74050-4

FILED
June 8, 2016
Court of Appeals
Division I
State of Washington

NO. 74050-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PAULINE LOUISE CONNER,

Plaintiff/Appellant,

v.

EVERHOME MORTGAGE COMPANY, a division of EVERBANK, REGIONAL TRUSTEE SERVICES, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, LENDER PROCESSING SERVICES, DOES I-XXX, INCLUSIVE,

Defendants/Respondents.

APPELLANT'S REPLY BRIEF

KOVAC & JONES, PLLC
Richard Llewelyn Jones
WSBA No. 12904
1750 112th Ave NE Suite D-151
Bellevue, WA 98004-2976
(425) 462-7322
rlj@kovacandjones.com
Attorney for Appellant

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

RULES **PAGE**

I. INTRODUCTION

By way of a short summary, the Deed of Trust Act (*RCW 61.24, et seq.)* (hereinafter "DTA") sets forth an exclusive procedure, to be strictly construed in favor of the borrower, whereby a deed of trust may be non-judicially foreclosed. *Albice v. Premier Mortgage Services*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (hereinafter "*Albice*"). Each step of the foreclosure process must be undertaken by the party with authority to take each step; otherwise the attempted non-judicial foreclosure is simply invalid and, moreover, may violate the Consumer Protection Act (*RCW 19.86, et seq*.) (hereinafter "CPA").

Here, we are concerned with four documents required under the DTA to evidence the parties' compliance with the DTA: the Affidavit of Possession of Note of September 8, 2009 (*RCW 61.24.030(7)(3)*) (CP 757-758); the Assignment of Deed of Trust (CP 1115-1116); the Appointment of Successor Trustee (*RCW 61.24.010*) (CP 1119-1120) and the Notice of Trustee's Sale (*RCW 61.24.040*) (CP 1122- 1125). Each of these documents were either received by the successor trustee or prepared by the successor trustee without verification of the information they contained. See testimony of Deborah Kaufman (CP 593-594, 596, 607, 611-612, 614-615) and Melissa Hjorten (CP 445, 449, 451-452, 453-454, 455-459, 479-480, 482, 488, 491-492, 499-501, 508, 510, 512, 563, 568-569). The evidence offered on summary judgment revealed that the Respondent, REGIONAL TRUSTEE SERVICES, INC.

(hereinafter "Regional Trustee") blindly accepted whatever information was provided by LPS and it's "clients" and failed to engage in the sort of investigation necessary to verify the information it relied upon to initiate non-judicial foreclosures and its duties of good faith described in *Lyons v. U.S. Bank,* 181 Wn.2d 775, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"). Unfortunately, the result of Regional Trustee's failure to fulfill its duty of good faith to Appellant was the loss of her home to a wrongful foreclosure.

II. ARGUMENT

A. No Waiver or Abandonment of Breach of Duty of Good Faith Claims.

Respondents assert that Appellant, PAULINE LOUISE CONNER (hereinafter "Ms. Conner"), abandoned, and thereby waived, her claims of wrongful foreclosure, fraud and gross-negligence, asserting these claims were not raised at summary judgment or on appeal without citation to either case law or the record on review.

Respondents curiously assert that Ms. Conner's claims of fraud and violation of the DTA were waived, stating that "a violation of the DTA does not appear to be a non-waivable claim." See Respondents' Appellate Brief, pg. 16. This is exactly the opposite of what *RCW 61.24.127* states and appears to be a careless misreading of the statutory provisions.

RCW 61.24.127 provides, in pertinent part, as follows:

> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter **may not be deemed a waiver** of a claim for damages asserting:
>
> (a) Common law fraud or misrepresentation;
> (b) A violation of Title 19 RCW;
> (c) Failure of the trustee to materially comply with the provisions of this chapter [*RCW 61.24, et seq.* – DTA]; or
> (d) A violation of RCW 61.24.026.
>
> (Emphasis added)

Fraud, misrepresentation and violation of the DTA are specifically enumerated exceptions to waiver under *RCW 61.24.127(1),* whether Ms. Conner timely enjoined the trustee's sale or not. Moreover, waiver cannot occur if the trustee's actions in a non-judicial foreclosure are unlawful. See *Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 111-112, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") and *Bavand v. OneWest,* 176 Wn.App. 475, 492, 309 P.3d 636 (2013) (hereinafter "*Bavand*").

