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No. 71402-3-I

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

VALMARI RENATA,

Appellant,

vs.

FLAGSTAR BANK, F.S.B. et al.,

Respondents,

BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

Submitted By:
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ORIGINAL

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I. STATEMENT OF THE CASE

On or about August 7, 2006, Appellant Valmari Renata ("Renata") executed a promissory note (the "Note") in the amount of $200,800.00 payable to Capital Mortgage ("Capital"). CP 485-492, Appellant's Brief p. 3. Capital delivered to Flagstar Bank FSB ("Flagstar") the original Note, specially indorsed to Flagstar, on August 11, 2006. CP 459, 494.

Renata secured repayment of the Note with a deed of trust (the "Deed of Trust") encumbering real property located at 2416 Cleveland Avenue, Everett, Washington 98201 (the "Property"). CP 415, Appellant's Brief, p. 3.

Renata defaulted under the Note and Deed of Trust by failing to make payments starting in December 2009. CP 459, ¶ 13. Flagstar issued a notice of default ("Notice of Default") on July 23, 2010, listing total arrears of $15,230.26. CP 460, 501 ¶ D. The Notice of Default explained that Flagstar was beneficiary of the Deed of Trust (as Note holder), it was Plaintiff's creditor, and it was also the loan servicer. CP 502, ¶¶ K, L(2).

On August 16, 2010, Flagstar recorded an appointment of successor trustee ("Appointment of Successor Trustee") appointing NWTS as successor trustee. CP 431-32, Appellant's Brief at 5. By its beneficiary declaration (the "Beneficiary Declaration") dated August 24, 2010, delivered to NWTS, Flagstar declared under penalty of perjury that Flagstar was "the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." Appellant's Brief at 5.

On September 7, 2010, NWTS recorded a notice of trustee's sale ("Notice of Sale") with a sale date of December 10, 2010. CP 434-39. Pursuant to RCW § 61.24.040(1)(f), the Notice of Sale identified the grantor, trustee, and beneficiary of the original Deed of Trust.

The day before the trustee's sale, Plaintiff filed a bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington, staying the trustee's sale. CP 1125, Appellant's Brief at 6. Plaintiff's bankruptcy was dismissed

on April 26, 2011. CP 1125. NWTS recorded an amended notice of trustee's sale ("Amended Notice of Sale") on May 3, 2011, setting a new sale date of June 10, 2011. CP 448-52. The foreclosure sale did not occur, and the property has not been sold.

II. ARGUMENT

A. Standard of Review

An order granting summary judgment is reviewed de novo, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, this Court may affirm the ruling below on any ground supported in the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 310, 170 P.3d 53, 56 (2007), *citing LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see*

also Knox v. Microsoft Corp., 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). With the motion, a trial court can consider "supporting affidavits and other admissible evidence based on personal knowledge." *Id.*

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See*

Vacova Co., supra. at 395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505 P.2d 151, rev. denied, 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow*, 53 Wn.2d 639, 335 P.2d 825 (1959); *see also Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id., citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992), *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

Here, Renata failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

B. NWTS Adhered to the DTA

1. NWTS Properly Relied on Flagstar's Beneficiary Declaration

Renata asserts in her briefing that NWTS' reliance on the Beneficiary Declaration itself violated RCW § 61.24.030(7)(b) and RCW § 61.24.010(4) because the Beneficiary Declaration "on its face stated that Flagstar Bank was not the owner, but only a servicer".[1] Appellant's Brief, p. 25.

The DTA 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 recording a notice of trustee's sale. RCW § 61.24.030(7)(a). One possible means of accomplishing this requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." *Id.* Moreover, "[u]nless the trustee has violated his or her duty under RCW § 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection." RCW § 61.24.030(7)(b).

[1] The Beneficiary Declaration does not state that Flagstar "was not the owner, but only a servicer", but even if it did, whether Flagstar is an owner or a servicer is irrelevant because the beneficiary is the holder. *See Trujillo v. Nw. Tr. Serv., Inc.*, --- Wn. App. ---, 2014 WL 2453092 (Div. I, June 2, 2014).

