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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 46906-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEY K. KIM, Appellant,

vs.

FAY SERVICING, Respondent

BRIEF of APPELLANT

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P/m 6/5/15

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TABLE OF AUTHORITIES

1. *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002)
2. *Landberg v. Carlson*, 108 Wn. App. 749, 33 P.3d 406 (2001)
3. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 (2012)
4. *Anhold v. Daniels*, 94 Wn.2d 40, 45, 614 P.2d 184 (1980)

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN RULING THAT RESPONDENT DID NOT MISLEAD PETITIONER INTO WAITING FOR A LOAN MODIFICATION; THAT PETITIONER WAS NOT INJURED BUT FOR RESPONDENT MISLEADING STATEMENT; and/or THAT RESPONDENT'S ACT(S) DO NOT GIVE RISE TO A CONSUMER PROTECTION ACT CLAIM

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

- I. Is it misleading for Respondent to advise Petitioner that they would contact the Petitioner again with an interpreter and fail to do so?
- II. Could Petitioner have avoided the foreclosure if he had known that the Respondent would not be modifying his mortgage?
- III. Is it a violation of the Consumer Protection Act if Respondent's statement(s) did mislead the Petitioner?

STATEMENT OF THE CASE

Procedural and Substantive Facts

On October 17, 2014, the trial court granted summary judgment in favor of Respondent Fay Servicing, Inc. (hereinafter "Fay Servicing"). CP 89-91.

On or about August 2, 2013, Fay Servicing prepared and mailed a letter to Petitioner Kim (hereinafter "Kim") notifying him that the servicing of Kim's mortgage was transferred to Fay Servicing. Kim then contacted Fay Servicing and discussed to mortgage with Fay Servicing on numerous occasions from August 2013 to October 2013. Kim advised Fay Servicing that although he would be receiving \$300,000.00 from a settlement related to his previous business, he would be investing the funds in a business to be determined to have a regular income. CP 77. During October 2013, Fay Servicing apparently started explaining the technical terms about Kim's modification request. Kim advised Fay Servicing that he did not understand the technical terms due to his limited English skills. Fay Servicing then advised that they would call Plaintiff again with a Korean interpreter. CP 78. The call never came and the property was sold at a trustee's sale.

Standard of Review

In reviewing an order of summary judgment, “this court engages in the same inquiry as the trial court.” *Tollycraft Yachts Corp. v. McCoy*, 122 Wash.2d 426, 431, 858 P.2d 503 (1993) (citing RAP 9.12; *Harris v. Ski Park Farms, Inc.*, 120 Wash.2d 727, 737, 844 P.2d 1006 (1993)). A trial court may grant summary judgment only “if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Dep't of Labor & Indus. v. Fankhauser*, 121 Wash.2d 304, 308, 849 P.2d 1209 (1993) (citing CR 56(c)). In reviewing a summary judgment, “all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo.” *Coppernoll v. Reed*, 155 Wash.2d 290, 296, 119 P.3d 318 (2005) (citing *Berger v. Sonneland*, 144 Wash.2d 91, [102-03,] 26 P.3d 257 (2001)).

ARGUMENT

“Summary judgment is proper if the pleadings and evidence, viewed in a light most favorable to the nonmoving party show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Landberg v. Carlson*, 108 Wn. App. 749, 757, 33 P.3d 406 (2001); Washington Court Rule 56. All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Summary judgment is proper when reasonable minds could reach but one conclusion regarding the material facts. *Cotton v. Kronenberg* 111 Wn. App. 258, 264, 44 P.3d 878 (2002).

In examining the facts most favorable to the nonmoving party, the evidence submitted to the trial court raised genuine issues as to material facts as to whether Petition was in fact misled by Respondent’s statement. First, the court must look to the evidence. The evidence submitted by Kim is clear in that Fay Servicing did state that they would call again with an interpreter and that Kim believed that this was to go over the details of the modification. Whether Kim’s such belief was reasonable and whether Fay Servicing’s decision not to contact an interpreter could lead a finder of fact that Fay Servicing misled Kim are genuine issues as to material facts. If Kim did reasonably believed that Fay Servicing would contact him again to discuss the modification of his mortgage and otherwise relied on Fay

Servicing's statement that they would call, such reliance did lead to his decision not to take other actions to prevent the foreclosure. Further, if Fay Servicing did mislead by its action or omission, then this matter is a proper Consumer Protection Act claim as Fay Servicing is in the business of servicing mortgage loans and therefore does affect the public interest and commerce.