Specifically, *RCW 61.24.127* provides homeowners a two-year statute of limits from the date of the foreclosure sale on various claims, including common law fraud or misrepresentation or failure of the trustee to materially comply with the provisions of the DTA. Here, the purported trustee's sale occurred on April 16, 2010 (CP 1127-1128) and Ms. Conner's Complaint was filed on February 13, 2012 (CP 1257-1269) – a year and ten months after the trustee's sale. Clearly, Ms. Conner's claims were timely asserted and perfected.

Ms. Conner's claims for fraud and violation of the DTA were properly plead on summary judgment. Two issues of fact raised on summary judgment and raised on appeal evidence fraud and misrepresentation.

First, on August 27, 2009, Ms. Conner spoke to representatives of Respondent, EVERHOME MORTGAGE COMPANY (hereinafter "Everhome Mortgage") who advised her to make two months of payments by August 31, 2009 to "avoid foreclosure". CP 841. Those two payments were made. Yet, on August 31, 2009, Ms. Conner's daughter-in-law called Everhome Mortgage to make payment as advised, but was told the property was already in foreclosure. CP 841. This constitutes fraud and misrepresentation on the part of Respondents.

Second, in connection with the issuance of the Notice of Trustee's Sale, Regional Trustee prepared and executed a Notice of Foreclosure pursuant to *RCW 61.24.040* indicating delinquent payments from May 1, 2009, to October 23, 2009, a period of six months. CP 682-684. However, the Notice of Foreclosure lists nine delinquent payments. In any event, there is no accounting for the two payments Ms. Conner made on August 31, 2009. This also constitutes fraud on the part of Respondents.

Turning to violations of the DTA, there were a number of violations of the DTA raised on summary judgment, including, without limitation: (1) the issuance of an assignment of Ms. Conner's Note (CP 1115-1116) by Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,

INC., aka MERSCORP (hereinafter "MERS"), when MERS never held or owned the Note and was never a true beneficiary of the Deed of Trust; (2) the Appointment of Successor Trustee (CP 668-669) by MERS after it purportedly assigned any and all interest in the obligation; (3) the reliance on the Affidavit of Possession of Note (CP 757-758), upon which Respondents relied to comply with *RCW 61.24.030(7)(a),* that was ambiguous and made without personal or testimonial knowledge; (4) the issuance of the first Notice of Trustee's Sale (CP 671-674) that was recorded a day prior to the recording of the unlawful Appointment of Successor Trustee, in violation of *RCW 61.24.010(2);* and (4) the successor trustee's failure to verify any of the records relied upon to initiate and prosecute a non-judicial foreclosure or the authority of any of the actors engaged in the initiation and prosecution of the non-judicial foreclosure. These same claims were each raised on summary judgment and in Ms. Conner's Opening Brief, on appeal. Therefore, Respondents' assertion that Ms. Conner has abandoned and waived her claims for violation of the DTA, fraud and misrepresentation is specious and without merit.

With regard to Ms. Conner's DTA claims, it must be reiterated that Regional Trustee never obtained authority to initiate a non-judicial foreclosure. The subject Assignment of Note and Deed of Trust was recorded by MERS under Snohomish County Auditor's Recording No. 200910200613 on October 20, 2009, divesting MERS of any authority to act under the

subject Deed of Trust. The Appointment of Successor Trustee, Regional Trustee's sole basis for authority under *RCW 61.24.010,* was recorded by MERS subsequently on October 20, 2009, under Snohomish County Auditor's Recording No. 200910200614.[1] As noted in *Walker v. Quality Loan Service Corp*., 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter "*Walker*"), at pg. 305-306:

> Under the DTA, if a deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. Only a lawful beneficiary has the power to appoint a successor trustee and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. Accordingly, when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. (Emphasis added)

Applied to the facts of the present case, when MERS recorded its Assignment of Deed of Trust, it lost all colorable authority to act "as nominee of the Lender". When it recorded the Appointment of Successor Trustee thereafter, it did so without authority as an "unlawful beneficiary" and the document upon which Regional Trustee relied to foreclose was a nullity. Accordingly, Regional Trustee had no authority to record and serve its Notices of Trustee's Sale or sell Ms. Conner's property.

