violations Comprise Some of the Elements Supporting His CPA Claim.

Although it may be unclear from reading respondent Chase's answering brief, Mr. Hall did specifically allege that Chase violated the FFA by failing to treat him as a borrower and not reviewing his loan modification application in good faith. In addition, he sought to amend his complaint to add claims that Chase misrepresented material facts to him and his attorney, claiming that no loan modification relief was available to him when this claim was contradicted by Freddie Mac guidelines. On the face of these two pieces of information alone, a reasonable inference could be made that if no mortgage relief was available, as asserted by respondent in its July 2015 letter of counsel and the declaration of Joseph Devine, then the March 2014 mediation was a sham and could not have been conducted in good faith. CP 77, 195.

CPA Elements. The facts and issues of law raised by the appellant do meet the five elements of a CPA claim outlined in *Hangman Ridge* and the case was therefore improperly dismissed. *Hangman Ridge Training*

Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986). These elements are: (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 is causally linked to the unfair or deceptive act.

1. Unfair or Deceptive Act or Practice.

In *Bain*, the Washington Supreme Court stated: To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity to* deceive a substantial portion of the public." Even accurate information may be deceptive "if there is a representation, omission or practice that is likely to mislead." *Bain v. Metro. Mortg. Group, Inc.*, 175 Wash.2d 83, 115-16, 285 P.3d 34 (2012). Chase's violation of the FFA and its explicit public interest component can be fairly considered an unfair or deceptive act. This is further substantiated by the OCC sanctions on Chase in 2015 for similar conduct. CP 161-62. Also, misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law reviewed de novo. *Id.* at 115-16. Bad faith conduct of the respondent at the mediation and misrepresentations by the servicer and its

representatives regarding the availability of loan modification are central to appellant's claims and the relief he now must seek through the courts.

2. Public Interest Impact.

A plaintiff may show that a deceptive commercial act or practice has affected the public interest by satisfying five different factors: (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it? *Hangman Ridge*, 105 Wash.2d at 790, 719 P.2d 531.

Again, given the OCC sanction of Chase for similar conduct, the explicit public interest component of the FFA, and the related private right of action in the CPA for violations of such statutes, the five factors are easily met in this case. RCW 19.86.093, RCW 61.24.005. Chase seeks to diminish the egregiousness of its conduct denying the availability of loan relief not by disputing the fact of the misrepresentations but by asserting that these misrepresentations are essentially immaterial, because the guidelines are "not law" and so forth. *Respondent's Answering Brief*, p. 14.

3. Injury and Causation.

To make out a CPA claim, a plaintiff must also show that he or she was injured in his or her "business or property." *Hangman Ridge,* 105 Wn.2d at 792, 719 P.2d 531. As the Supreme Court concluded in that case "[t]he injury involved need not be great, but it must be established." However, as the Supreme Court noted in *Panag*, "'injury' is distinct from 'damages.' Monetary damages need not be proved; unquantifiable damages may suffice." *Panag v. Farmers Insurance Co. of Washington,* 166 Wn.2d at 58, 204 P.3d 885; see also *Bavand v. OneWest Bank, F.S.B.*, 309 P.3d 636, 176 Wn.App. 475 (Div. 1 2013).

A lack of a successful nonjudicial foreclosure does not preclude recovery for damages associated with a claim alleging misrepresentation. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 433, 334 P.3d 529 (2014). And whether Chase's statements were misrepresentations, intentional or negligent, is a material issue of fact precluding summary judgment. CR 56(c); *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). If the Court finds that Mr. Hall has suffered a compensable CPA injury as a result of respondents' actions, it can also reasonably be held that he has presented a genuine issue of material fact as to whether he was injured by such conduct.

The Supreme Court held that " [t]o establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff's 'business or property.'" *Panag*, 166 Wash.2d at 58, 63-64, 204 P.3d 885. Here, while a sale has not occurred yet, Mr. Hall has suffered injury by the fact that he has been unable to effectively explore other financing options given the default foreclosure status on the property, he has also paid approximately $19,000 previously in an earlier attempt to modify the loan. Additionally, he has a community property interest in the home from the marriage, and Chase's argument that he is a "stranger" to the note, effectively deprives him of that property right and value.

