89688-7

NO. 30891-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife,

Petitioner,

v.

BUDGET FUNDING I, LLC, a California corporation,

Respondent

BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington

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PETITION FOR REVIEW

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COURT RULES

A. IDENTITY OF PETITIONERS

Petitioners, Phillip Kairez and Carolyn Kairez, ("Kairez") ask this Court to accept review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Kairez seeks discretionary review of the Court of Appeals' affirmation of the trial court's summary dismissal of their claims. A copy of the Court of Appeals' Opinion is in the Appendix at pages A1-A13.

C. ISSUES PRESENTED FOR REVIEW

1. Do issues of material fact preclude summary judgment regarding Kairez's interest in subject real property?

2. Do issues of material fact preclude summary judgment dismissing Kairez's claim of a continuing property interest in the subject real property following their acceptance of payment from Budget?

3. Do issues of material fact preclude summary dismissal of Kairez's negligence and Consumer Protection Act claims?

D. STATEMENT OF THE CASE

Nick Kairez, the son of Phillip Kairez and Carolyn Kairez, Plaintiffs (hereinafter collectively "Kairez") formed NRK Investments, LLC, a Washington Limited Liability Company ("NRK"), on March 21, 2006. Nick Kairez was the sole member and manager of NRK. NRK was formed by him for the purpose of purchasing an apartment complex in Pasco, Washington, located at 604 Yakima Street ("Pasco Property"). To that end, NRK purchased the property pursuant to a real estate contract entered into with James and Krista Gottula. The real estate contract was dated April 10, 2006, and recorded April 11, 2006 with the Franklin County Auditor. See Appendix B1-B2.

As part of NRK's purchase of the Pasco Property, Kairez loaned Nick Kairez $50,000 to make the down payment. Those monies were transferred to Nick on or about April 3, 2006. To memorialize the loan, and secure it, a $50,000 Promissory Note and Deed of Trust were dated and recorded on May 17, 2006. An additional $40,000 Amendment to Promissory Note was March 30, 2007, and recorded on April 11, 2007. In addition to the aforementioned $90,000, Kairez loaned additional sums for ongoing costs relative to the Pasco Property through approximately December 8, 2008. The total amount loaned, and utilized for the

purchase, renovation, and operation of the Pasco Property, was $149,104.30.[1] All along, Phillip, Carolyn and Nick Kairez understood that the loans were made solely for these purposes and only utilized for the benefit of the Pasco Property. See Appendix B1-B2.

In 2007, Nick Kairez sought refinancing from Defendant Budget Funding 1, LLC ("Budget"), and offered the Pasco Property as collateral. Budget extended a loan in the amount of $263,250 on or about September 14, 2007. As part of the loan, the Gottulas were paid the remaining balance on their real estate contract. A Fulfillment Deed recognizing that the Gottulas had been paid in full was recorded on September 28, 2007. See Appendix B3-B4.

On or about September 14, 2007, a wire transfer from the Budget loan proceeds was made to Kairez's bank account in the amount of $70,672. At that time, they were owed just over $145,000. In receiving that payment, it was not Kairez's intent to accept less than one-half of

[1] 1. The Deed of Trust granted by Nicholas Kairez to Kairez provides at page 2: "This Deed of Trust is for the purpose of securing performance of each agreement of Grantor(s) contained in this Deed of Trust, and payment of the sum of Fifty Thousand Dollars ($50,000.00) with interest, in accordance with the terms of a Promissory Note of even date herewith, payable to Beneficiary or order, and made by Grantor(s), and all renewals, modifications, and extensions of the note, and also such further sums as may be advanced or loaned by Beneficiary to Grantor(s)or any of the Grantor(s) successors or assigns, together with interest thereon at the rate agreed upon." [CP 46-50]

what they were owed in full and final payment of the debt and relinquishment of their lien position. Notably, there was no request made by Budget for any reconveyance or fulfillment deed, nor was any presented to Kairez, signed by them, or recorded.