---

[1] Pursuant to *RCW 65.08.070,* instruments recorded first in time is superior to subsequently recorded instruments. See *Bank of Gresham v. Johnson*, 143 Wash. 24, 254 Pac. 464 (1924); *Hollenbeck v. City of Seattle*, 136 Wash. 508, 514, 240 Pac. 916 (1925); *Bank of America v. Wells Fargo*, 126 Wn.App. 710, 109 P.3d 863 (2005)

Finally, Ms. Conner should not be limited to mere damages under *RCW 61.24.127*, as the Supreme Court has frequently over-turned non-judicial foreclosure sales for violations of the DTA. See *Cox v. Helenius,* 103 Wn.2d 383, 693 P.2d 683 (1985); *Albice*; and *Schroeder*. The sale conducted by Respondents should be vacated and set aside.

B. Basis of Joint and Several Liability.

As noted in Ms. Conner's Opening Brief, Respondents should be jointly and severally liable for the violations of the DTA done in their name and on their behalf. On the basis of the record before the trial court, LPS and Everhome Mortgage called the shots and assumed the authority to start and stop the foreclosure efforts. This was authority not shared with Ms. Conner. As the party in control of the process, Everhome Mortgage should be as liable as Regional Trustee for the violations of the DTA by application of the doctrine *respondeat superior*. See *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*"), *Walker,* at pg. 319, and *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 790, 295 P.3d 1179 (2012) (hereinafter "*Klem*"). See also *Nelson v. Elmview Group Home,* 131 Wn.2d 39, 929 P.2d 420 (1958).

Moreover, Everhome Mortgage and Regional Trustee should be held jointly responsible for Ms. Conner's claims under theories of civil conspiracy and joint venture liability subsumed in her claim of joint and several liabilities based upon these facts. See *Gilbrook v. City of Westminster,* 117

F.3d 839, 856 (9th Cir. 1999), *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 918 P.2d 531 (1996), *Refrigeration Engineering Co. v. McKay*, 4 Wn.App. 963, 486 P.2d 304, 311 (1971) and *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn.App. 533, 468 P.2d 717, 720-21 (1970). The undisputed fact is that all of the information upon which Regional Trustee relied came from LPS, presumably at the behest of Everhome Mortgage. Therefore, it was Everhome Mortgage that presumably controlled the foreclosure process. To the extent that Everhome Mortgage could start and stop the foreclosure process and failed to stop the process in view of the manifest defects in that process, Everhome Mortgage shares in the responsibility of that misconduct along with Regional Trustee and the trial court should have so found.

C. Evidence of Everbank's and/or Everhome Mortgage's Status as Holder Ambiguous and an Issue of Disputed Fact.

Respondents baldly assert that Everbank was the holder of the subject obligation at the time Regional Trustee initiated its non-judicial foreclosure. However, the convoluted chain of transactions that leads to that conclusion was based on contradictory evidence and was a material issue of fact in dispute on summary judgment.

Respondents apparently relied on the Affidavit of Possession of Note, dated September 8, 2009, required as a prerequisite to foreclosure under *RCW 61.24.030(7)(a),* to establish Everbank's interest in the obligation and right to

foreclose. But the Affidavit of Possession represents that Everhome Mortgage – not Everbank, to be the owner and holder of the obligation. CP 757-756. This directly contradicts the testimony of Bradley Lee and created a material issue of disputed fact on summary judgment. The representation of Everhome Mortgage, rather than Everbank, being the purported beneficiary is not anomalous. Please see the Assignment of Deed of Trust (CP 1115-1116) and the Appointment of Successor Trustee (CP 1119-1120), which both refer to Everhome Mortgage. The circumstance of Everhome Mortgage's involvement in the transaction and the assignment of the obligation to Everbank was never clarified on summary judgment. In fact, none of the Respondents' declarants on summary judgment were deposed to flesh out their conflicting statements regarding the holder and owner of the obligation at various points in the foreclosure process, which was the basis of Ms. Conner's request for relief under *CR 56(f).*

Arguably, Respondents could point to the Assignment of Deed of Trust (CP 1115-1116.) to establish Everbank's interest in the obligation. But, Respondents reject the import of the Assignment of Deed of Trust, arguing that the purported assignment of the obligation had "no legal effect on the ownership or possession of the Note because the the security interest follows the obligation." But for Ms. Conner, Respondents miss the real significance of MERS' assignment. The Assignment of Deed of Trust not only purported to assign the Deed of Trust, but the Note as well. While it could be argued

that MERS had a colorable interest in the Deed of Trust, as "nominee for the Lender", there was absolutely no evidence that MERS ever owned or held the Note, which it purported to assign along with its interest in the Deed of Trust. This constituted a material misrepresentation of the ownership of the Note by Respondents. Even if it is a nullity for purposes of assigning the Deed of Trust, Respondents, including MERS, have an obligation to be truthful whenever they file a document in the public record. As a public record, Ms. Conner, like other persons interested in the ownership of the obligation, had a right to rely on MERS' representations.

