73827-5

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Case No. 73827-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

D. RYAN PATRICK, et. al.,

Appellants,

vs.

WELLS FARGO BANK, N.A., et. al.

Respondents.

Appeal from an Order of the Snohomish County Superior Court

Case No. 14-2-07754-6

BRIEF BY RESPONDENTS QUALITY LOAN SERVICE CORP. OF WASHINGTON, QUALITY LOAN SERVICE CORP., and McCARTHY & HOLTHUS, LLP

Joseph Ward McIntosh, WSBA #39470
McCarthy & Holthus, LLP
108 1st Ave S, Ste 300
Seattle, WA 98104
206-319-9049
jmcintosh@mccarthyholthus.com

Attorney for Respondents Quality Loan Service Corp. of Washington; Quality Loan Service Corp.; McCarthy & Holthus, LLP

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I. INTRODUCTION

The Patricks took out a mortgage loan secured by a deed of trust, and intentionally stopped making their payments. Their default triggered the trustee's power of sale under the deed of trust. Respondent Quality Loan Service Corp. of Washington was appointed successor trustee to advance a foreclosure of the real property collateral. The foreclosure was advanced by the trustee pursuant to law and contract. The Patricks have no claims for relief against the trustee, or its attorneys, and the dismissal should be affirmed.

II. FACTS

A. Loan and Default.

In 2007, the Patricks took out a home loan and executed a promissory note for the principal sum of $435,960.00. CP at 856-861. The promissory note was secured by a deed of trust encumbering their real property. CP at 862-875. Sometime after origination, the loan was sold into a securitized trust with HSBC acting as trustee. CP at 2918, 2922. HSBC held the promissory note. CP at 2918. Wells Fargo was the loan servicer and agent for HSBC. CP at 2924.

In 2012, the Patricks intentionally stopped making their mortgage payments. CP at 5, 2924. The Patricks claim they stopped paying because they wanted better loan terms (specifically, a lower interest rate), and

Wells Fargo would not review them for a modification if the loan was current. CP at 5, 2780. Following their default, the Patricks applied-for but were denied a loan modification on different grounds. CP at 6-7.

B. Foreclosure.

Under the terms of the Patricks' deed of trust, the real property serves as collateral for repayment of their loan. Their failure to make mortgage payments was an event of default triggering the trustee's power of sale and duty to advance a foreclosure.

In 2013, HSBC, through its agent Wells Fargo, appointed respondent Quality Loan Service Corp. of Washington as successor trustee under the deed of trust to advance a foreclosure of the property. CP at 2915-2916.

On November 19, 2013 the trustee issued the first legal notice in the foreclosure process, the Notice of Default. CP at 2919-2933

On September 5, 2014, the trustee issued the second legal notice, the Notice of Sale, scheduling an auction date of the property. CP at 2938-2941

C. Lawsuit and Sale.

In December of 2014, prior to the scheduled auction date, the Patricks filed this lawsuit alleging wrongful foreclosure by the defendants. Despite their knowledge of the sale date and belief that defenses to it

existed, the Patricks never moved the superior court to enjoin the sale.

On February 13, 2015, as scheduled, the trustee auctioned the property for sale. CP at 2913. On February 20, 2015, the trustee issued to the winning bidder a Trustee's Deed to the property. CP at 2949-2951.

Following sale, defendants moved for summary judgment and dismissal of all claims. CP at 2867-2875. The superior court appropriately granted summary judgment. CP at 739-740. This appeal followed.

III. ARGUMENT

A. Foreclosure Advanced By Trustee Pursuant to Law.

1. Foreclosure Advanced by "Beneficiary".

Under Washington's Deed of Trust Act, the "beneficiary" of the deed of trust with the power to advance a foreclosure is the holder of the promissory note. RCW 61.24.005(2); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). The trustee, in verifying the identity of the "beneficiary," is allowed to rely on a statutory beneficiary declaration from the holder of the promissory note. RCW 61.24.030(7)(a); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 544 (Wash. 2015); *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484 (Div. 1, 2014); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 849 (Wash. Ct. App. 2015).