In *Trujillo v. Nw. Tr. Serv., Inc.*, --- Wn. App. ---, 2014 WL 2453092, (Div. I, Jun. 2, 2014), this Court recently addressed the use of the term "owner" in RCW § 61.24.030(7)(a) and clarified that the "required proof is that the beneficiary must be the holder of the note" and "need not show that it is the owner of the note." *Id.* at *8.[2]

Plaintiff does not dispute that NWTS received the Beneficiary Declaration from Flagstar prior to recording the Notice of Sale. It is also undisputedthat the Beneficiary Declaration stated, under the penalty of perjury, that Flagstar is the actual holder of the Note. *See* Appellant's Br. at 23-24. Therefore, as affirmed by *Trujillo*, NWTS had the requisite proof required under RCW §

[2] *See also John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) ("the holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is *not necessary* for the holder to first establish that he has some beneficial interest in the proceeds.") (emphasis added, citation omitted); *State Fin. Co. v. Moore*, 103 Wash. 298, 174 P. 22 (1918); *In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("one can be an owner of a note without being a holder."); *Rouse v. Wells Fargo Bank, N.A.*, 2013 WL 5488817 (W.D. Wash. October 2, 2013) ("courts have uniformly rejected that only the 'owner' of the note may enforce it."); *Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246 (W. D. Wash. July 29, 2012) (enforceability of note and deed of trust based on holder status, not ownership); RCW 62A.3-301 ("[a] person may be a person entitled to enforce the instrument even though the person is *not the owner* of the instrument....") (emphasis added); 11 Am. Jur. 2d *Bills and Notes* § 210 (2009) (discussing differences between a "holder" of a note, and an "owner" of a note).

61.24.030(7)(a) and relying on it did not amount to a breach of NWTS' duty of good faith.

2. The statutory duty owed by NWTS was a duty of good faith, not a fiduciary duty.

Renata repeatedly contends that NWTS "breached its fiduciary duty of good faith...." Brief of Appellant, pp. 39-43. But *Trujillo* clearly sets forth the applicable standard under RCW 61.24.010(4) ("a trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."). *Supra.* at *13. The addition of "fiduciary" is conspicuously absent.[3]

Moreover, as this Court mentioned, cases like *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), and *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), discuss a trustee's duties, they do not substantiate a violation absent supporting facts. *Id.* Based on this Court's holding in *Trujillo*, Renata is wrong that a trustee must ensure that

[3] Moreover, the DTA specifically provides that the "trustee or successor trustee **shall have no fiduciary duty or fiduciary obligation** to the grantor or other persons having an interest in the property subject to the deed of trust." RCW 61.24.010(3).

the beneficiary is the owner and holder of any promissory note. Brief of Appellant, p. 23.

To the extent Plaintiff relies on the discussion regarding a trustee's duty as discussed in *Klem*, such reliance is misplaced. The duty discussed in *Klem* is not applicable to the case at bar. The *Klem* court analyzed the trustee's statutory duties as they existed in early 2008. The trustee's sale in *Klem* occurred in February 2008. *Klem*, at 779. In 2008, the trustee's operative duty required the trustee to "act impartially between the borrower, grantor, and beneficiary."[4] However, as of July 26, 2009, the amendment to RCW 61.24.010(4) took effect, which provided the "trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." Moreover, as the concurring opinion in *Klem* pointed out, the "fiduciary" standard referred to in the majority opinion was expressly rejected by the 2008 DTA amendments.[5] *Klem*, at 805.

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[4] Wn. Senate Bill Report, 2008 Reg. Sess. S.B. 5378 (Feb. 9, 2008).
[5] At all times since the 2008 amendments took effect on June 12, 2008, RCW 61.24.010(3) has applied, which provides, "the trustee or successor trustee shall

The subject nonjudicial foreclosure was initiated in July 2010. Thus, in analyzing the trustee's duties under the 2010 nonjudicial foreclosure, the operative duty was that of good faith, not the duty as interpreted by the *Klem* court. Accordingly, *Klem* is inapplicable in the case at bar.