Additionally, where a more favorable loan modification could have been granted but for bad faith in mediation, the borrower may have suffered an injury to property within the meaning of the CPA. *Frias*, 181 Wn.2d at 431-32. Whether respondents' participation in mediation was in good faith remains disputed. To reiterate, respondents represented that they had authority at the mediation to modify Hall's loan. Later, respondents asserted that loan modification is not available because the loan guarantor does not offer such programs. Viewing the facts in the light most favorable to the nonmoving party, this should be sufficient

evidence to raise a genuine issue of material fact as to whether respondents participated in the mediation in good faith.

Further, while respondents may contend that Hall cannot demonstrate that any of his alleged injuries were proximately caused by their commercial practices, if reasonable minds could differ as is the case here, proximate cause is a factual issue to be decided by the jury. *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999).

C. Trustee's Duties Further Conflicted; "Borrower" Under FFA Also Deserving of Impartiality and Fair Dealing.

In its brief, respondent QLS presents further evidence of the trustee's exacerbated conflict of interest with respect to the FFA apart from the other conflicts outlined in appellant's original brief. QLS asserts in its response that it must abide by the instructions of appellant's ex-wife because she is the party on the note and deed of trust. Given this, the Court must determine a method by which a non-borrower spouse's right to seek a modification under the FFA cannot be prejudiced or actively obstructed by an ex-spouse.

By its language stating spouse who received property through a divorce must be treated as a borrower, some measure of standing, for a loan modification at least, is conferred on the spouse who received the property. Given this, the Court should reasonably extend the trustee's

duties of impartiality and fair dealing required under *Klem* and *Cox v. Helenius* to situations such as that presented here. *Klem v. Washington Mutual*, 176 Wn.2d 771 at 20; 295 P.3d 1179 (2013), *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, (1985).

D. Motion for Leave to Amend Should Be Granted; Trial Court's Orders Did Not Properly Confer Authority to Hear or Dispose of New Claims.

Given the misrepresentations of the respondent Chase regarding the availability of loan modification relief, the first indication being that it was available at mediation followed by later representations that it was not, respondent offers no compelling evidence to support its contention that the appellant should have somehow known this information earlier in the litigation. The fact is that it was discovered by appellant's counsel in preparation for the summary judgment and submitted with his declaration of counsel December 7, 2015. CP 74-153. Given the lack of opportunity for any meaningful discovery and the seriousness of these misrepresentations, appellant must be allowed an opportunity to amend his complaint with the new allegations and claims.

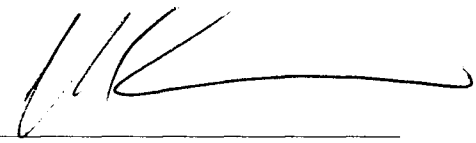
Additionally, the trial court's order of December 14, 2015, states: "In the event plaintiff's motion for leave to amend complaint is granted, the Court may consider disposition of all of plaintiff's claims, including those in plaintiff's proposed amended complaint, at the hearing on the

motion of Chase Bank and Wells Fargo for summary judgment." CP 14 Given that the motion for leave to amend was denied, the trial court should not have properly heard argument and disposed of appellant's new claims. This Court should reverse and remand the order of dismissal on the basis of this procedural error in addition to those other grounds previously raised.

IV. CONCLUSION

For these reasons, the lower court's order of summary judgment should be reversed and the matter remanded with a ruling that plaintiff is a borrower within the meaning of RCW 61.24.165(6), entitled to a mediation with the beneficiary as an individual.

Respectfully submitted this 27th day of May, 2016.



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DECLARATION OF SERVICE

I, Christopher Kerl, hereby declare that on the 27th day of May, 2016, I caused a true and correct copy of the following:

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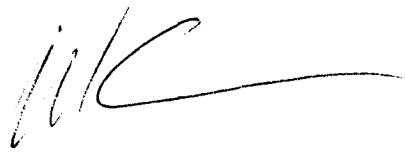

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