74264-7

FILED
March 11, 2016
Court of Appeals
Division I
State of Washington

Case No. 74264-7-I

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

ROBERT AND DORIS CUMMINGS

Appellants,

v.

NORTHWEST TRUSTEE SERVICES, INC. (erroneously named as NORTHWEST TRUSTEE SERVICES OF WASHINGTON); MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; AND DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED SECURITIES SERIES 2006-FF8

Respondents.

# BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

Submitted By:
Joshua S. Schaer, WSBA No. 31491
RCO LEGAL, P.S.
13555 S.E. 36th St., Ste. 300
Bellevue, WA 98006
(425) 457-7810

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Case Law**

**Statutes and Codes**

**Court Rules**



**Secondary Sources**

*Appellate Records*



*Treatises*



*Websites*

## I. STATEMENT OF THE CASE

### A. Factual History.

On or about April 12, 2006, in consideration for a mortgage loan, Appellants Robert and Doris Cummings executed a promissory note (the "Note") in the amount of $240,000, payable to First Franklin a division of National City Bank of Indiana. CP 287-290; *see also* CP 406 (Am. Compl., ¶ 3.1). In the Note, Appellants agreed that if they did "not pay the full amount of each monthly payment on the date it is due," they would be in default. CP 289, ¶ 7(B).

Appellants also executed a Deed of Trust securing the Note. CP 292-311; *see also* CP 406 (Am. Compl., ¶ 3.1). The recorded Deed of Trust encumbered a piece of real property commonly known as 21603 54th Ave. W., Mountlake Terrace, WA 98043 (the "Property"). CP 294.

Appellants agreed that the Note and Deed of Trust could be sold one or more times without prior notice to them. CP 303, ¶ 20. They also agreed that the lender could appoint a successor trustee, who would acquire all "title, power and duties" of the original trustee. CP 305, ¶ 24.

On or about October 6, 2011, an Assignment of Deed of Trust in favor of Deutsche Bank National Trustee Company, as Trustee, in trust for the registered Certificateholders of First Franklin Mortgage Loan Trust

2006-FF8, Asset-Backed Certificates, Series 2006-FF8 (the "Loan Trust") was recorded with the Snohomish County Auditor. CP 313-314; *see also* CP 407 (Am. Compl., ¶ 3.9).

On or about August 27, 2014, a beneficiary declaration was executed, stating that the Loan Trust was the actual holder of the Note, and the Note had not been "assigned or transferred to any other person or entity." CP 316; *cf.* CP 411 (Am. Compl., ¶ 3.28, asserting the Loan Trust has no right to foreclose); CP 417, ¶ 4.8 (same); CP 420, ¶ 4.26 (asserting a violation of the beneficiary declaration statute).

On or about September 5, 2014, another beneficiary declaration was executed, *again* stating that the Loan Trust was the actual holder of the Note. CP 318.

On September 16, 2014, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded with the Snohomish County Auditor. CP 320; *cf.* CP 413 (Am. Compl., ¶ 3.39, asserting NWTS was not properly appointed as trustee).

On or about September 24, 2014, as a result of Appellants' November 2010 default on payments due under the secured Note, they were sent a Notice of Default. CP 322-324; *see also* CP 414 (Am.

Compl., ¶ 3.43).

On November 5, 2014, a Notice of Trustee's Sale was recorded with the Snohomish County Auditor, setting a sale date of March 13, 2015 for the Property. CP 326-330; *see also* CP 414 (Am. Compl., ¶ 3.44).

Appellants failed to seek a restraining order to prevent the sale from occurring, and on March 13, 2015, the Property was sold at auction. CP 332-333; *see also* CP 415 (Am. Compl., ¶ 3.52).

B. Procedural History.

On March 20, 2015, Appellants filed their Amended Complaint which became the operative pleading in the action. CP 403-423. Appellants readily admitted that the foreclosure was proper, but they disputed who should have conducted the process. CP 417 (Am. Compl., ¶ 4.8).

On April 1, 2015, NWTS moved to dismiss all claims in the Amended Complaint pursuant to CR 12(b)(6). CP 269-333. Appellants did not submit a written response to this motion.[1]

On April 16, 2015, after hearing oral argument, the Hon. Marybeth Dingledy of the Snohomish County Superior Court granted NWTS'

[1] This Court should be aware no response brief can be found in the appellate record because none was filed.

Motion to Dismiss. CP 267-268. On June 4, 2015, Judge Dingledy also denied Appellants' reconsideration request. CP 145-146.

Appellants immediately attempted to seek review from this Court, but there was no final judgment below, and the case was consequently remanded for further proceedings. Case No. 73707-4-I, Notation Ruling (Sept. 9, 2015).