Even if the *Klem* standard applied, the record does not support a finding that NWTS failed to meet that standard. The evidence demonstrates NWTS strictly complied with the DTA to satisfy the applicable duty of good faith

3. NWTS did not have a duty to investigate beyond obtaining the Beneficiary Declaration.

Renata asserts that NWTS breached its duty of good faith because a Flagstar employee signed an assignment of deed of trust as an agent of MERS and also signed the Appointment of Successor Trustee, and "NWTS was on inquiry notice to question Ms. Morgan's authority under these circumstances." Appellant's Brief, pp. 39-40.

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have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust."

First, it is undisputed that Flagstar held the Note at all relevant times. Thus, because Flagstar was the proper party to appoint NWTS the successor trustee, allegations relating to NWTS' investigation are irrelevant.[6]

In any event, NWTS satisfied any requirement to investigate. NWTS obtained a declaration from Flagstar executed under the penalty of perjury attesting to Flagstar's actual holder status..

Second, there is no statutory authority or controlling case law that required NWTS to conduct an additional investigation and "confirm" certain issues regarding the sworn declaration they received. In addressing whether a trustee has an "affirmative duty of investigation," the United States District Court for the Western District of Washington found in *Mickelson v. Chase Home Fin. LLC*, that:

> [t]he duty of good faith does not create a duty to conduct an independent verification of sworn

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[6] *See Mickelson v. Chase Home Finance, LLC.*, 2014 WL 2750133 (9th Cir. June 18, 2014) (Because Chase actually held the note during the relevant period, even if allegations concerning the trustee's failure to comply with the duties under the DTA were correct, plaintiffs could show no prejudice.)

> affidavits. This expansive view of good faith remains untenable. NWTS relied, as they are specifically permitted to do, on a declaration made under penalty of perjury. They did not breach their duty of good faith in so doing.[7]

Mickelson v. Chase Home Fin. LLC, 2012 WL 6012791, *3 (W.D. Wash. Dec. 3, 2012), , *affd* --- Fed. Appx. ---, 2014 WL 2750133 (9th Cir. June 18, 2014); *see also US Bank Nat'l Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. June 6, 2012) (finding the borrower's claim of a violation under RCW 61.24.030(7) is "without merit.").

Finally, there is no statutory authority or controlling case law that even suggests an employee of Flagstar signing an assignment of deed of trust as an agent of MERS is improper. *See Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 107, 285

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[7] In general, "good faith" is also the "absence of intent to defraud or to seek unconscionable advantage." *See* Black's Law Dictionary, 701 (7th ed. 1999); *see also Indus. Indem. Co. of the Northwest, Inc. v. Kallevig,* 114 Wn.2d 907, 792 P.2d 520 (1990). (A "covenant of good faith and fair dealing cannot be read to prohibit a party from doing that which is expressly permitted by an agreement."), *Mickelson* adds that"Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand." *Id. Accord Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1048 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure from the creditor, proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

P.3d 34, 45 (2012) ("Washington law, and the deed of trust act itself, approves the use of agents").

Here, the sworn declaration from Flagstar is unambiguous concerning Flagstar's status as Note holder, and NWTS received this declaration prior to recording the Notice of Sale. Both RCW § 61.24.010(4) and RCW § 61.24.030(7) were therefore followed in all respects.

4. An Assignment of Deed of Trust is Irrelevant to the Propriety of Foreclosure.

To the extent Renata argues that NWTS relied on or should have investigated the assignment of deed of trust, summary judgment was proper because an assignment of deed of trust is not relevant to the propriety of the foreclosure.[8]

The purpose of an assignment of deed of trust "is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property."

[8] Neither Flagstar nor NWTS ever alleged to have relied on the assignment of deed of trust in proceeding with the nonjudicial foreclosure, and this objection was raised in NWTS' Reply in Support of Motion for Summary Judgment. See, NWTS' Reply in Support of MSJ at 4.

Corales v. Flagstar Bank, FSB, 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *citing* RCW § 65.08.070. In fact, "an Assignment of a deed of trust... is valid between the parties whether or not the assignment is ever recorded....Recording of the assignments is for the benefit of the parties." *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987)[9].

