

Case No. 74979-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MARK AND JULIE DAVISCOURT

Appellants,

vs.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, INC., et. al.

Respondents.

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CLERK OF COURT
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

BRIEF BY RESPONDENT QUALITY LOAN SERVICE CORP. OF
WASHINGTON

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I. INTRODUCTION

Appellants Mark and Julie Davis court took out a mortgage loan secured by a deed of trust and stopped making their payments. Quality was appointed as successor trustee under the deed of trust to advance a foreclosure of the encumbered property. The foreclosure by Quality, which was never completed, was advanced pursuant to the law in all respects. The Davis courts' claims against Quality were appropriately dismissed on summary judgment. This court should affirm.

II. FACTS

In 2005, the Davis courts refinanced their existing mortgage with Countrywide dba America's Wholesale Lender, and gave Countrywide a promissory note secured by a deed of trust against their property. CP at 660-665; 13-29. The loan was sold into a securitized trust with Bank of New York Mellon ("BONY") acting as trustee. CP at 54. Select Portfolio Servicing ("SPS") is the loan servicer and agent for BONY. CP at 38.

In 2009, the Davis courts stopped making their mortgage payments. CP at 38. Their failure to timely make mortgage payments was an event of default triggering the power of sale under the deed of trust.

On September 4, 2013, BONY appointed Quality as successor trustee under the deed of trust to advance a foreclosure of the property. CP at 31-32. On September 12, 2013, Quality issued a Notice of Default. CP at 34-47. On

February 12, 2014, Quality issued a Notice of Sale scheduling an auction date for the property. CP at 49-52. Prior to issuing the Notice of Sale, Quality obtained a statutory beneficiary declaration confirming BONY held the promissory note. CP at 54. Quality also had at the time (and still maintains to this day) a physical office in Seattle with employees and phone service. CP at 11; 542-45. The Notice of Sale issued by Quality identified the correct address for the Seattle office. CP at 52.

The Daviscourts believe, incorrectly, that they are under no legal obligation to pay the mortgage debt and that the deed of trust does not encumber their property¹. Mr. and Mrs. Daviscourt allege they attempted to physically enter Quality's Seattle office, unannounced and without an appointment, for the specific purpose of asserting their legal theories. CP at 178, 253-57. The Daviscourts found the building within which the office was located and took a picture of it, but allege they were either unable to enter or were denied entry. CP at 254-57, 316.

In July of 2014, the Daviscourts filed this lawsuit. The Daviscourts successfully served Quality's registered agent at the Seattle office. CP at 684. Quality was dismissed from all claims on summary judgment. CP at 499-500.

¹ The Daviscourts pled their theories in the underlying superior court case. None of their theories for why the debt, deed of trust, and foreclosure were invalid had any legal merit, and all claims were appropriately dismissed by the superior court.

III. ARGUMENT

A. Foreclosure Complied With Law In All Respects.

1. Foreclosure Advanced on Proper Authority.

Non-judicial foreclosures are governed by the Deed of Trust Act, RCW 61.24. If the borrower breaches his or her payment obligations, the deed of trust trustee may foreclose the home by trustee's sale. RCW 61.24.020; *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515-516 (Wash. 2015); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93 (Wash. 2012). The deed of trust “beneficiary” has the power to appoint a successor trustee and to instruct the trustee to initiate the foreclosure. RCW 61.24.010(2); *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 31 (Wash. Ct. App. 2016). The “beneficiary” of the deed of trust is the holder of the promissory note. RCW 61.24.005(2); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103-104 (Wash. 2012); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 533 (Wash. 2015); *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 177 (Wash. Ct. App. 2016). The trustee, in verifying the identity of the “beneficiary”, may rely on a statutory beneficiary declaration from the holder of the promissory note prior to issuing the Notice of Sale. RCW 61.24.030(7)(a); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 544 (Wash. 2015).

Here, it is undisputed that the Daviscount's mortgage loan was in default by reason of nonpayment and a foreclosure sale was appropriate. BONY holds the promissory note and is therefore the “beneficiary” of the deed of trust. BONY

as “beneficiary” had the authority to appoint Quality as successor trustee and advance the foreclosure sale. Furthermore, Quality obtained a statutory beneficiary declaration confirming BONY is the promissory note holder before issuing the Notice of Sale. The foreclosure by Quality was advanced in all respects on the proper authority.

