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Case No. 72506-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DAVID GUTTORMSEN and TERRY GUTTORMSEND, husband and wife,

Appellants,

vs.

AURORA BANK, FSB, a federally chartered savings bank, et. al.

Respondents.

Appeal from an Order of the Snohomish County Superior Court

Case No. 13-2-04263-9

RESPONDENT QUALITY LOAN SERVICE CORPORATION OF WASHINGTON'S BRIEF

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I. INTRODUCTION

Respondent Quality Loan Service Corporation of Washington ("Quality") is the trustee under the subject deed of trust who advanced the foreclosure sale. The trustee's duty to advance the sale was triggered when the Guttormsens' stopped making their mortgage payments.

As explained below, the sale in question was advanced pursuant to law, and the Guttormens' claims for wrongdoing against Quality were properly dismissed by the trial court. This Court should affirm the dismissal.

II. FACTS

A. Underlying Loan.

On February 23, 2006, David Guttormsen executed a Note in favor of AIG Federal Savings Bank for the principal sum of $200,000.00. CP at 807, 812-817. The Note was secured by a Deed of Trust against the Guttormsens' house. CP at 807, 819-835. The Deed of Trust was recorded twice with the county recorder's office. CP at 954-69, 971-86. To be clear, both recordings are of the *same* instrument. The Guttormsens did not give multiple security instruments in connection with the loan.

In 2007, Fannie Mae purchased the loan. CP at 807. Aurora Loan Services, LLC ("Aurora") serviced the loan for Fannie Mae until on or

about July 2, 2012, after which time Nationstar Mortgage LLC ("Nationstar") took over as servicer. CP at 807.

The physical Note, endorsed in blank, was held by Aurora, through a custodian, until August 20, 2011. CP at 808. Aurora itself maintained physical possession of the Note from August 20, 2011 to March 10, 2013, after which time Nationstar took possession of the Note. CP at 808.

B. Default and Foreclosure.

In 2011, the Guttormsens stopped making their mortgage payments. CP at 808, 1009. Failure to make mortgage payments is an event of default under the Note and Deed of Trust, triggering the trustee's power of sale.

On June 13, 2012, Aurora appointed Quality as the successor trustee under the Deed of Trust. CP at 1005-06. At the time, Aurora held the Note. CP at 808.

On July 13, 2012, Quality issued a Notice of Default. CP at 1008-18. On December 17, 2012, Quality issued a Notice of Sale, scheduling an auction date for April 19, 2013. CP at 1024-1027.

Prior to issuing the Notice of Sale, Quality had in its possession a beneficiary declaration confirming that Aurora held the Note. CP at 343. The beneficiary declaration was true; Aurora did, in fact, hold the Note. CP at 808.

The auction did not proceed as scheduled, and Quality discontinued its sale. CP at 340-41, 345-46.

C. Lawsuit.

On April 18, 2013, the Guttormsens filed the underlying lawsuit, accusing the trustee and other defendants of wrongdoing in connection with the foreclosure. CP at 931-1027. The Guttormsens did not allege any contacts with the trustee prior to filing the suit. CP at 929-1027, 519-609. Quality was dismissed on summary judgment. CP at 14-16.

III. ARGUMENT

A. Summary Judgment Standard.

A CR 56 motion is evidentiary in nature, and the party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial." CR 56. "[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain." *White v. State*, 131 Wash.2d 1, 9, 929 P.2d 396 (1997).

The Guttormsens failed their burden in opposing summary judgment. Instead of producing evidence of their own, they resorted to attacks on the admissibility of the defendants' business records (business records are admissible, and the defendants' declarations provided foundation, see CP at 19, 472-74). The Guttormsens' speculation that the

business records were wrong, without evidence in support, was insufficient to survive a summary judgment motion.

The Guttormsens also asked for more time under CR 56(f) to do discovery, but failed to demonstrate diligence (the case had been open for well over a year without any discovery). Nor did they provide any reason to believe discovery would produce evidence creating a genuine issue of material fact. The trial court correctly declined the Guttormsens' CR 56(f) request.

B. Foreclosure Advanced Pursuant to Law.

The record before the Court demonstrates that the foreclosure was advanced by the trustee pursuant to law.

1. Verification of Beneficiary.

Under Washington's Deed of Trust Act, the beneficiary is the "holder of the instrument or document evidencing the obligations secured by the deed of trust". RCW 61.24.005(2) (emphasis added). Washington's Supreme Court has further confirmed that the beneficiary is the holder of the note. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). The parties cannot alter this requirement by contract. *Id.* at 108.

The trustee's obligation to verify the identity of the beneficiary (i.e. the holder) arises prior to issuance of the notice of sale, as follows:

RCW 61.24.030

Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. **A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.** (emphasis added).