And even if an assignment of deed of trust was somehow relevant to the foreclosure process, it is simply an agreement between MERS and Flagstar, and not NWTS. *Accord Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *8 (E.D. Wash. May 25, 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed."). Therefore, Renata's "questions of material fact" concerning the assignment of

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[9] *See also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727 (W.D. Wash. Jan. 10, 2012); *Fed. Nat. Mortg. Ass'n v. Wages*, 2011 WL 5138724 (W.D. Wash. Oct. 28, 2011); *St. John v. Northwest Trustee Services, Inc.*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011) ("Washington State does not require recording of such transfers and assignments."); *In re Reinke*, 2011 WL 5079561, n. 10 (Bankr. W.D. Wash. Oct. 26, 2011) ("The WADOTA does not require that an assignment... be recorded in advance of the commencement of foreclosure.").

deed of trust do not legitimately defeat the trial court's award of summary judgment to NWTS.

5. The Notices of Foreclosure complied with the DTA

Renata alleges that NWTS prepared and served two Notice of Foreclosure that fail to substantially comply with the provision of RCW § 61.24.030(2) in that neither identifies "the beneficiary of your Deed of Trust and owner of the obligation." Brief of Appellant, p. 42.[10] RCW § 61.24.030(2), however, requires as a requisite to a trustee's sale that the deed of trust contain a statement that the real property conveyed is not used principally for agricultural purposes. *See* RCW § 61.24.030(2). Here, Paragraph 25 of the Deed of Trust states, "[t]he Property is not used principally for agricultural purposes." CP 415.

[10] This claim was first raised, improperly, in response to NWTS' motion for summary judgment. *See Lundberg v. Coleman,* 115 Wn. App. 172, 180 (2002) (because claims were "not substantiated in any of the pleadings" plaintiff was barred from raising them). Washington courts have specifically held that a party who fails to plead a cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Id.*

Accordingly, Renata's allegation failed to create a genuine issue of material fact to defeat summary judgment on the wrongful foreclosure claim. NWTS complied with the DTA. Both the Notice of Sale and Notice of Foreclosure followed the statutory approve form by including pertinent information of the beneficiary's identity. Given the Supreme Court's principal concern in *Bain* (and this Court's clarification in *Trujillo*), that "the beneficiary must hold the promissory note," the mere omission of an entity with an ownership interest from a Notice of Foreclosure is not a material defect in compliance with the DTA or prejudicial. *See Bain*, 175 Wn.2d at 102, 120.

6. The Notices of Sale were not falsely notarized.

Renata alleges the Amended Notice of Sale was notarized after it was executed. Appellant's Brief, p. 41-42.[11] This allegation is false. Renata mistakenly claims the Amended Notice of Sale was executed on April 29, 2011, but was not notarized until May 2,

[11] This was also first raised, improperly, in response to NWTS' motion for summary judgment. *See Lundberg*, 180.

2011. *Id.* However, the Amended Notice of Sale was executed and notarized on May 2, 2011. CP 448-52. The Amended Notice of Sale also indicates an "effective date" of April 29, 2011. *Id.* Renata erroneously characterizes the "effective date" as the execution date. The "effective date" is not the execution date. *See Mickelson v. Chase Home Finance, LLC.*, 2014 WL 2750133 (9th Cir. June 18, 2014)[12]. Rather, the "effective date" refers to the date upon which the financial information listed on page 2 regarding the amount due to reinstate was effective. *Id.* This is further corroborated by the fact that page 2 of the Amended Notice of Sale indicates the same April 29, 2011 date. *Id.*

The timing and recording of the Amended Notice of Sale strictly complied with the DTA. RCW § 61.24.135(4) allows the trustee to set a sale date not less than forty five days after the date of the bankruptcy court's order dismissing the case. Here, the bankruptcy court Order dismissing Plaintiff's bankruptcy was

[12] In *Mickelson*, the 9th Circuit Court of Appeals addressed the identical allegation and held that, "[t]he disparity between the date on which a document becomes effective and the date on which it was notarized does not indicate that it was signed on one day and notarized on another". *Id.* at p. 6, ¶ C.

entered on April 26, 2011. CP 1125. The sale date of June 10, 2011, listed in the Amended Notice of Sale was 45 days after entry of the Order. CP 448-552.