Clearly, the evidence as to Everbank's interest in the obligation on summary judgment was contradictory and in dispute on summary judgment.

D. Affidavit of Possession of Note Clearly Ambiguous.

Respondent's and the trial court's reliance on the Affidavit of Possession of Note to establish Everhome Mortgage's or Everbank's interest in the subject obligation and right to foreclose was misplaced. *RCW 61.24.030(7)(a)* provides as follows:

> 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).

Under *Lyons* and *Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter "*Trujillo II*"), a trustee fulfills its duty of good faith and complies with *RCW 61.24.030(7)(a)* only when it has in its possession an unambiguous sworn statement that the beneficiary is the holder of the obligation. The Affidavit of Possession, that served as a substitute for a beneficiary declaration under *RCW 61.24.030(7)(a)*, failed to comply with the statutory requirements.

Here, the subject Affidavit of Possession (CP 757), signed under oath by Michele de Craen, provides as follows:

> The undersigned, having been duly sworn, deposes and says the following:
>
> * * *
>
> In my capacity as Assistant Vice President of Everhome Mortgage Company I have either personal knowledge of the facts set forth in this Affidavit **or** have made appropriate inquiry of those individuals having knowledge of the facts set forth in this Affidavit. (Emphasis added) CP 757.

Well, which is it? Is the Affidavit of Possession based on personal knowledge, as it would need to be under the authority cited above and *CR 56(e),* or is it based upon hearsay, inadmissible under *ER 802*? If the statements are based on hearsay, there was no evidence before the trial court to indicate who may have been consulted or the basis of their information or knowledge and no way for the trial court to evaluate the credibility of the information offered.

To the extent it is impossible to determine the source of Ms. Craen's information, the Affidavit of Possession is ambiguous on its face and could not reasonably be relied upon by Regional Trustee to establish Everhome Mortgage to be the holder of the obligation with the authority to foreclose or otherwise to comply with its duties under *RCW 61.24.030(7)(a).* See *Lyons* and *Trujillo II*. To the extent Regional Trustee failed to investigate and verify the information contained in the Affidavit of Possession to determine who actually held the subject Note, Regional Trustee violated the DTA and its duty of good faith. *Lyons* and *Trujillo II.* This was one of the many violations of the DTA that the trial court ignored, erroneously believing it had not been plead. CP 8. The remedy for this error is reversal and remand to the trial court for further hearing.

Finally, it needs to be reiterated that according to Respondents, the entity that allegedly held the obligation at the time of the trustee's sale, Everbank, was not the entity that was the purported holder of the obligation at the time the Affidavit of Possession was issued: Everhome Mortgage. If the DTA is to be strictly complied with, Regional Trustee should have obtained an amended beneficiary declaration upon assignment of the obligation from Everhome Mortgage to Everbank before it conducted its sale to assure the party on whose behalf it was acting had the right to foreclose to comply with *RCW 61.24.030(7)(a). Lyons* and *Trujillo II.*

E. Claims for violation of the CPA.

While damages for pre-sale violations of the DTA are not recoverable, a CPA claim may be maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412, 417, 334 P.3d 529 (2014)*; Lyons,* at pg. 784. In *Lyons,* the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is automatically created if the issue is disputed. *Lyons*, at pgs. 786-787. Here, each element of the CPA claim are in dispute.

i. Unfair and Deceptive Acts.

Respondents argue that Ms. Conner's CPA claim "is simply a private dispute between a creditor and debtor rather than a consumer transaction." Respondents' Appellate Brief, pg. 21. This assertion is rebutted by the Consent Order entered into between Everbank and the Office of Thrift Supervision on April 13, 2011, in which many of the acts complained of herein have occurred numerous times before. CP 188-239.

Moreover, Respondents minimize the actions taken by MERS on their behalf. As noted in *Bain,* the unfair and deceptive act or practice element can be presumed based upon MERS' business model and the manner in which it has been used.[2] *Bain* at pgs. 115-117; *Klem,* at pgs. 784-788; *Walker,* at pgs.