In this case, HSBC was the "beneficiary" under the deed of trust because HSBC held the promissory note. HSBC had the power to appoint the trustee to advance the foreclosure.

Furthermore, the trustee complied with the statute and obtained a beneficiary declaration confirming HSBC held the promissory note. That the beneficiary declaration was executed by HSBC's agent does not make it invalid; the beneficiary is allowed to act through agents. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106 (Wash. 2012) (Washington law, and the Deed of Trust Act itself, approves of the use of agents); *Brodie v. Northwest Trustee Serv.*, 579 Fed. Appx. 592, 593 (9th Cir. Wash. 2014) (The fact that U.S. Bank chose to act through its authorized agent, JPMorgan Chase Bank, does not alter its right to foreclose and to appoint a successor trustee under the Washington Deed of Trust Act); *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015) (holding that beneficiary's agent was allowed to sign beneficiary declaration on its behalf where authorized to do so); *Ennis v. Smith*, 171 Wash. 126, 130, 18 P.2d 1 (1993) (an authorized agent is empowered to make binding declarations within the scope of its agency on its principal's behalf such that the declarations of the agent are deemed to be those of the principal itself)..

2. Loan Default.

It is undisputed the Patricks intentionally stopped making their monthly mortgage payments in 2012, and made no payments thereafter. Their failure to make mortgage payments was an event of default triggering the trustee's power of sale.

In response to summary judgment, and now on appeal, the Patricks argue they were legally excused from their default because Wells Fargo promised to modify their loan and lower the payments. The Patricks cite "promissory estoppel," with little explanation or analysis on how it would apply to excuse their obligation to make payments on the loan. No other legal authorities are cited or briefed. Their argument is unpersuasive.

First, under the Statute of Frauds, a loan modification, or promise to make a loan modification, must be in writing to be enforceable. RCW 19.36.110; *Frontier Bank v. Bingo Invs.*, LLC, 361 P.3d 230, 238 (Wash. Ct. App. 2015) (holding that Statute of Frauds barred enforcement of forbearance agreement not in writing). In this case, there is no writing from Wells Fargo modifying the promissory note obligation, or promising to do so. The Patricks' argument that the promissory note obligation was modified, or was supposed to be modified, fails under the Statute of Frauds because there is no writing signed by Wells Fargo.

Second, there is no evidence that Wells Fargo actually promised the Patricks a loan modification. That testimony is not in the Patricks'

declarations. At most, Wells Fargo promised to review the Patricks for a loan modification, which Wells Fargo did. There was never a promise for a loan modification, and the Patricks' "promissory estoppel" theory fails on the most important element. *Elliott Bay Seafoods v. Port of Seattle*, 124 Wn. App. 5, 13 (Wash. Ct. App. 2004) ("Obviously, promissory estoppel requires a promise.").

Third, "promissory estoppel" is an equitable defense to enforcement that the Patricks needed to sustain with the superior court. RCW 61.24.130(1) (superior court can enjoin trustee sale on any legal or equitable ground). The trustee is not the adjudicator of equitable defenses, the superior court is. *Id.* In this case, the Patricks intentionally chose not to move the court to enjoin the sale, and the promissory estoppel defense was waived.

Fourth, even if the Patricks had an enforceable agreement in law or equity with Wells Fargo for a modified monthly payment, the Patricks never performed. The Patricks did not make any mortgage payments after 2012. It makes no difference what the enforceable payment amount was because no payments were made.

3. Trustee's Fee and Costs.

The trustee is allowed to charge a fee for its services and reimburse for expenses incurred. RCW 61.24.090(1)(b). The trustee in this case

advanced the sale, incurred costs, and was allowed to charge Wells Fargo for those[1]. The items complained about by the Patricks, e.g. title report, mailing costs, recording costs, etc., are common expenses for a trustee advancing a foreclosure. Furthermore, the Patricks did not pay the trustee's fees or any of the costs, and are in no position to complain about them.