On October 27, 2015, the Hon. Millie Judge of the Snohomish County Superior Court granted summary judgment to Mortgage Electronic Registration Systems, Inc. ("MERS") and the Loan Trust. CP 6-8.

On November 12, 2015, the instant appeal was filed. CP 1-5.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in granting NWTS' Motion to Dismiss, especially after Appellants failed to offer a written response thereto.[2]

//

//

[2] The Assignments of Error numbered 2-4 are improvidently asserted, and subsumed within the first Assignment of Error, as the trial court made no findings with respect to specific arguments of Appellants. Rather, the trial court dismissed the Amended Complaint as a whole for its failure to state a claim upon which relief could be granted. The fifth Assignment of Error, concerning attorneys' fees, does not apply to NWTS.

## III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR[3]

1. NWTS did not contend the waiver doctrine applied to this case because RCW 61.24.127(1) allows post-sale Consumer Protection Act ("CPA") and material Deed of Trust Act ("DTA") claims for damages. However, Appellants' contentions surrounding the Deed of Trust, Loan Trust "closing date," and Pooling and Servicing Agreement were all time-barred under RCW 19.86.120.

2. RCW 62A.9A-203 does not determine who is entitled to non-judicially foreclose on a Deed of Trust; pursuant to the DTA, the right to foreclose is strictly vested with the noteholder.

3. Again, NWTS did not contend the waiver doctrine applied to bar Appellants' causes of action in relation to seeking damages.

4. Appellants' CPA claim failed as a matter of law and was properly dismissed.

5. Appellants lack standing to challenge the propriety of either documents they were not parties to, or documents they assented to at the loan's origination.

---

[3] Appellants' stated issues do not match the Assignments of Error.

## III. RESPONSE ARGUMENT

### A. Standard of Review.

NWTS maintains that R.A.P. 2.5(a) should preclude the consideration of issues now raised in Appellants' Opening Brief due to their failure to submit a written response to NWTS' Motion to Dismiss. But if the Court is inclined to address the merits, an order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 899, 249 P.3d 625 (2010), *citing Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). However, this Court may affirm on any supported ground, even without analyzing specific assignments of error. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 214, 304 P.3d 914 (2013).

CR 12(b)(6) dismissal is proper where claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005); *see also Zabka v. Bank of Am.*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005). The inquiry should focus on whether the plaintiff's claim is legally sufficient, which is answered by looking to the face of the pleadings. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008).

But in addition to the pleadings, "[d]ocuments whose contents are

alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion…." *Rodriguez v. Loudeye Corp.* at 726. Submission of extraneous material by either party, such as an affidavit, normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn. App. 236, 797 P.2d 521 (1990).

However, "if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, motion remains one under CR 12(b)(6)." *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987). Additionally, under ER 201(b), a court may take judicial notice of public documents if their authenticity cannot be disputed without converting a motion to dismiss into a motion for summary judgment. *Rodriguez, supra.* at 725.

Here, Appellants were not entitled to relief against NWTS on the CPA and DTA causes of action as pled. As such, the trial court's ruling should be upheld based on the arguments set forth below.

B. Analysis of CPA Claim.

A CPA violation 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 Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal to the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

1. NWTS Did Not Engage in an Unfair or Deceptive Act.

Concerning the first prong, the CPA requires 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*.

*Klem v. Wash. Mut. Bank* states that "[t]he Washington legislature instructed courts to be guided by federal law in the area" of CPA liability. 176 Wn.2d 771, 205 P.3d 1179 (2013). Federal law defines an act or practice as "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." 15 U.S.C. § 45(n). An act or practice is "deceptive" when it is material, likely to mislead a consumer, and the consumer's interpretation is reasonable. *Id.*

"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); *see also Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009) (to establish an unfair or deceptive act under the first prong test, there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated act being repeated).

In their Amended Complaint, Appellants alleged that NWTS committed several unfair or deceptive acts, *i.e.*: 1) because MERS assigned its interests to the Loan Trust, 2) because the Note and Deed of Trust should have been placed in the Loan Trust within a certain time and these instruments were not "lawfully assigned to the trust," and 3) because NWTS acted as the successor trustee. CP 416 (Am. Compl., ¶ 4.2).[4] NWTS prevailed on all these issues in the absence of responsive briefing from Appellants.