[2] This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter "*Panag*") (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

318-319 and *Bavand,* at pgs. 504-506. The acts need not be made with an intent to deceive, merely that the acts in question have the capacity to deceive a substantial portion of the public. *Panag.* Indeed, the improper assignment of the obligation (the Deed of Trust and the Note) by MERS and appointment of Regional Trustee at a time when it had previously assigned all interest in the obligation and had no authority to act, constitute unfair and deceptive acts or practices. *Walker*, at pgs. 319-320, and *Bavand*, at pg. 505.

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pgs. 115-120. MERS' undisputed execution of its Assignment of Note and Deed of Trust (CP 1115-1116) as an ineligible beneficiary and execution of an Appointment of Successor Trustee (CP 1119-1120) after recording the Assignment constituted unfair and deceptive acts in that MERS was either an ineligible beneficiary or an unlawful beneficiary at the time these documents were prepared and recorded. *Bain* and *Walker.* Certainly, the source of MERS' apparent authority was not addressed by Respondents on summary judgment, if it existed at all. The existence and scope of MERS' authority was a genuine issue of material fact in dispute on summary judgment and was ignored by the trial court. But for this Assignment, Respondents could not have initiated and prosecuted a non-judicial foreclosure of Ms. Conner's home.

Finally, it is important to note that MERS' Appointment of Successor Trustee was the only recorded instrument to provide Regional Trustee authority to foreclose. CP 1119-1120. Unfortunately, the Assignment of Deed of Trust (CP 1115-1116) was recorded prior to the Appointment of Successor Trustee, eliminating MERS' colorable authority to act on behalf of the "beneficiary" under *RCW 61.24.010*, rendering the Appointment of Successor Trustee void. Regional Trustee's and Respondents' reliance on MERS' Appointment of Successor Trustee, when a review of the public record would have revealed the defect and Regional Trustee's failure to investigate and verify the information it was provided, constitutes an unfair and deceptive act. See *Lyons.* But for Regional Trustee's unwarranted reliance on MERS' Appointment of Successor Trustee, Ms. Conner's home would not have been sold.

ii. Affecting the Public Interest.

As noted in *Panag,* "the business of debt collection affects the public interest." *Panag,* at pg. 54. Moreover, since Respondents' misconduct relates to the sale of property, it affects the public interest pursuant to RCW 19.86.010(2). See *Trujillo II.* Therefore, there should be no dispute that Respondents' misconduct affected the public interest. Moreover, as noted above, the conduct complained of here has occurred on numerous occasions before. CP 188-239.

iii. Damages and Causation.

Respondents argue that Ms. Conner was not injured or damaged as a result of their misconduct. Nothing could be further from the truth. But for Respondents' misconduct, Ms. Conner would not have lost her home.

Respondents argue that Ms. Conner admitted a default in her loan, citing to CP 305 and CP 311. However, Respondents misstate the facts. While Ms. Conner admitted she "was back two payments", those payments were actually paid to cure the default prior to the issuance of Regional Trustee's Notice of Default. CP 841. But, Ms. Conner's alleged default does not justify or mitigate Respondents' patent misconduct. As noted in *Panag*, pgs. 55-56: "a person's blameworthiness . . . is not relevant in deciding whether a collection practice is unfair or deceptive: the focus is on the conduct of the collection agency, not the alleged debtor." See also *Frias.* Accordingly, the fact that Ms. Conner may have missed payments should not diminish or prejudice her claims under the CPA.

As a direct and proximate result of Respondents' misconduct, Ms. Conner totaled her injuries and damages as of June 27, 2014 at approximately $15,350.00. CP 365-366. Her injuries and damages have increased since that time, but Ms. Conner's testimony was certainly specific enough for summary judgment purposes under *Frias, Lyons* and *Panag*, where it is the existence of a material issue of fact in dispute that is germane.

In addition, Ms. Conner had to repeatedly take time off from work at a loss of wages, incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of her Note, and incurred the expense of obtaining an Audit to address Respondents' misconduct. Such damages have been found to be compensable under Washington law. CP 248-399. See *Lyons* and *In re Meyer,* 506 B.R. 533 (2014).

All of the injuries and damages alleged by Ms. Conner were the direct and proximate cause of Respondents' misconduct, including Regional Trustee, Everhome Mortgage and MERS, and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA were met.