Importantly, per the above, the trustee is allowed to rely on a declaration from the holder. *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484 (Div. 1, 2014). This remains true if the owner and holder are different. *Id.*

In this case, before issuing its Notice of Sale, Quality had in its possession the beneficiary declaration confirming Aurora held the Note. This declaration satisfied the trustee's obligation under RCW 61.24.030(7)(a). Furthermore, the record confirms that Aurora did, in fact, hold the Note.

While Fannie Mae owns the Note, the appointment was appropriate from Aurora because Aurora held the Note, making it the beneficiary under Washington law. Fannie Mae was not the beneficiary,

and could not appoint a successor trustee, because they did not hold the Note. *Bain*, 175 Wn.2d 83 (2012).

2. Notice of Default.

The notice of default is a statutory form. RCW 61.24030(8). It requires identification of the owner of the note, and servicer of the loan. RCW 61.24.030(8)(l). It does not require identification of the deed of trust beneficiary.

Quality's Notice of Default complied with the statutory form. It correctly identified Fannie Mae as the owner of the Note, and Aurora as servicer. Because Aurora was servicing the loan, and communications (including those pertaining to loan modifications) are made through the servicer, Aurora's address and phone number were appropriately listed.

3. Debt Validation Notice.

The Debt Validation Notice (CP at 1018) attached to Quality's Notice of Default is not part of Washington's non-judicial foreclosure process, but rather issued by the trustee to comply with the Federal Debt Collection Practices Act (the "FDCPA"). While Quality's position is that non-judicial foreclosures are not "collection" activities under the FDCPA, it issues the notice anyway as a safe harbor.

The FDCPA defines creditor, in relevant part, as the person "to whom a debt is owed." 15 USC 1692a(4). Under the UCC and law of

negotiable instruments, Aurora was the "person to whom [the] debt is owed" because Aurora held the Note, endorsed in blank, and had the power to enforce it. *Trujillo*, 181 Wn. App. 484, 501-502. Aurora, as servicer for Fannie Mae, was also responsible for collecting the payments. Thus, Aurora was accurately identified as the creditor in the trustee's Debt Validation Notice.

4. Trustee Does Not Owe a "Fiduciary" Duty.

The trustee does not owe the Guttormsens a "fiduciary" duty, as they appear to allege in their opening brief. The trustee owes a duty of "good faith" in advancing the foreclosure, and that duty is owed to the beneficiary, as well. RCW 61.24.010(4).

Quality did not breach its duty of good faith to the Guttormsens. It is undisputed the Guttormsens stopped making their mortgage payments (and haven't made payments in years). Nonpayment triggered the trustee's power of sale and duty to advance the foreclosure pursuant to the agreement of the parties. And as already explained, Quality was appointed by the holder of the note and lawful beneficiary, and issued its foreclosure notices based on the statutory forms.

5. Duplicate Recording of Deed of Trust Is Immaterial.

The duplicate recording of the Deed of Trust is immaterial. It is nothing more than a red herring in the Guttormsens' briefing, intended to create an issue that does not exist.

To be clear, there is only one Deed of Trust. Both recording numbers lead to the same Deed of Trust. Anyone searching the public records under either recording number will arrive at the same Deed of Trust.

The county recorder does not alter the underlying instrument by giving it a reference number, or two, or more. It remains the same instrument.

The Guttormsens' theory that the duplicate recordings resulted in different liens has no basis in law. There is only one lien.

C. Claims For Relief Properly Dismissed.

1. Violation of the Deed of Trust Act.

The Court found there was no violation of the Deed of Trust Act by Quality, and properly dismissed that claim for damages. Since the dismissal, Washington's Supreme Court in the case of *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 429 (2014) has held, as a matter of law, there is no cause for damages under the Deed of Trust Act in the absence of a completed sale. In this case, there has been no sale of

Guttormsens' property by Quality. Thus, *Frias* bars their relief for damages under the Deed of Trust Act.

2. Consumer Protection Act.

A claim under Washington's Consumer Protection Act ("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, Inc. v. Safeco Title Ins.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to meet all of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

The Guttormsens failed to demonstrate the elements necessary to sustain a CPA claim against Quality, and the claim was properly dismissed at summary judgment.

i. *No Unfair or Deceptive Act.*

"Whether an action constitutes an unfair or deceptive practice is a question of law." *Columbia Physical Therapy, Inc., PS v. Benton Franklin Orthopedic Associates, PLLC*, 168 Wn.2d 421, 442, 228 P.3d 1260, 1270 (2010). An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *State v. Pacific Health Center, Inc.*, 135 Wn. App. 149, 170, 143 P.3d 618, 628 (2006). "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, 226, 135 P.3d 499 (2006).

As a threshold matter, the Guttormsens failed to demonstrate a defect in the foreclosure by the trustee, let alone an "unfair or deceptive" act. Quality was appointed trustee by the holder of the note, and lawful beneficiary under the law. The sale was advanced based because the Guttormsens stopped making their mortgage payments, triggering the trustee's power of sale. And the foreclosure notices were based on the statutory forms. It is not 'unfair or deceptive" for a trustee to advance a foreclosure pursuant to law.