In April, 2009, Kairez heard from Nick Kairez that Budget was claiming NRK had defaulted, and was arranging to begin foreclosure proceedings. Upon hearing this, Kairez requested a copy of the Trustee's Sale Guarantee issued by Defendant Benton Franklin Title Company. Said guarantee, issued on June 25, 2009, included the Kairez Deed of Trust as superior lien to that of Budget's. See Appendix B5. Kairez did not receive foreclosure notices, including notice of the Trustee's Sale, further cementing their understanding of their superior lien position, as only lien holders junior to Budget were required notice.

The trustee's sale occurred on December 18, 2009. Thereafter, a Litigation Guarantee requested by Kairez on or about December 27, 2010, failed to note as a special exception their Deed of Trust at all. The most superior interest reported was now Budgets. See Appendix B5.

On January 31, 2011, Kairez filed suit. On April 20, 2012, the trial court, by way of a Final Judgment Dismissing Claims Against

Budget Funding and Preserving Claims Pursuant to CR 54(b), summarily dismissed Kairez's claims.

On or about May 16, 2012, Kairez filed a Notice of Appeal. On November 7, 2013, the Court of Appeals issued its Opinion (Appendix A1-A3) affirming the trial court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Summary Judgment Standard/ Standard of Review

Summary judgment may be granted only if the pleadings, affidavits, admissions, and other material properly presented show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c); Leland v. Frogge,* 71 Wn.2d 197, 427 P.2d 724 (1967). The burden is on the moving party to establish the absence of any genuine issue of material fact. *Regan v. City of Seattle,* 76 Wash.2d 501, 503-504, 458 P.2d 12 (1969). Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the non-moving party to relief." *White v. Kent Medical Center,* Inc., 61 Wn.App. 163, 175, 810 P.2d 4 (1991) (Quoting *Mostrom v. Pettibon,* 25 Wn.App. 158, 162, 607, P.2 864 (1990)). It is the court's duty to draw all reasonable inferences in favor of the non-moving party. *Hash by Hash v. Childrens Orthopedic Hosp. and Medical Center*, 110,

Wn.2d 912, 916, 757 P.2d 507 (1988). If reasonable persons might reach a different conclusion, the motion should be denied. *Bernethy v. Walt Failor's Inc.,* 97 Wn.2d 929, 930, 653 P.2 280 (1982). Summary Judgment is not appropriate where a genuine issue of material fact exists or the moving party cannot demonstrate that they are entitled to judgment as a matter of law and the motion may not be used as a substitute for trial on disputed issues of fact. *Green v. A.P.C.,* 136 Wn.2d 87, 960 P.2d 912(1998). The function of summary judgment is to avoid a useless trial, however a trial is not useless but absolutely necessary where there is a genuine issue as to any material fact. *Preston v Duncan,* 55 Wn.2d 678, 682, 349 P.2d 605(1960). Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the non-moving party to relief."

The grant of a motion for summary judgment is reviewed de novo. *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

2. *Issues of Material Fact Preclude Summary Judgment Regarding Kairez Interest in Pasco Property*

In granting summary judgment, the trial court, as affirmed by the Court of Appeals, ruled that taking the facts in a light most favorable to Kairez, the Pasco Property was nevertheless never owned by Nick Kairez, and thus the Notes and Deed of Trust executed by him were ineffective to

create a lien in favor of Kairez in the property. Budget relied upon *Griffin v Union Savings and Trust Co.*, 86 Wash. 605 (1915), for the proposition that if the signature block does not indicate the signing party is acting in a corporate capacity, the signature only binds the individual. However, the Court of Appeals erred by ignoring the critical portion of that ruling whereby the Court held there was not any evidence that the signing party intended to bind the corporate entity. The Court stated there as follows:

> There is not a word of testimony that Woolley himself intended to bind the appellant by this guaranty, or that he was ever asked to give a bank guaranty. Griffin did not testify that he himself ever at any time told Woolley that he wanted a bank guaranty. Though he testified that he did tell Struthers and Hightower that he would accept a bank guaranty, there is no evidence that either Struthers or Hightower ever requested a bank guaranty from Woolley or told him that Griffin had demanded or expected to receive a bank guaranty. There is nothing in evidence raising an implication that Griffin had any reason, because of any antecedent custom or course of dealing with Woolley or with the bank, to rely upon this instrument as binding the bank. He had never had any dealings with Woolley or with the bank, and there is no evidence that Woolley ever gave to any one on behalf of the bank any guaranty of any kind. There is not a single circumstance in evidence having any reasonable tendency to estop the appellant from disputing liability upon this guaranty. It received no benefit from it, and there is no competent evidence that it was intended, either by Woolley or by anyone else, that it ever would receive any such benefit. The evidence is clear that Woolley, as manager of the branch bank, had no actual authority to execute this, or any guaranty on its behalf. While this fact would not be important as binding upon Griffin had the guaranty been so drawn as to be clearly intended to bind the appellant, since Griffin would then