Unfortunately, the trial court did not reach Ms. Conner's CPA claims under *Frias, Lyons* and *Trujillo II,* because it mistakenly believed Ms. Conner had not plead claims under the DTA. CP 8. This error can only be remedied by reversal and remand.

F. *RCW 19.86.120* Does Not Bar Ms. Conner's CPA Claims.

Respondents argue that *RCW 19.86.120* bars Ms. Conner's CPA claims because more than four years elapsed from execution of the Note and the filing of this action. This argument is specious.

RCW 19.86.120 provides as follows:

> Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action **accrues**: PROVIDED, That whenever

> any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof. (Emphasis added)

A claim under the CPA accrues when the plaintiff discovers or should have discovered facts that establish all of the essential elements of the claim. See *Allen v. State*, 118 Wn.2d 755, 826 P.2d 200 (1992); *Mayer v. Sto Industries, Inc.,* 123 Wn.App. 443, 463, 98 P.3d 116 (2004), *affirmed in part and reversed in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006).

Here, the earliest point in time Ms. Conner could be charged with awareness of a problem with her loan and Respondents' potential misconduct is when she received Regional Trustee's Notice of Default or **September 18, 2009,** that failed to account for the two payments she made on August 31, 2009. CP 841 and CP 1088-1091. Prior to that, Ms. Conner had no reason to believe there was any problem with her loan. Ms. Conner's Complaint was filed on **May 14, 2012,** approximately **three years and eight months** after she discovered facts that could arguably establish the essential elements of her claims. CP 1192.

Moreover, the mere fact that MERS is identified as the "beneficiary" in a deed of trust does not, by itself, give rise to a *per se* violation of the CPA. *Bain,* at pg. 117. It's not until MERS takes some action that the conduct may

become actionable or if MERS is used for some other deceptive purpose. *Bain*. Here, on **October 20, 2009,** unbeknownst to Ms. Conner, MERS took action for the first time by executing its Assignment of Deed of Trust and Appointment of Successor Trustee. CP 1115-1120. But for the Assignment and Appointment, Everhome Mortgage and Regional Trustee would not have had any colorable right to initiate non-judicial foreclosure proceedings against Ms. Conner. The Assignment of Deed of Trust and Appointment of Successor Trustee were recorded in the public record approximately **three years and seven months** prior to the filing of the initial Complaint herein, which is well within the four year bar date established in *RCW 19.86.120.*

For the reasons set forth above, Respondents' assertion that Ms. Conner's CPA claims are time barred pursuant to *RCW 19.86.120* is specious and without merit.

III. CONCLUSION.

The trial court's summary judgment was entered despite the existence of disputes regarding issues of fact. The trial court ignored the incompetency of Respondents' witnesses, who clearly had no personal and testimonial knowledge of the matters they were testifying to, in violation of *RCW 5.45.020* and *CR 56(e),* and contained inadmissible evidence which could have been challenged through discovery, had it been allowed under *CR 56(f).* The trial court ignored Ms. Conner's DTA and CPA claims, erroneously believing they had not been plead (CP 8) and excused Respondents from their

responsibility to clearly establish their factual and legal entitlement to summary judgment and to foreclose Ms. Conner's home. Reversal is the remedy.

Finally, Ms. Conner should be awarded taxable costs and attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject Deed of Trust. CP 161.

REPECTFULLY SUBMITTED this 8th day of June, 2016.

KOVAC & JONES, PLLC

/S/ Richard Llewelyn Jones
Richard Llewelyn Jones
WSBA No. 12904
1750 – 112th Ave., N.E.
Suite D-151
Bellevue, WA 98004
425.462.7322
rlj@kovacandjones.com

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on June 8, 2016, I caused to be served a true and correct copy of the foregoing Reply Brief on the following party(ies) and in the manner(s) indicated:

Wesley Werich, WSBA No. 38428	_____	Facsimile
ROBINSON TAIT PS	_____	Messenger
710 Second Avenue, Suite 710	_____	U.S. 1st Class Mail
Seattle, Washington 98104	_____	Overnight Courier
Telephone No. 206.876.3286	X	Electronically
E-mail: wwerich@robinsontait.com	_____	CM/ECF

SIGNED this 8th day of June, 2016, at Bellevue, Washington.

/S/ Dan L. Williams
Dan L. Williams Paralegal