2. Beneficiary Can Act Through Agents.

Washington law, and the Deed of Trust Act itself, approves of the use of agents. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106 (Wash. 2012); *Brodie v. Northwest Trustee Serv.*, 579 Fed. Appx. 592, 593 (9th Cir. Wash. 2014) (The fact that U.S. Bank chose to act through its authorized agent, JPMorgan Chase Bank, does not alter its right to foreclose and to appoint a successor trustee under the Washington Deed of Trust Act); *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015) (holding that beneficiary’s agent was allowed to sign beneficiary declaration on its behalf where authorized to do so); *Ennis v. Smith*, 171 Wash. 126, 130 (Wash. 1993) (an authorized agent is empowered to make binding declarations within the scope of its agency on its principal's behalf such that the declarations of the agent are deemed to be those of the principal itself).

In this case, it is undisputed that SPS is BONY’s loan servicer, and SPS additionally declared itself to be BONY’s attorney-in-fact in the instruments it signed. At the least, SPS had apparent authority to execute those instruments on

BONY's behalf. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913 (Wash. 2007) (an agent has apparent authority when a third party reasonably believes the agent has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations). Furthermore, the Davis courts failed to demonstrate the absence of an express agency relationship between SPS and BONY to execute the foreclosure instruments, and that Quality had reason to know no agency relationship existed.

3. Notice of Sale Complies with the Statute.

The Notice of Sale is a statutory form which requires the trustee to fill-in the following template:

which is subject to that certain Deed of Trust dated,, recorded,, under Auditor's File No., records of County, Washington, from, as Grantor, to, as Trustee, to secure an obligation in favor of, as Beneficiary, the beneficial interest in which was assigned by, under an Assignment recorded under Auditor's File No. [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

RCW 61.24.040(1)(f).

Quality's Notice of Sale in this case complies with the above statutory form in all respects. It correctly identifies the information required, including the contents of the original deed of trust and the most recent publicly recorded assignment of the deed of the trust to BONY.

4. Quality Complied with the Physical Office Requirement.

RCW 61.24.030(6) provides that:

[P]rior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address[.]

In this case, when the Notice of Sale was issued in February of 2014, Quality had a physical office in Seattle with employees and telephone service. There is no genuine dispute to this fact. Even in their exaggerated and self-serving declarations, which are also replete with hearsay, the Daviscourts acknowledge finding the building within which the office was located. The Daviscourts cannot testify to the absence of an office with employees because they never entered the building. On the other hand, Quality's employee testified from personal knowledge that the office existed and she and others were working in it. The Daviscourts produced no rebuttal evidence to the employee's testimony, nor could they.

Furthermore, the Daviscourts had no legal right to physically enter the Seattle office for their stated purpose. The reason for requiring a local trustee office is to accommodate service of process, not for borrowers such as the Daviscourts to show-up unannounced and confront employees (as discussed further below, there are other proper channels to communicate sale objections to Quality). Notably, the Daviscourts were able to successfully serve Quality with legal process at the Seattle office, and thus, the Seattle office served its statutory

purpose in this case.

5. Trustee's Discontinuance was Proper.

For the first time on appeal, the Daviscourts argue they should have but did not receive notice that the trustee sale was discontinued and this creates a cause of action proximately causing them damage. First, the court does not address claims raised for the first time on appeal. *Heg v. Alldredge*, 157 Wn.2d 154, 162 (Wash. 2006). Second, there is no requirement in the Deed of Trust Act that a trustee give express notice to a borrower of a sale discontinuance, whether the discontinuance is express or by operation of law. Courts may not amend a statute by judicial construction and add requirements that do not exist. *Salts v. Estes*, 133 Wn.2d 160, 170 (Wash. 1997).

Although there is no express statutory requirement, Quality does provide multiple ways for borrowers such as the Daviscourts to get updates on trustee sales or otherwise communicate with the trustee. Borrowers can get real-time sale updates via Quality's website, <http://wa.qualityloan.com/>. They can also call Quality, which the Daviscourts acknowledge they were able to do. Borrowers can also correspond with Quality by email, fax, or letter. And while borrowers do not have an unfettered right to physically enter Quality's office whenever they please, Quality will and regularly does meet in-person with borrowers at the office by appointment to discuss their issues.

B. Claims For Relief Properly Dismissed on Summary Judgment.

1. Summary Judgment Standard.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 608 (Wash. Ct. App. 2009). A defendant in a civil action is entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim. *Slack v. Luke*, 192 Wn. App. 909, 915 (Wash. Ct. App. 2016).

2. Consumer Protection Act.

A private claim under the CPA requires (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (Wash. 1986). The CPA does not compensate personal injury, mental distress, embarrassment, and inconvenience. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431 (Wash. 2014). Failure to satisfy even one of the elements is fatal to a CPA claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (Wash. Ct. App. 2002).

Here, the Davis courts have failed to demonstrate a violation by Quality of the Deed of Trust Act, let alone a violation so egregious it would rise to the level of “unfair and deceptive” implicating a public interest and punishable under the

CPA. The trustee sale in this case was advanced by Quality pursuant to the law in all respects.