> have had the right to rely upon the fact that the giving of such a guaranty was within the apparent scope of Woolley's authority as manager, the lack of actual authority is nevertheless important as bearing upon the question of Woolley's intention in giving the guaranty. The very fact that he had no such authority is some evidence that he never intended to bind the appellant by this instrument, prima facie his personal undertaking.

Griffin v. Union Sav. & Trust Co. 86 Wash. 605, 611-612, 150 P. 1128, 1131 (Wash.1915)

Unlike the factual situation in *Griffin*, here Nick Kairez freely admits he intended all along to bind NRK. Kairez have a like understanding. Further, NRK (and for that matter Budget) received significant benefit from the Kairez loans, in that every penny was invested in the Pasco Property. At worst there are issues of fact as to intent to bind NRK that must go to trial.

Moreover, Nick Kairez, as the sole member of NRK, had actual and apparent authority to bind NRK:

> (a) Management of the business or affairs of the limited liability company shall be vested in the members; and (b) each member is an agent of the limited liability company for the purpose of its business and the act of any member for apparently carrying on in the usual way the business of the limited liability company binds the limited liability company unless the member so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the member is

> dealing has knowledge of the fact that the member has no such authority. Subject to any provisions in the limited liability company agreement or this chapter restricting or enlarging the management rights and duties of any person or group or class of persons, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.

RCW 25.15.150(1)

Nick Kairez had authority to encumber NRK property. In fact, there was no other asset available to satisfy a nearly $150,000 debt, other than the NRK property. Once again, this leads to the only reasonable conclusion – that Nick Kairez, Phillip Kairez and Carolyn Kairez understood this debt to be an entity debt, secured by entity property. Additionally, the fact that Budget paid over $70,000 on what they now claim is a non-existent interest, is telling as to what Budget truly believes. Whether an agent has apparent authority to bind the corporation depends upon the circumstances and is to be decided by the trier of fact. *Louron Indus.,Inc. v Holman,* 7 Wn.App. 834, 502 P.2d 1216 (1972). Again, at a minimum, the facts, and reasonable inferences drawn therefrom, support a reversal of the summary dismissal affirmed by the Court of Appeals.

Finally, the Court of Appeals affirmed the trial court finding that Nick Kairez never had any interest in the Pasco Property, that is in error. Title to LLC-owned property passes to the owner of a cancelled LLC.

Sherron Associates Loan Fund V LLC v Saucier, 157 Wn. App. 357, 237 P.2d 338 (2010). NRK ceased to exist as an LLC at the latest July 1, 2008. Thereafter, Nick Kairez was the owner of the Pasco Property. Even if he had not had authority to enter into the Notes and Deed of Trust, or had not already ratified the debt owed as an LLC debt, to the extent that debt was incurred by him personally, he did have an interest in the property to support the Deed of Trust granted to Kairez. The Court of Appeals erred in affirming the summary judgment dismissal given the existence of these material facts.

3. Kairez Not Barred From Claiming a Continuing Property Interest and Issues of Material Fact Preclude Summary Judgment

Budget has argued that because Kairez accepted payment from Budget, they are barred from asserting any further interest. Budget relies upon *Jones v Curtiss,* 20 Wn.2d 470, 147 P.2d 912 (1944), for support. Notably, in *Jones*, the plaintiffs had signed a written consent to take a lesser amount than what they were owed, which resulted in an express accord and satisfaction. There is nothing of the sort here. At best there is a factual dispute as to what the intent of the $70,000 payment was. There is no reconveyance, fulfillment deed, nor any other document evidencing such an express accord and satisfaction. Furthermore, Philip Kairez has signed nothing. Budget's claim that they would not have funded the loan

to NRK without assurance that the Kairez lien would be released, belies the fact that no such release was requested, nor obtained by Budget. As late as June, 2009, the Kairez Deed of Trust remained of title. Budget certainly recognized the need for a fulfillment deed when it came to clearing title of the Gottula real estate contract, and one was immediately recorded. That similar documentation was not procured with respect to the Kairez lien is, again, one of many issues of material fact that preclude summary judgment. The Court of Appeals erred in affirming the trial court grant of summary judgment in light of these genuine issues of material fact.