Significantly, the statutory timing is not tied to the date when the notice of trustee's sale (or amended notice of trustee's sale) is executed, signed, or notarized. Rather, the key date is when the notice is recorded. Because these notices were recorded after the later of the effective/notarization dates, any discrepancy between those dates caused Renata no prejudice. In addition, unlike in *Klem*, no sale was ever held here, so Renata was not deprived of an opportunity to avoid foreclosure. 176 Wn.2d at 795.

7. The Notices of Sale properly recited MERS' role in the original Deed of Trust.

Renata contends that both the Notice of Sale and Amended Notice of Sale "misleadingly refer to MERS as the party Ms. Renata was originally obligated to pay." Appellant's Brief, p. 43. Because NWTS was not a party to the loan's origination, it did not

participate in executing the Deed of Trust, and thus made no representation that MERS was a Note holder in its own right. The Notice of Trustee's Sale compels a description of the original Deed of Trust (listing MERS as a *nominee* for the Lender, its successors and assigns), but does not assert that MERS is the beneficiary or attempting to foreclose. *See Massey v. BAC Home Loans Servicing LP*, 2013 WL 7219501 (W.D. Wash. Nov. 20, 2013) (amending summary judgment order; NWTS was required to describe original parties to Deed of Trust); RCW 61.24.040(1)(f).

C. Renata's Consumer Protection Act (CPA) Claim

A violation of the CPA requires:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal and

necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002).

1. Renata Failed to Show an Unfair or Deceptive Act or Practice Involving NWTS Affecting a Substantial Portion of the Public.

Under the CPA, Renata was required to show that NWTS engaged in an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge*, *supra*; *see also* RCW 19.86.093. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006). An "act performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997).

Here, Renata did not allege a per se CPA violation, so the only method by which he could have established a CPA violation was to show that NWTS engaged in conduct that has a capacity to deceive a substantial portion of the public. *See Saunders*, *supra.* at 344, *quoting Hangman Ridge*, *supra.* at 785-86. However, Renata failed to meet this burden because each of the alleged unfair or deceptive acts alleged against NWTS relate to conduct directed at her, and not the public. These alleged acts did not, and could not, have the capacity to deceive any other member of the public, let alone a substantial portion of the public. Thus, Renata was unable to establish the existence of an unfair act with "a capacity to deceive a substantial portion of the public."

2. Renata Identified No Impact on the Public Interest.

Under the second prong of *Hangman Ridge*, Renata was also required to show that the acts in question were likely to impact the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged acts were committed. *See Hangman Ridge*, 105 Wn.2d at 780.

Because Renata complained of a consumer transaction, the following factors were relevant:

> (1) [w]ere 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?

Id. at 790. Moreover, "[t]he public interest in a private dispute is not inherent." *Tran v. Bank of America*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790.

Here, Renata was unable to plead facts sufficient to show that the public interest had been impacted. *See e.g., Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Each of the alleged acts on which Renata relies exclusively relates to conduct directed at her personally, i.e., whether Flagstar was the beneficiary and had authority to execute documents during foreclosure of the subject Property. These acts do not, and cannot, have the capacity to deceive any other individual, let alone a substantial portion of the general public. Renata's allegations were wholly insufficient to satisfy the CPA's public impact requirement as to NWTS.

3. The Role of MERS Does Not Impute Liability to NWTS.

In *Bain*, the Washington Supreme Court found that MERS's representation that it was the beneficiary of the Deed of Trust in its own right – rather than as an agent for a disclosed principal – had the capacity to deceive within the meaning of the CPA, because MERS was not the Note holder. 175 Wn.2d at 117. The Supreme Court also held, however, that "[t]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id.* at 120.