---

[4] Appellants also assign error to an issue not found in their Amended Complaint, namely the erroneous notion that NWTS was "required to issue a new notice of default prior to commencing the foreclosure proceeding that is the subject of this litigation." Brief of Appellants at 1. Appellants seem to be referencing an argument presented in the pending appellate matter of *Worm v. Bank of New York Mellon et al.*, Case No. 47779-3-II, which raises many of the same issues as this case based on strikingly similar briefing from a supposedly *pro se* party.

a. NWTS Could Not be Held Liable in Connection With the Assignment.

i. NWTS Had No Role in the Assignment.

First, NWTS was not a party to the Assignment of Deed of Trust and did not participate in its creation. *Cf.* Brief of Appellants at 18.

In fact, the Assignment was recorded *three years before* NWTS' appointment as trustee and subsequent involvement in the foreclosure process. *Compare* CP 313-314, CP 320. There is no authority holding that the first element of a CPA claim can be satisfied against a non-judicial foreclosure trustee just because of MERS's earlier involvement in either the Deed of Trust or Assignment. *Accord Lynott v. MERS,* 2012 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("*Bain* [*v. Metro. Mortg. Co.*] did not… create a per se cause-of-action based solely on MERS's involvement."), *Zalac v. CTX Mortg. Corp.,* 2013 WL 1990728 (W.D. Wash. May 13, 2013), *aff'd* 2016 WL 146006 (9th Cir. Jan. 7, 2016); *Florez v. OneWest Bank,* 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) (authority to foreclose based on holding note was independent of MERS); *Bhatti v. Guild Mortg. Co.,* 550 Fed. Appx. 514 (9th Cir. Dec. 24, 2013).

The Assignment's existence in the public record long before foreclosure commenced did not amount to unfair or deceptive act by

NWTS, and Appellants could not establish the trustee's responsibility for a CPA violation as a result.

ii. Appellants Also Lacked Standing to Attack the Assignment.

Second, even if NWTS was somehow connected to the Assignment, persuasive case law is in accord that Appellants lacked standing to challenge that document. CP 313-314; *see also, e.g., Brodie v. NWTS*, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (a borrower cannot attack assignments as non-party to them); *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, **4-5 (W.D. Wash. Sept. 5, 2014) (same); *Borowski v. BNC Mortg., Inc.*, 2013 WL 4522253, *5 (W.D. Wash. Aug. 27, 2013) (a borrower must possess a genuine claim of being at risk to pay the same debt twice if the assignment stands).[5]

Indeed, courts in other jurisdictions routinely find that borrowers cannot attack the validity of assignments because they were not parties to those transactions. *See, e.g., Christie v. Bank of New York Mellon, N.A.*, 617 Fed. Appx. 680, 682 (9th Cir. 2015) ("Christie does not have standing

[5] In Washington, a borrower is never at risk of paying twice based on an assignment because the "recording of an assignment of a mortgage is not in itself notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage." RCW 65.08.120.

under California law to challenge irregularities in the assignment of her Note or Deed of Trust because those instruments are negotiable and her obligations thereunder remain unchanged even if her creditor changes."); *Gale v. First Franklin Loan Servs.*, 599 Fed. Appx. 286, 287 (9th Cir. 2015) (borrower lacked standing to challenge an assignment during Nevada foreclosure); *Campbell v. California Reconveyance Co.*, 2012 WL 5299099, at *2 (D. Ariz. Oct. 25, 2012) (same under Arizona law).

Further, Appellants agreed at the loan's origination that the Note and Deed of Trust could be sold one or more times *without prior notice* to them. CP 303, ¶ 20. Thus, even if the Assignment constituted a "transfer" as Appellants claim[6], the agreed loan terms prevent them from undermining its validity by claiming the assignment's recordation was unfair or deceptive. *Cf.* Brief of Appellants at 24-25 (arguing the illegality of an unknown "three MERS assignments").

This Court should find that Appellants lacked standing to prosecute a CPA violation based on the recording of a Deed of Trust Assignment which identified the Loan Trust as the assignee.

---

[6] Contrary to Appellants' position, the Deed of Trust follows the Note with *or without* a formally-recorded document confirming the assignment of the security instrument's beneficial interest. *See* Sect. B(1)(a)(iii), *infra*. (citing cases).

iii. Even if Appellants Could Attack the Assignment, That Document Does Not Convey the Right to Foreclose.