4. Negligence and Consumer Protection Act Claims Should Not Have Been Summarily Dismissed

The Kairez lien disappeared from the title report sometime between June 25, 2009 and December 27, 2010. See Appendix B5. The primary intervening event was Budget's foreclosure action and trustee's sale.

In an action for damages under the Consumer Protection Act, a party must prove: (1) an unfair deceptive act or practice; (2) that occurred in conduct of trade or commerce; (3) that has an impact on public interest; (4) that results in injury to the plaintiff in their business or property; and (5) that satisfies the requirement of a causal link between

the unfair practice or deceptive act and the injury suffered. *Young v Savidge*, 155 Wn.App. 806, 230 P.3d 222(2010). The CPA was intended to be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920.*

The first element of the CPA, an unfair or deceptive act, can be met if the act "had the capacity to deceive a substantial portion of the public." *Brown ex rel. Richards v Brown*, 157 Wn. App. 803, 239 P.3d 602 (2010). Neither intent to deceive, proof of a specific party being deceived, nor the possibility of future deception is a necessary predicate to finding a violation of the CPA. *Panag v Farmers Ins Co. of Washington,* 166 Wn.2d 27, 204 P.3d 885 (2009). The CPA does not define "unfair or deceptive act or practice," but "[i]mplicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Nguyen v Doak Homes, Inc*, 140 Wn. App. 726, 734, 167 P.3d 1162(2007). Whether the act in question had the capacity to deceive a substantial portion of the public is a question of fact. *Holiday Resort Community Ass'n v Echo Lake Associates, LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006).

That the Kairez lien interest was removed from title during the same time that Budget was conducting its foreclosure, without any reconveyance, fulfillment deed, or other document signed by Phillip and Carolyn Kairez , at a minimum raises a factual dispute as to whether there has been an unfair or deceptive act or practice. Summary judgment should not have been granted, and the Court of Appeals erred in affirming the same.

The third element of the CPA, that the act had an impact on the public interest, can be met if the allegedly deceptive act sufficiently affects the public interest. The five relevant factors for a finding of the existence of a public interest are: (1) Whether the alleged acts were committed in the course of the defendant's business; (2) whether the acts are part of a pattern or generalized course of conduct; (3) whether repeated acts were committed prior to the act involving the plaintiff; (4) whether there is a real and substantial potential for repetition of defendant's conduct after the act involving the plaintiff; and (5) whether the act complained of involved a single transaction, many consumers were affected or were likely to be affected by it. *Bloor v Fritz*, 143 Wn.App. 718, 180 P.3d 805 (2008). Not all of the five factors need to be present in order to find that the transaction affected the public interest. *Mayer v Sto Industries, Inc*, 123 Wn. App. 443, 98 P.3d 116 (2004). In

the case of a private dispute, the public interest determination is made by evaluating four factors: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions. *Michael v Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009). Not all of the factors need to be present, and none is dispositive. *Id.* Whether or not a transaction is a "private" transaction or a "consumer" transaction subject to the CPA is a question of fact for the jury. *Id.*

Impact on public interest is generally a question of fact for the jury. Facts and inferences, taken in the light most favorable to Kairez, include that the alleged unfair and deceptive acts occurred in the course of Budget's business, that Budget advertises to the public in general, and that there is a real and substantial potential for repetition. Again, these issues need to go to the jury. The Court of Appeals erred in affirming summary judgment dismissal.

The injury element of the CPA can be met if there is a loss of use of property which is causally related to an unfair or deceptive act, including injury without specific monetary damages. *Panag v Farmers*

Ins Co of Washington, 166 Wn.2d 27, 204 P.3d 885 (2009). Even non-quantifiable injuries, such as loss of goodwill, may satisfy the injury element of the CPA. *Stephens v Omni Ins Co*, 138 Wn.App. 151, 159 P.3d 10 (2007). Here, the Kairez lien interest and position have been removed from title during the course of the foreclosure. There can be no question that satisfies the liberal injury standard of the CPA. Summary judgment on the CPA claim should have been reversed.