The case of *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014) does not help the Guttormsens. There is nothing similar factually about *Lyons* and the Guttormsens' case, other that they both involved foreclosures.

In *Lyons*, the borrower agreed to a modification with the purchaser of her delinquent loan. *Id.* at 1146. Yet the trustee continued with its foreclosure sale against the property, presumably on instructions from the original lender. *Id.* The borrower on multiple occasions contacted the trustee to inform them she cured the default, and requesting cancellation of

the sale. *Id.* The trustee refused. *Id.* It was only after the filing of the lawsuit by the borrower that the trustee discontinued the sale. *Id.*

The *Lyons* Court held that genuine issues of material fact existed as to whether the trustee's lack of neutrality towards the borrower was "unfair and deceptive". *Id* at 1149. The Court said:

> [A] trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands...but must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith.

Id at 1149.

There is nothing factually similar between *Lyons* and the present case. First, there is no issue with the foreclosure in the present case, as there was in *Lyons*, where the borrower cured her default.

Second, the Guttormsens do not allege ever contacting Quality and raising issues with the foreclosure before filing their lawsuit. In other words, there was no "borrower's side of the story" for the trustee to investigate and vet. Quality was appointed by the holder. The loan was in default. Quality had a duty, as trustee, to advance the foreclosure in accordance with the parties' agreement. There was no objective reason for Quality to refuse to foreclose based on its record. To refuse to foreclose would have implicated the trustee's duty owed to the beneficiary.

Furthermore, the beneficiary declaration relied upon by the trustee in *Lyons* (which was also an issue in that case) is distinguishable. The *Lyons* beneficiary declaration said Wells Fargo either held the note, *or* had the "requisite authority...to enforce [it]." *Id.* at 1145. The *Lyons* Court said that the "requisite authority to...enforce" could mean that Wells Fargo was a nonholder in possession, or a person not in possession who is entitled to enforce under the UCC. *Id.* at 1151.

The beneficiary declaration in the present case did not contain that ambiguity. The beneficiary declaration in the present case unequivocally states Aurora is the holder. The record further demonstrates that Aurora did, in fact, hold the Note.

ii. Injury to "Business or Property."

A CPA claimant must demonstrate injury to "business or property" proximately caused by the "unfair or deceptive" act. RCW 19.86.090; *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). A claimant 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 Washington, Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007).

In *Lyons*, the case so heavily cited by the Guttormsens, the borrower ran an elder care business out of her home. *Id.* at 1146. The

foreclosure notices caused her to lose clients. *Id.* The Court said this was potential injury to "business," proximately caused by the unlawful actions of the trustee. *Id.* at 1148 FN #4.

In the present case, nothing in the record on summary judgment demonstrated any recoverable injury to "business or property" suffered by the Guttormsens as a proximate result of the trustee's actions. Mr. Guttormsens' vague, self-serving declaration complains of credit loss, inability to refinance, "investigative expenses", and emotional harm. CP at 519-609. Zero documentary proof was provided to support any of these claims. The Guttormsens essentially just restated their pleadings in opposition to summary judgment, instead of actually producing evidence, which is required to survive a CR 56 motion and necessitate a trial. *Bates Jr. v. Grace United Methodist Church*, 12 Wash. App. 111, 115 (Div. 2, 1974) ("...the whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.").

Furthermore, there is no proximate cause between the claimed damages and the trustee. The reason the trustee got involved, and initiated a foreclosure, is because the Guttormsens stopped making their mortgage payments. That is what the trustee does. The trustee sale is the remedy the Guttormsens agreed to when they signed the Deed of Trust. This is

not *Lyons* where the borrower cured her default, informed the trustee of that fact, and the trustee continued with the sale.

3. Criminal Profiteering.

To state a claim for criminal profiteering under Washington's "little RICO" statute, Plaintiff must allege, among other things, a "pattern of criminal profiteering." RCW 9A.82.100(1)(a). "Criminal profiteering" is defined as "any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred[.]" RCW 9A.82.010(4).

Like their CPA claims, the Guttormsens "criminal profiteering" claim against Quality was entirely derivative of their claim for wrongful foreclosure and violation of the Deed of Trust Act. As discussed already, the uncontroverted evidence demonstrated that Quality complied with the Deed of Trust Act. Because Quality complied with the statute, there was nothing "deceptive" or "fraudulent", and certainly not illegal, about their conduct. Plaintiffs' criminal profiteering claim was appropriately dismissed.

IV. CONCLUSION

The Court should affirm the dismissal of Quality.

Dated: January 27, 2015

MCCARTHY & HOLTHUS, LLP

By:_____
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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 January 28, 2015, I arranged for service of the forgoing Initial Brief of Respondent on the following parties via U.S. 1st Class Mail:

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