4. Alleged Trustee "Bias".

Under the Deed of Trust Act, the trustee owes an equal statutory duty of "good faith" to both the borrower and the beneficiary in advancing the foreclosure. RCW 61.24.010(4); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515-516 (Wash. 2015). The trustee does not owe a fiduciary duty. RCW 61.24.010(3). *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 94 (Wash. 2012) (In 2008, the legislature amended the Deed of Trust Act to provide that trustees do not have a fiduciary duty, only a duty of good faith).

The Patricks argue the trustee in this case is "biased", but they fail to demonstrate with evidence how the trustee acted biased towards them in advancing the foreclosure. The sale was advanced in accordance with law

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[1] The reinstatement quote located at CP 1764 contains fees and costs incurred by the lender in 2010, long before Quality's involvement. The 2010 fees and costs were not from Quality. These were likely incurred from the prior trustee, or another vendor, in connection with the Patricks' loan default in 2010.

and contract, and on account of a material default by the Patricks. The actions by the trustee were consistent with its duties owed to both parties under the statute.

Furthermore, the record demonstrates the trustee independently vetted the Patricks' claims and responded with two letters. CP at 1838-39, 1903-04. The trustee offered to review additional paperwork provided by the Patricks, and even setup a meeting with Patricks to discuss their issues. *Id.* The Patricks never responded to the trustee's letters, never provided additional documentation, and never took the trustee up on its offer for a meeting. This makes sense in hindsight; the Patricks were not interested in saving their home otherwise they would have moved the court to enjoin the sale. This case has always been about extracting money from the defendants through litigation, not stopping the foreclosure sale.

5. Robert McDonald

Mr. McDonald was employed by the law firm McCarthy & Holthus, LLP ("M&H") when he represented Wells Fargo at the Patricks' foreclosure mediation. Mr. McDonald was subsequently offered a job in-house with the trustee, and accepted. He was not working for both companies at the same time.

Furthermore, the Patricks fail to demonstrate how Mr. McDonald's previous employment with the law firm, and representation of Wells Fargo

at mediation, had any impact on them. Again, the trustee owes an equal duty to *both* sides to advance the foreclosure to law and contract. RCW 61.24.010(4). The foreclosure in this case was advanced because the loan was in default and the power of sale was triggered; not because of an alleged "bias" by the trustee or Mr. McDonald against the Patricks.

B. Claims For Relief Against The Trustee.

1. 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).

In this case, the Patricks failed to demonstrate a viable claim for relief against the trustee. Not only was there no defect in the foreclosure by the trustee, but the record was completely devoid of any evidence that the Patricks suffered legally recoverable damages caused by the trustee. Summary judgment was appropriate under CR 56.

2. Declarations in Support of Summary Judgment

A motion for summary judgment may be supported by affidavits setting forth admissible evidence. CR 56(e). Business records are an exception to the hearsay rule and are admissible as evidence. RCW

5.45.020. A custodian or other qualified witness may testify as to the contents and admissibility of a business record that is offered into evidence. *Id.*

In this case, the Supplemental Declaration of Sierra-West (CP at 2878-79) is admissible as a business record. The exhibit attached to the declaration – an affidavit of mailing of the Notice of Sale – is a business record kept in the ordinary course by the trustee and is admissible. Yet even if the declaration were excluded, it would make no difference. The Patricks do not deny receiving the Notice of Sale[2], and the declaration was not material to the claims and outcome on summary judgment.

The Declaration of Annette Cook (CP at 2876-77) is also admissible. Ms. Cook is the managing attorney for the law firm's Washington office and can speak to its affairs, including its corporate records which are kept in the ordinary course.