Similar to the CPA claim, the negligence claim is based on the mysterious disappearance of Kairez's lien interest of record. Budget owes a duty to all parties affected by the foreclosure to proceed in good faith and with concern for their due regard. That included a duty owed to Kairez to recognize their senior lien. Taking the facts and inferences drawn from those facts in the light most favorable to Kairez, Budget breached this duty. The negligence claim should proceed to the trier of fact, and the Court of Appeals' affirmation of the summary judgment dismissal of this claim was in error.

F. CONCLUSION

Kairez has been denied the benefit of issues of material fact in their favor that preclude a summary dismissal of their claims. As argued above,

this Court should accept review based on the Court of Appeal's significant error in affirming the trial court's grant of summary judgment.

Respectfully submitted this 9th day of December, 2013

Jeffrey T. Sperline, WSBA # 24028
Attorney for Petitioner

APPENDIX A

FILED

November 7, 2013

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife, Appellants, v. BUDGET FUNDING I, LLC, a California corporation, Respondent, BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington, Defendants.	)	No. 30891-0-III UNPUBLISHED OPINION

SIDDOWAY, A.C.J. — Phillip and Carolyn Kairez brought the action below to assert a lien against an apartment complex and to recover amounts they loaned to their son, whose limited liability company was a one-time owner of the complex. One of the several defendants—a lender, Budget Funding I, LLC—was granted summary judgment dismissing the Kairezes' claims against it. The Kairezes appeal. We affirm the dismissal.

FACTS AND PROCEDURAL BACKGROUND

In March 2006, Nick Kairez,[1] the son of Phillip and Carolyn Kairez, formed NRK Investments LLC. Nick was the sole member and manager. A month later, NRK entered into a real estate contract to purchase an apartment complex in Pasco from James and Krista Gottula. Nick executed the contract as NRK's manager but was not individually a party to the contract. The contract was recorded.

Nick's parents had loaned him $50,000 to make the down payment for the property. To memorialize the loan, Nick, individually, signed and delivered a $50,000 promissory note to his parents. A month after NRK entered into the real estate contract, Nick executed what was styled as a deed of trust on the apartment complex property to secure the promissory note to his parents. The deed of trust identified the grantor as Nick, however, and only he signed it, individually, as grantor. It too was recorded. A $90,000 "amended" promissory note in favor of Nick's parents was later executed by Nick and was recorded in April 2007. NRK was not mentioned in the original note, the amended note, or in the deed of trust.

The Kairezes continued to loan Nick money for costs associated with the apartment complex through December 2008. According to them, the total amount they

[1] Mr. and Ms. Kairez refer to their son as "Nick" in their briefing and we adopt that reference as well to avoid confusion between our references to him and to his father. We intend no disrespect.

loaned to Nick that he used to purchase, renovate, and operate the apartment complex was $149,104.30.

In 2007, NRK sought financing from Budget Funding I, LLC and offered its interest in the apartment complex as security. Budget agreed to loan NRK $263,250 with a portion of the funds to be applied first to pay off the Gottulas. The loan documents all identified the borrower as NRK and were prepared for execution by Nick as NRK's manager. When the loan closed in September 2007, the Gottulas were paid the balance of the contract price from the loan proceeds, and the earlier-executed fulfillment deed from the Gottulas to NRK was recorded, as was Budget's deed of trust from NRK.

Budget was aware of the Kairezes' deed of trust and, it contends, it intended the proceeds of its loan to NRK to be applied to satisfy amounts secured by that deed of trust before the balance was disbursed to Nick. Budget's escrow agent contacted Carolyn Kairez before the loan closing and requested a payoff amount. According to a sub-escrow agent responsible for disbursing the loan proceeds, Ms. Kairez supplied a payoff figure of $70,402 and wire instructions. When the loan closed, a slightly higher amount, $70,672, was wired to a Kairez bank account. Despite making the payment, neither the escrow agent nor Budget obtained the Kairezes' signatures on a request for reconveyance, an acknowledgment that the obligation secured by the deed of trust had been satisfied, or any other documentation that the Kairezes were relinquishing whatever interest they held in the property.