Third, an Assignment of Deed of Trust does not grant its assignee the ability to initiate foreclosure in Washington. *See, e.g., St. John v. NWTS*, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011). Rather, such right is strictly vested with the note holder because our law recognizes the general principle that a security instrument (Deed of Trust) follows the debt (Note) with or without formal assignment. *See, e.g., Deutsche Bank Nat. Trust Co. v. Slotke*, -- Wn. App. --, 2016 WL 107783, *5 (Jan. 11, 2016) ("Washington courts have long recognized that the security instrument follows the note that it secures."). Appellants are simply incorrect that this clearly-understood principle is nothing more than a "misconception." Brief of Appellants at 12.[7]

Although Appellants believe that the State Supreme Court "failed to recognize" an "analysis Plaintiffs' counsel originated more than 2 years

[7] Appellants misapprehend the nature of a deed of trust assignment. Although an assignment is not necessary for a note holder to foreclose, most participants in a trustee's sale want title insurance, which can only be obtained if a foreclosing entity can show it holds all interests in the lien. *Accord Espeland v. OneWest Bank, FSB*, 323 P.3d 2, 11-12 (Alaska 2014) (title insurer required MERS assignment as a condition of insuring sale); Nelson & Whitman, 1 Real Estate Finance Law § 5.28 (5th ed. 2010) ("possession of the note leaves no permanent record that future title examiners can rely upon. Hence, there is often a felt need for a recorded document [to act as] an assignment of the mortgage.").

before… *Brown* [*v. Wash. State Dep't of Commerce*], Appellants cannot change the fact that *Brown* is controlling authority finding a note's holder – and not the owner – is entitled to enforce it through non-judicial foreclosure of property securing repayment of the note as collateral. *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 543, 359 P.3d 771 (2015); *accord 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006), *as corrected* (Nov. 15, 2006) (Supreme Court rulings must be followed). Under the DTA, "[o]wnership of the note is not dispositive." *Trujillo v. NWTS*, 181 Wn. App. 484, 498, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014), *rev'd on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

Further, Washington law provides that a creditor *may* record an assignment reflecting a transfer of beneficial interest, even though it is not necessary to proceed non-judicially under the DTA. *See, e.g.*, RCW 62A.9A-607(b).[8] Appellants' arguments suggest that taking advantage of a statutory right is a CPA violation, which cannot be correct. *See Dwyer v.*

[8] A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) recording a Notice of Trustee's Sale (RCW 61.24.040), and 4) delivery and recording a Trustee's Deed to the purchaser at sale (RCW 61.24.050). Noticeably absent is any requirement to execute or record an Assignment of Deed of Trust.

*J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000) (the "CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest.").

The Assignment in question properly transferred MERS's agency interest found in the Deed of Trust, which has been recognized as assignable, and neither unfair nor deceptive. *See, e.g.*, *Jackson v. Qual. Loan Serv. Corp.*, 186 Wn. App. 838, 842, 347 P.3d 487 (2015) ("MERS, acting as the nominee… terminated its agency interest when it assigned its nominee interest in the deed of trust back to its principal…."); *Andrews v. Countrywide Bank, N.A.*, 2015 WL 1487093 (W.D. Wash. Apr. 1, 2015); *Estribor v. Mtn. States Mortg.*, 2013 WL 6499535 (W.D. Wash. Dec. 11, 2013); *see also* CP 293 ("MERS… is acting solely as a nominee for Lender and Lender's successors and assigns.").

In sum, the trial court acted properly to reject Appellants' theory of CPA liability predicated on the Assignment.

b. <u>The CPA Claim was Time-Barred as to Allegations Pertaining to the Loan Trust "Closing Date" or Whether the Loan Was a "Qualified Mortgage."</u>

CPA claims have a four-year statute of limitations. RCW

19.86.120; *see also Lapinski v. Bank of Am., N.A.*, 2014 WL 347274, *6 (W.D. Wash. Jan. 30, 2014). "A statute-of-limitations defense may be raised in motion to dismiss if 'it is apparent from the face of the complaint' that the limitations period has expired." *Stephenson v. First Am. Title Ins. Co.*, 2014 WL 2894692, *2 (W.D. Wash. Jun. 25, 2014), *quoting Seven Arts Filmed Entertainment Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013).

Traditionally, a cause of action accrues when the alleged harm occurs, regardless of whether the injured party knows he or she has the right to seek relief in the courts. *See Unisys Corp. v. Senn*, 99 Wn. App. 391, 398, 994 P.2d 244 (2000); *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455 (1996) (cause accrues when a party can apply to the court for relief); *see also, e.g., Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (rejecting CPA liability for "any alleged unfair or deceptive practice" occurring more than four years prior to suit); *Pruss v. Bank of Am. NA*, 2013 WL 5913431, *5 (W.D. Wash. Nov. 1, 2013) (same).

In *Shepard v. Holmes*, Division Three recently cited an older State Supreme Court decision concerning a situation where facts constituting the plaintiff's claim were easily ascertainable and therefore resulted in a

statute of limitations bar:

> [t]he public record serves as 'constructive notice to all the world of its contents'…. '[T]he defrauded party cannot be heard to say that he has not discovered the facts showing the fraud within the limit of the statute if the facts should have been discovered prior to that time by anyone exercising a reasonable amount of diligence.'