3. Waiver of Claims.

Waiver of the right to object to a trustee's sale occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to the foreclosure prior to the sale, and (3) failed to obtain a court order enjoining the sale. *Leahy v. Quality*

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[2] The Patricks attached the Notice of Sale as an exhibit to their complaint. CP at 899-902

Loan Serv. Corp. of Wash., 190 Wn. App. 1, 10 (Wash. Ct. App. 2015) (citing *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003)); *Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 183 (Wash. Ct. App. 2015); *Frizzell v. Murray*, 179 Wn.2d 301, 309 (Wash. 2013).

In this case, the Patricks waived their objection to the sale by failing to move the superior court to enjoin it. The waiver elements are all present. The Patricks knew of the sale. They knew of their defense to the default, as the complaint had already been filed. They had counsel representing them who knew or should have known of the ability to move the court to enjoin. Yet the Patricks intentionally chose not to raise their defense with the court and challenge the sale. Thus, their sale objections are waived as a matter of law, and so are their claims for damages against the trustee based on the waived objections. *Leahy v. Quality Loan Serv. Corp. of Wash.*, 190 Wn. App. 1, 13 (Wash. Ct. App. 2015) (holding that borrower waived objections to sale by failing to move to enjoin, and that waiver also applied to claims for damages against the trustee under the CPA and DTA).

Notwithstanding waiver, the Patricks' claims for relief still fail on the merits, as discussed below.

4. Claim for Violation of the Deed of Trust Act / Negligence.

For reasons already discussed, the trustee advanced the sale

pursuant to law and contract. The Patricks have no claims against the trustee for breach of its trustee duty, or for other violations under the Deed of Trust Act.

5. Claim Under the 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).

a. 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).

The Patricks fail to establish any defect in the foreclosure by the trustee, let alone an act that would rise to the level of "unfair or deceptive." The trustee was lawfully appointed, and the sale was advanced based on the Patricks' default, which triggered the trustee's power of sale. It is not "unfair or deceptive" for the trustee to advance a foreclosure pursuant to law and contract.

b. *Public Interest.*

An act or practice is injurious to the public interest if it "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093(3). A plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (citing *Hangman Ridge*, 105 Wn.2d at 788; *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976)).

The Patricks fail to identify or demonstrate any "public interest" as to the trustee's foreclosure. This case involves a mortgage loan the Patricks intentionally stopped paying. Their failure to make payments is an event of default. Foreclosure by the trustee is the remedy provided by contract, and what the Patricks agreed to when they took out the loan. The

Patricks have not been injured by the trustee, and cannot demonstrate that the trustee's lawful foreclosure "has the capacity" to injure the public.

c. *Causation and Damages.*

A 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). There must be a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman*, 105 Wn.2d at 793. "[T]he term proximate cause means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without such injury [or] event would not have happened." *Schnall v. AT&T Wireless Servs. Inc.*, 171 Wn.2d 260, 278 (2011) (quoting 6 Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed.2005)).

The Patricks fail to demonstrate any injury to "business or property" proximately caused by the trustee's actions. The Patricks stopped paying their mortgage, which triggered the trustee's power of sale and duty to advance a foreclosure. Foreclosure of the collateral by the trustee was the legal consequence of the Patricks not paying their mortgage. The Patricks have not suffered any injury to "business or property" proximately caused by the trustee advancing the foreclosure.

Finally, to the extent the Patricks incurred attorney's fees and costs in bringing the lawsuit, those expenses are not "damages" under the CPA. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992) (merely having to prosecute a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property."); *Demopolis v. Galvin*, 57 Wn. App. 47 (1990); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, *3-4 (W.D. Wash. Aug 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 *4 (W.D. Wash. Oct 23, 2013) (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element; if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation").

C. McCarthy & Holthus, LLP

M&H is a law firm that was named as a co-defendant with the trustee. M&H and the trustee company are commonly owned, but they are separately incorporated and operated. CP at 2876-77. The trustee is a Washington corporation, and the law firm is a California limited liability company. CP at 2876. These are separate entities, and they are treated as such under law.