In April 2009, the Kairezes learned from Nick that Budget was going to begin foreclosure proceedings. The Kairezes contacted a lawyer, who requested a copy of a trustee's sale guarantee issued by Benton Franklin Title Company, also a defendant in the action below. The trustee's sale guarantee disclosed the Kairezes' deed of trust as one of the "[d]efects, liens, encumbrances or other matters affecting title," although it also revealed that title to the apartment complex was held by NRK and yet the grantor of the Kairezes' deed of trust was Nicholas Robert Kairez. Clerk's Papers (CP) at 61. The Kairezes' deed of trust was identified by the guarantee as the third numbered lien, encumbrance, or matter affecting title while Budget's deed of trust was identified as the fourth. The Kairezes construed the guarantee as establishing that their deed of trust was superior to Budget's. They did not thereafter receive a notice of the trustee's sale, but according to Ms. Kairez this did not concern them because they understood that only lienholders junior to Budget would receive notice.

The trustee's sale took place in December 2009. Budget was the successful bidder and the property was conveyed to it by a trustee's deed. In January 2011, more than a year after the foreclosure sale and more than three years after the Kairezes received $70,672 from the closing of the loan from Budget, they filed the action below. Budget denied liability and later moved for summary judgment, which the trial court granted. This appeal followed.

ANALYSIS

The Kairezes argue that summary judgment in favor of Budget was improper because genuine issues of material fact remained with respect to their claim to a continuing property interest; for negligence; and under the Consumer Protection Act (CPA), chapter 19.86 RCW. They also argue that their receipt of $70,672 from the loan closing should not estop them from relying on their deed of trust, as argued by Budget.

The Kairezes failed to present evidence demonstrating any genuine issue of material fact in support of their claim to a property interest in the apartment complex, which is fatal to all of the issues they raise on appeal. We turn to that first.

I. Did the Kairezes present evidence raising a genuine issue of material fact that they had a property interest in the apartment complex?

On appeal from an order granting summary judgment, the standard of review is de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment will be upheld if the pleadings, affidavits, answers to interrogatories, admissions, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002); CR 56(c). Like the trial court, we review all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party. *Id.* at 300.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets that burden, the nonmoving party must present evidence that material facts are in dispute. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If it fails to present evidence that material factual issues remain, then summary judgment is proper. *Id.*

Budget met its initial burden by showing that the deed of trust on which the Kairezes rely was granted to them by Nick, who never had an ownership interest in the apartment complex. The deed of trust provided in relevant part:

> Grantors: Nicholas Robert Kairez
> Beneficiary: Philip[2] and Carolyn Kairez
> . . . .
> THIS DEED OF TRUST, made this ____ day of _____, between Nicholas Robert Kairez, GRANTOR(S), . . . Benton Franklin Title Company of Kennewick, TRUSTEE, . . . and Philip and Carolyn Kairez, BENEFICIARY . . . .
> WITNESSETH: Grantor(s) hereby bargain(s), sell(s), and convey(s) to Trustee in trust, with power of sale, the following described real property.

CP at 46. The signature block for the grantor was for "NICHOLAS ROBERT KAIREZ." CP at 49. The acknowledgement required by RCW 64.04.020 was documented by a certification that the notary public knew or had satisfactory evidence "that Nicholas Robert Kairez is the person who appeared before me, and said person acknowledged that

[2] The record includes various spellings of Mr. Kairez's first name.

he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in this instrument." CP at 50.

One cannot convey a greater title or interest in property than he or she has. *Sofie v. Kane*, 32 Wn. App. 889, 895, 650 P.2d 1124 (1982). Since Nick had no interest in the apartment complex, his written and recorded deed of trust in favor of his parents conveyed no interest to Benton Franklin Title Company as trustee that could be exercised for the benefit of the Kairezes.

In response to this initial showing by Budget, the Kairezes submitted the declarations of Ms. Kairez and Nick. Ms. Kairez's declaration stated, in part, that "[i]n our dealings with [Nick], my husband, Nick and I all understood we were lending money to NRK." CP at 35. As to the funds wired to her and her husband's account at the time the Budget loan closed, she stated she "believed we were receiving a partial payment towards Nick's debt owed to us, and that was it." CP at 36. Ms. Kairez's declaration also described and attached a trustee's sale guarantee that she characterized as "includ[ing] our Deed of Trust as superior in time to that of Budget's." CP at 37.