185 Wn. App. 730, 345 P.3d 786 (2014), *quoting Davis v. Rogers,* 128 Wash. 231, 236, 222 P. 499 (1924).

Here, information relating to the Loan Trust was easily ascertainable to Appellants, as trust documents have long been publicly available from the Securities and Exchange Commission. *See* http://www.sec.gov/edgar/searchedgar/companysearch.html (EDGAR search).[9] Appellants are time-barred from raising a CPA claim against NWTS with respect to the June 2006 "closing date" of the Loan Trust. *Cf.* Brief of Appellants at 22-23.

Moreover, like the Assignment, NWTS could not have committed unfair or deceptive acts Appellants that ascribe strictly to the Loan Trust based on its "closing date" or the U.S. Code definition of a "qualified mortgage" when NWTS did not participate in the foreclosure process until

---

[9] *See also* http://en.wikipedia.org/wiki/EDGAR ("Companies were phased in to EDGAR filing over a three-year period, ending 6 May 1996. As of that date, all public domestic companies were required to submit their filings via EDGAR, except for hardcopy paper filings, which were allowed under a hardship exemption.").

many years later. *Id.*[10]

As such, the trial court soundly disallowed Appellants' time-barred theories.

c. NWTS Was Lawfully Appointed.

Appellants next argue that NWTS did not have legal authority to act upon its appointment as the successor trustee of the Deed of Trust, and this amounted to an unfair and deceptive act. Brief of Appellants at 20-21.

i. Appellants Lacked Standing to Challenge the Appointment of Successor Trustee.

First, just as with the Assignment addressed above, Appellants' Amended Complaint could not legitimately assert a defect with the Appointment of Successor Trustee. CP 416 (Am. Compl., ¶ 4.2); *but see* CP 305, ¶ 26 (Appellants permitted a potential trustee substitution at origination).

[10] Appellants' arguments that the loan was not a "qualified mortgage" are impertinent to the claims presented. Brief of Appellants at 22-23, *citing* 26 U.S.C. § 860G(a)(3)(A)(i, ii). The stated section pertains to the *taxation* of real estate mortgage investment conduits, or REMICs. *Id.*; *see also* 26 U.S.C. § 860A(a) ("Except as otherwise provided in this part, a REMIC shall not be subject to taxation under this subtitle."). Whether the subject loan is considered a "qualified mortgage" according to 26 U.S.C. § 860G for tax purposes is immaterial to the Loan Trust's status as beneficiary under Washington law or the propriety of foreclosure on the Property after Appellants' default.

The United States District Court for the Eastern District of Washington has found that a borrower:

> [d]oes not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party beneficiary of this agreement, he could not have been injured by the alleged fraud.

*Brophy v. JPMorgan Chase Bank*, 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), *citing Javaheri v. JPMorgan Chase Bank*, 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012)[11]; *see also Brophy v. JPMorgan Chase Bank*, 2015 WL 1439346, *5 (E.D. Wash. Mar. 27, 2015) ("Whatever claim Plaintiffs have regarding the alleged fraudulent execution of the appointment of successor trustee can only be pursued against Defendant JPMorgan Chase, not Defendant NWTS. The DTA does not impose a duty upon Defendant NWTS to verify the validity of an appointment."); *Brodie v. NWTS*, 2012 WL 6192723, *3 (E.D. Wash. Dec. 12, 2012), *aff'd*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) (dismissing challenge to trustee's appointment; "[a]t bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff's obligation to make her…

[11] *See Javaheri* at *6 ("The only injury [plaintiff] alleges is the pending foreclosure on his home, which is the result of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so [plaintiff] suffered no injury as a result of this substitution.").

payments."). The Western District of Washington also adopted similar reasoning in *Cagle v. Abacus Mortg., Inc.*, *supra*. at *5, and NWTS urges this Court to hold likewise.

ii. An Attorney-in-Fact Was Permitted to Execute the Appointment for the Beneficiary Loan Trust.

Second, even if Appellants could assail the Appointment of Successor Trustee, the use of an attorney-in-fact to execute documents is well-established under Washington law and particularly in the DTA context. *See*, *e.g.*, *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994) (a power of attorney confers on the agent authority to act in the place of its principal).