The Patricks ask the court to hold the law firm responsible for the

actions of the trustee because of the companies' common ownership and alleged "commingling". As a threshold matter, there are no viable claims against the trustee, so there is no liability to impute to the law firm. Furthermore, the trustee is separately incorporated, and its corporate liabilities cannot be imputed to its shareholders or other companies such as the law firm. This is basic corporate law.

An exception to the general rule identified above is the doctrine of piercing the corporate veil, which applies if (1) the corporate form was intentionally used to violate or evade a duty, and (2) disregard is be necessary and required to prevent unjustified loss to the injured party. *Meisel v. M&N Modern Hydraulic Press Company*, 97 Wn.2d 403, 410 (1982). The above test does not apply to the trustee, and no effort is made by the Patricks to demonstrate it does.

First, the trustee is not misusing the corporate form for the purpose of benefitting a stockholder or depriving a creditor. The DTA expressly allows a trustee to incorporate. RCW 61.24.010(1)(a).

Second, piercing the trustee's corporate veil to reach the law firm is not *necessary* and *required* to prevent unjustified loss to the Patricks. The Property has already been sold, so there is no injunctive or declaratory relief available. And the fact that a money judgment against the trustee may not be collectable against the trustee (which is not even alleged), is

not grounds to disregard the corporate veil. *Meisel*, 97 Wn.2d at 411 (corporate entities should not be disregarded solely because the company cannot meet its obligations); *Eagle Pacific Insurance v. Christensen*, 85 Wn. App. 695 (Div. 2, 1997) (refusing to pierce corporate veil to reach assets of another corporation where alleged misconduct had no effect on plaintiff's ability to collect on a monetary judgment).

Finally, the allegation that the trustee and the law firm "commingle" employees, clients, customers, and business interests is not sufficient to pierce a corporate veil. *Norhawk Investments, Inc. v. Subway Sandwich Shops*, 61 Wn. App. 395 (Div. 1, 1991) (holding that notwithstanding the commingling of assets, piercing the corporate veil was not appropriate because the corporate form was not being used to mislead and evade a duty to plaintiff); *Rogerson Hiller Corporation v. Port of Angeles*, 96 Wn. App. 918 (Div. 2, 1999) (finding that sole shareholder of multiple corporations commingled finances, banking transactions, employee savings plans, and inventories, but that "commingling" alone was insufficient, and that Plaintiffs failed to demonstrate the "duty" element of the *Meisel* test); *Becker Family Builders v. FDIC*, 2010 U.S. Dist. LEXIS 95692 (2010) (refusing to pierce corporate veil against corporation who shared the same shareholders, directors, and officers); *One Pacific Towers Homeowners' Association v. Hal Real Estate*

Investments, Inc., 108 Wn. App. 330, 350 (Div. 1, 2001) ("Courts will not apply an overt intent to disregard the corporate form from the presence of common directors, shareholders, or a common business address.").

IV. CONCLUSION

The foreclosure was advanced by the trustee pursuant to law. The Patricks' claims for relief fail and the dismissals should be affirmed.

Dated: February 22, 2016

MCCARTHY & HOLTHUS, LLP

Joseph Ward McIntosh, WSBA # 39470
Attorneys for Quality Loan Service Corp. of Washington; Quality Loan Service Corp.; McCarthy & Holthus, LLP

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 February 23, 2016, I arranged for service of the forgoing Brief by Respondents Quality Loan Service Corp. of Washington, Quality Loan Service Corp., and McCarthy & Holthus, LLP on the following parties via U.S. 1st Class Mail and e-mail:

Molly J. Henry
Keesal, Young, & Logan
1301 Fifth Avenue, Suite 3300
Seattle, WA 98101
molly.henry@kyl.com

Joshua B. Trumbull
Emily A. Harris
JBT & Associates, P.S.
106 E Gilman Ave
Arlington, WA 98223
josh@jbtlegal.com
emily@jbtlegal.com

SIGNED this 23 day of February, 2016, at Seattle, Washington.

Walter Babst
Legal Assistant