The relevant question certified to the Supreme Court was: "[d]oes a homeowner possess a cause of action against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of the Washington Deed of Trust Act?" *Id.* at 115. Nothing in the *Bain* decision, or any case in Washington, holds that the first element of a CPA claim is satisfied against a non-judicial foreclosure trustee. *Accord Lynott v. MERS*, 2012 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("*Bain* did not... create a per se cause-of-action based solely on MERS's involvement."), *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) (authority to foreclose based on holding note, independent of MERS), *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011), *aff'd*, 2013 WL 6773673 (9th Cir. Dec. 24, 2013) (no declaratory relief based on MERS's capacity as nominee in deed of trust).

Because NWTS was not a party to the loan's origination, it did not participate in executing the Deed of Trust, and thus made no representation that MERS was a Note holder in its own right.

According to *Bain*, any public interest impact would relate to MERS's actions (whatever they may have been), and not those of NWTS. *Accord Estribor v. Mtn. States Mtg.*, 2013 WL 6499535, *6 (W.D. Wash. Dec. 11, 2013) ("[t]he deed of trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive.").

In *Myers v. MERS, Inc. et al.*, the Ninth Circuit Court of Appeals affirmed the Fed. R. Civ. P. 12(b)(6) dismissal of a claim for "wrongful foreclosure" and a "violation of the [DTA]," in addition to claims of fraud, a breach of good faith, the CPA, and gross negligence. *Myers v. MERS, Inc. et al.*, 2013 WL 4779758 (9th Cir. Sept. 9, 2013). The District Court opinion upheld in *Myers* rejected the notion that "MERS's involvement taints the foreclosure process." *Myers v. MERS, Inc. et al.*, 2012 WL 678148 (W.D. Wash. Feb. 24, 2012). The District Court further found that the plaintiff failed "to allege that MERS took any action

in regards to him... [or that] MERS initiated or participated in the foreclosure process in any way." *Id.* at *6.

Moreover, the District Court correctly recognized "the bottom line;" namely that Flagstar (in that action) was "empowered as the beneficiary to appoint the trustee because it holds [the] Note, not because of the Assignment [of Deed of Trust]." *Myers*, 2013 WL 4779758 at *2, *citing* 2012 WL 678148 at *6. The same conclusion was warranted in this case as well.

In sum, *Bain* should not be stretched to infer presumptions against NWTS, or to suggest it is somehow liable under the CPA, and thus, a genuine issue regarding the second prong of the applicable CPA test was not evident below against NWTS as a specific defendant.

4. NWTS Did Not Cause Injury to Renata.

Finally, a CPA claim must plead and prove that there is a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge*, *supra.* at 793; *see also Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321,

617 P.2d 415 (1980) (alleged deceptive acts must result in injury). A plaintiff must demonstrate that the "injury complained of... would not have happened" if not for defendant's acts. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007).

An award under the CPA is strictly limited to damage "in... [a plaintiff's] business or property...." RCW § 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998).

As the Ninth Circuit Court of Appeals recently held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

Likewise in this case, Renata did not identify an injury that was proximately caused by NWTS's conduct, i.e., related to NWTS's role in conducting the non-judicial foreclosure. Cf. *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are not an "injury" under the CPA).

Renata offered no facts demonstrating that, because of NWTS's conduct, she suffered injuries merely as a result of receiving foreclosure notices due to her own failure to pay the secured loan. As such, Renata could not satisfy either the damages or causation prongs of her CPA claim, and the trial court correctly found in NWTS' favor.

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III. CONCLUSION

For the foregoing reasons, NWTS requests this Court to affirm the trial court's granting summary judgment.

DATED this 22nd Day of July.

RCO LEGAL, P.S.

By: _____
John A. McIntosh, WSBA #43113
Of Attorneys for Respondent Northwest Trustee Services, Inc.

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

VALMARI RENATA, Appellant, v. FLAGSTAR BANK, F.S.B., a federally chartered Savings Bank; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; and DOE DEFENDANTS 1-10, Respondents.	No. 714023 **DECLARATION OF SERVICE**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on July 22, 2014, I caused a copy of the **Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

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ORIGINAL

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Fred B. Burnside Davis Wright Tremaine, LLP 1201 Third Ave., Suite 2200 Seattle, WA 98101-3045 Attorneys for Defendants / Respondents Flagstar Bank, FSB and MERS	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 22nd day of July, 2014.

Kristine Stephan, Paralegal

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