The DTA and Uniform Commercial Code both contemplate that the actions of a beneficiary can be performed by agents such as attorneys-in-fact. *See Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 69, 358 P.3d 1204 (2015) (Chase executed both the Appointment and beneficiary declaration as attorney-in-fact for U.S. Bank; in addressing a CPA claim, this Court found "U.S. Bank, through its agent, Chase, was the holder of the note, which GreenPoint had endorsed in blank. Therefore,

U.S. Bank had the authority to appoint NWTS as successor trustee.");[12] *see also Bain v. Metro. Mortg. Group, Inc.*, 2010 WL 891585 (W.D. Wash. Mar. 11, 2010) ("[t]here is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions."); *Knecht v. Fid. Nat. Title Ins. Co.*, 2013 WL 7326111 (W.D. Wash. Mar. 11, 2013) (beneficiary declaration signed by attorney-in-fact was proper); *US Bank v. Woods*, 2012 WL 2031122 (W.D. Wash. Jun. 6, 2012) (same).

Appellants are incorrect that the DTA authorizes only a beneficiary "and no one else" to appoint a successor trustee because an attorney-in-fact *actually takes the beneficiary's place* for purposes of executing foreclosure-related documentation. *Cf.* Brief of Appellants at 3, n. 2. Here, Appellants' position that Select Portfolio Servicing was not the "agent of a lawful beneficiary" is a legal conclusion that deserved no deference under CR 12(b)(6). *See Rodriguez*, 144 Wn. App. at 717-18 (a court is "not required to accept a complaint's legal conclusions as true.").

Consequently, the Loan Trust's appointment of NWTS – which occurred shortly after both beneficiary declarations averred to the Loan

---

[12] *See* Case No. 72051-1-I at CP 255, 257-59 (documents in record).

Trust's capacity as Note holder – could not be deemed an unfair or deceptive act by NWTS.[13]

iii. Appellants Also Failed to Plead Prejudice Resulting From the Appointment.

Third, Washington law mandates a showing of prejudice must be made before a court will entertain DTA process-based challenges. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (a borrower who cannot cure default is economically indifferent to procedural defects in the foreclosure process and suffers no prejudice); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005), *citing Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *see also Meyer v. U.S. Bank*, 2015 WL 3609238, *5 (W.D. Wash. Jun. 9, 2015) ("[t]echincal violations of the DTA do not constitute unfair or deceptive acts or practices actionable under the CPA absent a showing of materiality or prejudice.").

Thus, while DTA is a strictly construed statute, it is not a strict-liability statute. Prejudice must be shown to demonstrate liability

[13] It must be noted that NWTS did not make itself the trustee, so NWTS did not "act" with respect to being appointed. *See* RCW 61.24.010(2) ("The trustee may resign at its own election *or* be replaced by the beneficiary.") (Emphasis added).

predicated on a DTA violation.

Appellants' Amended Complaint does not articulate that they suffered prejudice from the Appointment. *See Bavand v. OneWest Bank, FSB*, 2014 WL 5317145 (9th Cir. Oct. 20, 2014) ("any technical, non-prejudicial issues should not bar foreclosure proceedings."); *Meyer v. U.S. Bank*, 530 B.R. 767 (W.D. Wash. Apr. 10, 2015), *reconsid. denied* (Jun. 9, 2015) (no prejudice shown). As a result, Appellants were unable to sufficiently plead unfair or deceptive acts due to material defects in the Appointment pursuant to the DTA, and the trial court did not err by resolving Appellants' CPA claim in NWTS' favor.

2. Appellants' Allegation of a Public Interest Impact Was Devoid of Factual Matter Concerning NWTS.

Concerning the second prong of a CPA claim, Appellants' Amended Complaint also failed as a matter of law on the question of impacting the general public.

It is "the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 790 (emphasis added); *see also Tran v. Bank of Am.*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013) ("[t]he public interest in a private

dispute is not inherent."); *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) ("[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."); *Segal Co., Inc. v. Amazon.com*, 280 F.Supp.2d 1229 (W.D. Wash. 2003) (dismissing 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).

Appellants pled, in boilerplate fashion, that the "practice of allowing MERS to assign the Note and deed of trustee [*sic*] not only has the *capacity* to injure the public interests, it is currently injuring the public interest." CP 416 (Am. Compl., ¶ 4.5) (emphasis in original). But Appellants did not allege, in even the barest sense, how NWTS was involved in the 2011 Assignment – which it clearly was not – or how NWTS' role in this particular foreclosure resulted in actions likely injurious to the broader public.

To the contrary, each of the alleged acts claimed as to NWTS exclusively relate to conduct directed at Appellants *personally*, *i.e.*, whether certain DTA procedures were followed. This purported conduct did not, and could not, have the capacity to deceive other individuals, let

alone a substantial portion of the public. *Accord Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816, 239 P.3d 602 (2010), *citing Burns v. McClinton*, 135 Wn. App. 285, 290-91, 143 P.3d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public."); *see also Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 855, 138 P.3d 638 (2006).