The Daviscourts have also not suffered any damage to “business or property” proximately caused by the trustee sale. The trustee sale was advanced because the Daviscourts stopped making their mortgage payments, and as already discussed there was no violation of the Deed of Trust Act by Quality. *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 37 (Wash. Ct. App. 2016) (a borrower must prove more than the defendant violated the DTA, and he was injured; a borrower must prove, but for the violation of the statute, he would not have been injured); *Babrauskas v. Paramount Equity Mortg.*, 2013 U.S. Dist. LEXIS 152561 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title); *McCrorey v. Fannie Mae*, 2013 U.S. Dist. LEXIS 25461 (W.D. Wash. Feb. 25, 2013) (plaintiffs failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure).

Furthermore, the Daviscourts had no right to physically enter Quality's Seattle office for their stated purpose, and they bear sole responsibility for those “alleged” attempts. The Daviscourts had ample opportunity to communicate their legal theories to Quality through the normal routes, and showing up unannounced and without an appointment at the trustee's office is not one of them. Additionally, the Daviscourts' legal theories were (and have since proven to be)

entirely without merit, and any cost incurred in investigating or advancing those meritless legal theories is not a recoverable item of damage against any defendant. *Matthews v. Nationstar Mortgage*, 2016 U.S. Dist. LEXIS 29691 (W.D. Wash. Mar. 7, 2016); *Marts v. United States Bank Nat'l Ass'n*, 2016 U.S. Dist. LEXIS 24741, 8-9 (W.D. Wash. Feb. 26, 2016).

3. Other Claims For Relief.

The Daviscourts' other claims for relief (e.g. civil conspiracy and injunctive and declaratory relief) are based on the same meritless arguments that the deed of trust is unenforceable and the trustee sale was unlawful. For reasons already discussed, the trustee sale was advanced by Quality pursuant to the law in all respects. The Daviscourts failed to demonstrate otherwise in response to summary judgment. As a matter of law judgment was appropriate in favor of Quality.

IV. CONCLUSION

The claims against Quality were properly dismissed. This court should affirm.

Dated: October 2, 2016

MCCARTHY & HOLTHUS, LLP



Joseph Ward McIntosh, WSBA # 39470
Attorney for Quality Loan Service Corp. of Washington

CP 684

Sub # 8

FILED

14 JUL 22 PM 2:27

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT, IN AND FOR THE COUNTY OF KING, STATE OF WASHINGTON

**MARK AND JULIE DAVISCOURT, HUSBAND
AND WIFE AND THEIR MARITAL COMMUNITY**
Plaintiff/Petitioner

Cause No.: **14-2-19520-6 SEA**
Hearing Date:

vs.

**QUALITY LOAN SERVICES CORPORATION OF
WASHINGTON, A WASHINGTON
CORPORATION; ET AL.,**

DECLARATION OF SERVICE OF
CASE INFORMATION COVER SHEET AND AREA
DESIGNATION; ORDER SETTING CIVIL CASE SCHEDULE;
SUMMONS; COMPLAINT

Defendant/Respondent

2014 OCT -8 PM 2:08
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

The undersigned hereby declares: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the **21st day of July, 2014** at **11:32 AM** at the address of **108 1ST AVE S #202, SEATTLE, King County, WA 98104**; this declarant served the above described documents upon **QUALITY LOAN SERVICES CORPORATION OF WASHINGTON, A WASHINGTON CORPORATION c/o SIERRA HERBERT-WEST, REGISTERED AGENT** by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with **SIERRA HERBERT-WEST, REGISTERED AGENT, Who accepted service, with identity confirmed by verbal communication, a white female approx. 35-45 years of age, 5'6"-5'8" tall, weighing 140-160 lbs with brown hair.**

No information was provided or discovered that indicates that the subjects served are members of the United States military.

Service Fee Total: **\$ 49.50**

Declarant hereby states under penalty of perjury under the laws of the State of Washington that the statement above is true and correct.

DATED this 21st day of July, 2014



James Bradford, Reg. #0204960, King, WA

ORIGINAL PROOF OF SERVICE

PAGE 1 OF 1



For: **Stafns Law Firm**
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Tracking #: **0004106031**



CERTIFICATE OF MAILING

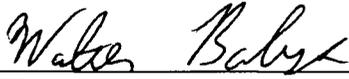
The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On October 3, 2016, I arranged for service of the forgoing Brief by Respondent Quality Loan Service Corp. of Washington on the following parties via U.S. 1st Class Mail and email:

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2016 OCT - 3 PM 2:08
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED this 3 day of October, 2016, at Seattle, Washington.



Walter Babst
Legal Assistant