Nick's declaration similarly stated, "While it appears from the . . . Promissory Note, Deed of Trust, and Amendment to Promissory Note, that they were signed in my personal capacity, the intent was clearly that the debt was owed by NRK. My parents and I understood the same, and to the extent that we went forward with that intent, I ratified, as the sole member of NRK, the loans as NRK debts." CP at 79. Nick's declaration also

stated that "NRK, as an entity, expired as of March 31, 2008. NRK was deemed inactive by the Washington State Secretary of State as of July 1, 2008." *Id.*

Based on this evidence, the Kairezes argue that while the parties agree that Nick signed a promissory note and a deed of trust, they disagree as to the capacity in which he signed the agreements and who is bound by their terms. According to the Kairezes, trial is required because they contend that Nick's signature bound NRK whereas Budget contends it bound Nick individually and not NRK. But this disagreement over who is bound presents a legal dispute, not a factual one.

Viewing the evidence in the light most favorable to the Kairezes and accepting their testimony that there was an unwritten understanding that NRK would grant the Kairezes a deed of trust interest in the apartment complex, the rights and obligations arising out of that unwritten understanding are dictated by the statute of frauds and the recording statute. The statute of frauds relating to real estate provides, in part, that "[e]very deed shall be in writing, signed by the party bound thereby." RCW 64.04.020. A deed of trust is subject to the statute of frauds. *GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 554, 307 P.3d 744, *petition for review filed*, No. 89245-8 (Wash. Sept. 3, 2013). In light of the statute, a deed of trust interest cannot be created by an oral understanding.

In addition, an unrecorded interest in real property is ordinarily subordinate to a recorded interest. *Zervas Grp. Architects, PS v. Bay View Tower LLC*, 161 Wn. App.

322, 325, 254 P.3d 895 (2011). This is the result under the real estate recording statute, RCW 65.08.070, which provides, in pertinent part:

> A conveyance of real property . . . may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor . . . of the same real property or any portion thereof whose conveyance is first duly recorded.

A "conveyance" for purposes of the statute includes "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected." RCW 65.08.060(3). A deed of trust is therefore a conveyance subject to the recording statute. The unwritten, unrecorded understanding that NRK would grant the Kairezes a deed of trust interest in the apartment complex is void against Budget under the recording statute.

The Kairezes nonetheless argue that they have shown that Nick, as the sole member of NRK, had actual and apparent authority to bind NRK. We accept the fact that he did. But he did not bind NRK in the deed of trust that he signed individually and recorded in 2007. The language of that deed of trust consistently and unambiguously identifies Nick as the grantor. It makes no mention of NRK. Parol evidence that flatly contradicts the deed of trust's plain meaning cannot be given substantive effect.[3]

[3] Both parties argue that *Griffin v. Union Savings and Trust Co.*, 86 Wash. 605, 150 P. 1128 (1915) supports their position as to the significance of the form of the signature block on the deed of trust. A signature block assumed importance in *Griffin*

Thornton v. Interstate Sec. Co., 35 Wn. App. 19, 29-30 n.2, 666 P.2d 370 (1983) (citing *Mapes v. Santa Cruz Fruit Packing Corp.*, 26 Wn.2d 145, 173 P.2d 182 (1946)). The Kairezes characterize Budget as arguing that Nick's encumbrance of the property was ultra vires, and then argue that a corporation that retains the benefit of an ultra vires act thereby ratifies it. This argument is flawed on several levels, the most basic being that the written, recorded deed of trust to the Kairezes is not an encumbrance by NRK at all. "The phrase 'ultra vires' describes corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature." *Hartstene Pointe Maint. Ass'n v. Diehl*, 95 Wn. App. 339, 344, 979 P.2d 854 (1999). Budget's position has nothing to do with the concept of ultra vires action; it merely contends, correctly, that Nick's individual written grant of a deed of trust could not convey an interest in property in which he had no individual interest.