By not including facts to support the public interest prong under *Hangman Ridge*, Appellants' Amended Complaint failed to plead a requisite element of the CPA against NWTS.

3. NWTS Did Not Cause Injury to Appellants.

CPA liability also requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge, supra* at 793; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007) (a plaintiff must prove that the "injury complained of… would not have happened" if not for the defendant's acts). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not established. *Panag*, *supra*. at 64.

An award under the CPA is strictly limited to damage "in…

business or property…." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009); *cf.* Amended Brief of Appellant at 26 (alleging other sorts of injuries). 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*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of… [prosecuting] a CPA claim is not sufficient to show injury to business or property."); *see also Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (tort recovery is barred where damages are purely economic losses based on a contract).

In *Bain v. Metro. Mortg. Group, Inc.*, the State Supreme Court cited to *Bradford v. HSBC Mortg. Corp*., 799 F.Supp.2d 625 (E.D. Va. 2011), for an example of an injury in the foreclosure context. 175 Wn.2d 83, 119, 285 P.3d 34 (2012). In *Bradford*, three different companies

attempted to foreclose on property after the borrower attempted to rescind a mortgage under the Truth in Lending Act. *Id.* All three companies claimed to hold the note. *Id.* Nothing like the harm in *Bradford* was alleged in Appellants' Amended Complaint.

As the Ninth Circuit Court of Appeals 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.*, 550 Fed. Appx. 514, 515 (9th Cir. Dec. 24, 2013).

In the same way, none of Appellants' vague injuries were proximately caused by NWTS. *See, e.g., Mickelson v. Chase Home Fin. LLC*, 579 F. App'x 598 (9th Cir. Jun. 18, 2014); *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013), *citing Babrauskas v. Paramount Equity Mortg. et al.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n, supra.* at *4 ("[i]t was the failure to meet their debt obligations that

led to a default, the destruction of credit, and the foreclosure.").[14]

Nowhere in their Amended Complaint did Appellants describe how the issuance of foreclosure notices – generated as a result of their default on the loan – caused injury to them. Likewise, Appellants did not suggest that foreclosure suddenly commenced for no valid reason whatsoever, or that they were at risk of making loan payments to multiple parties. Instead, Appellants merely recited that they "have suffered injury due to the distractions and loss of time to pursue business and personal activities necessitated by the need to address [Defendants' conduct]…." CP 141 (Compl., ¶ 4.7).[15]

---

[14] Numerous courts elsewhere have also recognized that a borrower's default, resulting in foreclosure, cannot cause claimed injuries. *See, e.g., Junod v. MERS, Inc.*, 584 F. App'x 465, 469 (9th Cir. 2014) ("The flaw in this claim is that while the loss of a home to foreclosure is most likely an injury in fact, causation has not been demonstrated. The Junods' default triggered the foreclosure of their home."); *Contreras v. JPMorgan Chase*, 2014 WL 4247732, *10 (C.D. Cal. Aug. 28, 2014) ("Contreras's default caused the foreclosure, and because his default occurred prior to the allegedly unlawful acts leading to the foreclosure, those acts could not be the cause of his economic loss."); *Bergman v. Bank of Am.*, 2013 WL 5863057, *21 (N.D. Cal. Oct. 23, 2013) *(*"Plaintiffs must make allegations that prejudice was caused by defects in the foreclosure process, rather than their own default."); *Yost v. Nationstar Mortgage, LLC*, 2013 WL 4828590, *12 (E.D. Cal. Sept. 9, 2013) ("Defendants have the right to foreclose on the property. It was Plaintiffs' default that caused the foreclosure and Plaintiffs' injury….").

[15] This language is *identical* to the averment of Appellant Worm in the aforementioned appeal pending before Division Two. Case No. 47779-3-II at CP 141 (Compl., ¶ 4.7). It is also substantially similar to the wording found in Mr. Barkley's Complaint in *Barkley v. GreenPoint Mortg. Funding, Inc.* Case No. 72051-1-I at CP 15-16. This Court should recognize that such phraseology is nothing more than a common mantra among debtors and their counsel that seeks to recite the causation and injury elements in conclusory fashion.

Just as with the aforementioned criteria for a CPA violation, this statement alone failed to satisfy the causation and injury prongs of the applicable *Hangman Ridge* test, and the trial court was within its discretion to dismiss the cause of action.