1. Fay Servicing misled Kim when they stated that they would call with an interpreter and subsequently failed to do so.

Fay Servicing, by their own account (CP 69) last spoke with Kim on October 17, 2013 and the telephone conversation ended with Kerber telling Kim that he would call again with an interpreter (CP 70), having him wait for a call that never came. There were numerous communications between Kim and Fay Servicing. It is troubling that while Fay Servicing states that Kim had an attorney to assist with the modification (CP 63) but Fay insisted on talking with Kim instead of his attorney. Such decision by Fay Servicing to speak directly with Kim contributed significantly to the "miscommunication" between Fay Servicing and Kim. The unfortunate result, which may have been Fay Servicing's intent all along, was Kim waiting for the call from Fay Servicing beyond the November 2013 trustee's sale date. Fay Servicing claims that the conversation on October 17, 2013, which was put on hold

until they could find a Korean interpreter, was never resumed because they were unable to find a Korean interpreter. CP 70. Mr. Kerber does not state in his declaration as to what, if any, effort he made to find a Korean interpreter. While this declaration does not confirm that an offer of modification was indeed made to Kim, it does confirm that modification discussions were taking place and that the conversation was paused in need of an interpreter, not terminated. If Fay Servicing did in fact seek an interpreter and were unsuccessful, they could have easily contacted Kim's attorney for assistance in either locating a Korean interpreter or explaining what was being discussed. They already had the attorney's contact information as they had at least one contact from the attorney. CP 63. But they chose not to. Such facts could definitely lead one to reasonably believe that Fay Servicing was merely keeping Kim waiting by misleading him to believe that something was being done about the modification.

2. Kim could have taken steps to avoid foreclosure had he not relied on Fay Servicing's statement.

Had Kim known before the trustee's sale that Fay Servicing would not be calling him, that they would be proceeding with the trustee's sale, he could have and certainly would have either sought an injunction to enjoin the sale or to make payment arrangements. Kim had \$300,000.00 available to him to use if necessary to protect his home. He did not do so only because

he sincerely thought that Fay Servicing would be calling about the modification, not selling his home at a trustee's sale.

3. Fay Servicing's acts or omissions do give rise to a Consumer Protection Act claim.

Fay Servicing's acts in misleading Kim to wait for the phone call with an interpreter is both unfair and deceptive. Fay Servicing is registered to conduct business in the State of Washington and is in the business of servicing loans to the public. Affecting the public interest is determined as, "[T]he presence of public interest is demonstrated when the proof establishes that (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition. *Anhold v. Daniels*, 94 Wn.2d 40, 45, 614 P.2d 184 (1980). Representations by Fay Servicing led Kim to believe that the modification was being granted and therefore the trustee's sale would not be held. The fact that Fay Servicing did not contact Kim's attorney and simply quit contacting Kim some two weeks before the scheduled trustee's sale telling Kim that they would call him again with an interpreter could reasonably be inferred by a finder of fact as deliberate misrepresentation. Even if it were not so, Fay Servicing admits that they told Kim that they

would call with the interpreter and such representation led to Kim reasonably believing that another phone call was on its way. Relying on this belief, Mr. Kim did not seek to enjoin the sale and he has suffered the injuries arising from the trustee's sale. As Fay Servicing is in the business of servicing mortgage loans, potential does exist for repetition of this act.

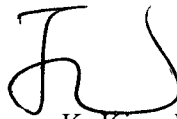
CONCLUSION

The facts, especially when viewed in a light favorable to Kim, the nonmoving party, are ample evidence to show that Fay Servicing was unfair and deceptive, violated the Consumer Protection Act, and caused injury to Kim. At the very least, there are genuine issues of material facts that must be decided by a finder of fact after reviewing all evidence regarding those issues.

Kim respectfully requests the Court to vacate the summary judgment and remand the matter for trial.

DATED this 5th day of June, 2015.

Respectfully Submitted,



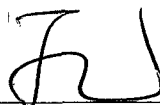
James K. Kim, WSBA #28331
Attorney for Appellant Kim

CERTIFICATE OF SERVICE


I certify under penalty of perjury that on the 5th day of June 2015, I caused a copy of the Brief of Appellant to be served upon Adam Hughes via first class mail at the following address:

Adam Hughes
720 Olive Way Ste 1201
Seattle, WA 98101-3809

Dated this 5th day of June, 2015



James Kim

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