The Kairezes finally argue that the trial court erred in finding that Nick never had any interest in the apartment complex. They argue that title to property owned by an LLC passes to its owner and NRK ceased to exist by July 2008 at the latest, with the result that its interest in the complex passed to Nick. *See* RCW 64.04.070 (providing that

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because it could not be determined from the body of the letter that was at issue whether the author was undertaking a guarantee individually or on behalf of an alleged principal, disclosed by the letterhead. There is no ambiguity in the written deed of trust in this case. *Griffin* and other cases that focus on the signature block to resolve an ambiguity as to capacity are inapposite.

after acquired title follows a deed). Even so, the Kairezes' deed of trust would only attach to title in the condition that Nick received it in July 2008, subject to other encumbrances existing at that time. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 18.3, at 308 (2d ed. 2004) (citing *Occidental Life Ins. Co. v. May*, 194 Wash. 201, 77 P.2d 773 (1938)). The interest acquired by Nick was subject to the deed of trust to Budget that NRK had granted almost a year earlier, in September 2007.

To summarize, viewing the evidence in the light most favorable to the Kairezes, they were the beneficiaries under a *written, recorded* deed of trust that was incapable of conveying an interest in the apartment complex because the grantor—their son—had no interest to convey. They had an *unwritten understanding* with their son, as manager of NRK, that they enjoyed a deed of trust interest in the apartment complex. But that unwritten understanding was void under the statute of frauds and void against Budget under the recording statute. The trial court properly granted summary judgment dismissing the Kairezes' quiet title claim asserting an interest in the property. Because the Kairezes had no interest as a matter of law, we need not address whether they were estopped to assert it as a result of their receipt of $70,672 from the closing of Budget's loan, as argued by Budget.

II. Did the trial court err in granting summary judgment dismissing the Kairezes' negligence and CPA claims?

The Kairezes' complaint also asserted claims against Budget for violation of the CPA and for negligence. In opposing summary judgment, they argued that the "mysterious disappearance" of their deed of trust as an exception to title between the time of the trustee's sale guarantee and a litigation guarantee that their lawyer ordered in December 2010 raises a factual dispute preventing summary judgment on these claims. Br. of Appellant at 26. According to the Kairezes, "That the Kairez lien interest was removed from title during the same time that Budget was conducting its foreclosure . . . at a minimum raises a factual dispute as to whether there has been an unfair or deceptive act or practice." *Id.* at 23. They similarly argue that removal of their lien interest raises a factual dispute as to a breach of a duty of care.

Our conclusion that the Kairezes had no lien against the apartment complex effectively disposes of their CPA and negligence claims. Because the Kairezes had no interest in the property, Budget owed them no duty, nor could any act or omission by Budget cause injury to them.

Beyond that, however, and even if the Kairezes had a viable but disputed basis for an interest in NRK's property, their sheer conjecture that their lien was dropped as an exception to title because of some wrongful act or breach of duty by Budget does not satisfy their burden as the nonmoving party. A nonmoving party must set forth specific

facts showing there is a genuine issue for trial. CR 56(e). There are any number of reasons why the title officer who prepared the litigation guarantee might have omitted the Kairezes' deed of trust, ranging from oversight to a conclusion that the deed of trust did not affect NRK's title. A nonmoving party cannot rely on mere allegations, speculation, or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, A.C.J.

WE CONCUR:

Brown, J.

Kulik, J.

89688-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife,

Petitioners,

vs

BUDGET FUNDING I, LLC, a California corporation,

Respondent,

BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington,

Defendants.

Appeal No.: 30891-0-III

DECLARATION OF MAILING

THE UNDERSIGNED hereby declares as follows: That she is over the age of twenty-one (21) years and is not a party interested in the above-entitled action, and that she has on the 9th day of **December, 2013**, personally sent via e-mail and via U. S. mail, postage prepaid, a true and correct copy of **PETITION FOR REVIEW** in the above-entitled action to Respondent's Counsel, Tom Larkin and Daniel Womac, at Fidelity National Law Group, Inc., a Division of Fidelity National Title Group, Inc., 1200-6th Ave., Ste. 620, Seattle, Washington 98101, telephone (206) 224-6006

DATED this 9th day of December, 2013.

Kelly Corrigan-Scott

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