C. Analysis of DTA Claim.

As it pertains to NWTS, Appellants' DTA claim alleged that NWTS breached RCW 61.24.030(7) and therefore "was not authorized… to record the notice of trustee's sale…." CP 420 (Am Compl., ¶ 4.26). On appeal, Appellants argue that they have "provided proof that Defendants have violated RCW 61.24.030(7) in numerous ways…." Brief of Appellants at 15-16. Appellants, however, are mistaken.

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). The State Supreme Court has confirmed this statute is ambiguous "where the owner and the holder of the note are different entities." *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d at 543.

The statute itself suggests that one possible means of accomplishing the "proof" requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other

obligation." RCW 61.24.030(7)(a); *see also Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013).[16]

The State Supreme Court recently held that this unequivocal declaration as to the note holder's status equates to "sufficient proof" under RCW 61.24.030(7)(a) for a trustee to rely upon. *See Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d at 525; *see also* RCW 61.24.030(7)(b); *cf. Lyons v. U.S. Bank, N.A. et al.*, 181 Wn.2d 775, 336 P.3d 1142 (2014) (additional language in declaration rendered it unhelpful).[17] In the wake of *Brown*, courts have applied its holding to reject borrowers' claims like the one pled below. *See, e.g.*, *Leonard v. Recontrust Co., N.A.*, 2016 WL 304802, *6 (W.D. Wash. Jan. 26, 2016) ("To the extent that they assert that the Washington State Supreme Court's decision in *Brown* was 'wrongly decided' and that if properly decided Defendants would not have complied with the statute, their argument is without merit.").

In its Motion to Dismiss, NWTS demonstrated that it possessed

---

[16] Washington law does not mandate recording such declaration or providing a copy to the borrower. *See, e.g., Douglass v. Bank of Am. Corp.*, 2013 WL 2245092 (E.D. Wash. May 21, 2013).

[17] It would be illogical for the trustee's reliance on a declaration required by the DTA to create the very lack of good faith that would prohibit reliance on the same declaration. *See Arnett v. MERS*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (observing the circular reasoning inherent in such an argument).

*two of* the same substantive declarations approved in *Brown*. CP 316, 318. The first declaration was even *more* specific and stated that the Note had "not been assigned or transferred to any other person or entity." CP 316. Given this sufficient proof shown in the factual record of this case - within the scope of allegations in the Amended Complaint – the DTA did not require NWTS to receive some other form of documentation prior to recording the Notice of Trustee's Sale and proceeding accordingly.

The trial court correctly decided to dismiss Appellants' DTA claim as related to NWTS.

## IV. CONCLUSION

This Court continues to face a plethora of appeals derived from the dismissal of stock allegations demanding liability against trustees for the issuance of mandatory notices, and this stream of challenges will persist unless these oft-repeated and unsupported arguments are repudiated.

Here, NWTS did not participate in the Assignment of Deed of Trust, which by itself is immaterial to the authority to foreclose non-judicially in this state. NWTS also did not self-appoint to obtain the capacity of successor trustee. Rather, Appellants agreed that all these actions could occur upon the commencement of foreclosure when they received the benefit of a mortgage loan. Additionally, NWTS came to

possess two unambiguous declarations of the Loan Trust's note holder status before both the Appointment and Notice of Trustee's Sale were recorded.

The factual record in this case compels the conclusion that NWTS' actions were authorized and proper, and Appellants' did not bother to file a response brief arguing otherwise. Appellants' legal theories cannot now be utilized as a means of escaping CR 12(b)(6) dismissal.

For these reasons, the trial court's decision to dismiss NWTS from the action should be affirmed.

DATED this 10th day of March, 2016.

**RCO LEGAL, P.S.**

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

**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. On March 11, 2016 I caused a copy of the **Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

| | |
|---|---|
| James A. Wexler<br>Attorney at Law<br>2025 201st Ave. SE<br>Sammamish, WA 98075<br><br>Attorneys for Appellants | [**X** ] US Mail, Postage Prepaid<br>[ ] Hand Delivery<br>[ ] Overnight Mail<br>[ ] Facsimile |
| John E. Glowney<br>Vanessa S. Power<br>Stoel Rives, LLP<br>600 University St., Suite 3600<br>Seattle, WA 98101<br><br>Attorneys for Respondents Deutsche Bank National Trust Company as Trustee for the First Franklin Mortgage Loan Trust, Asset-Backed Certificates, Series 2006-FF8; and Mortgage Electronic Registration Systems, Inc. | [**X**] US Mail, Postage Prepaid<br>[ ] Hand Delivery<br>[ ] Overnight Mail<br>[ ] Facsimile |

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

Signed this 11th day of March, 2016.

Kristine Stephan, Paralegal