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Case No. 65975-8

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

DOUG WALKER, an individual,

Plaintiff-Appellant,

vs.

**QUALITY LOAN SERVICE CORP. OF WASHINGTON, a
Washington Corporation, et al.,**

Defendants-Respondents.

Appeal from an Order of the Snohomish County Superior Court
Case No. 09-2-09456-8

RESPONDENTS' SUPPLEMENTAL BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
CLERK OF COURT
KIMBERLY A. HARRIS

TABLE OF CONTENTS

INTRODUCTION 1

SUPPLEMENTAL ARGUMENT 2

 I. BAIN HAS NO IMPACT ON APPELLANT’S WRONGFUL
 INITIATION OF FORECLOSURE CLAIM BECAUSE
 WASHINGTON DOES NOT RECOGNIZE SUCH A CLAIM
 WHERE THE FORECLOSURE HAS BEEN DISCONTINUED..2

 II. BAIN HAS NO IMPACT ON APPELLANT’S FDCA CAUSE
 OF ACTION. 4

 III. THE TRIAL COURT PROPERLY DISMISSED APPELLANT’S
 CPA CLAIM BECAUSE HE DID NOT AND CANNOT ALLEGE
 INJURY OR CAUSATION BECAUSE THERE HAS BEEN NO
 SALE..... 4

 IV. APPELLANT STILL HAS NOT STATED A VALID CLAIM
 FOR QUIET TITLE..... 5

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

<i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wn.2d 83 (2012)	2, 5
<i>Evans v. BAC Home Loans Servicing LP</i> , 2011 U.S. Dist. LEXIS 136282 (W.D. Wash. Dec. 10, 2010).....	5
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59 (2007)	4
<i>Klinger v. Wells Fargo Bank, NA</i> , 2010 U.S. Dist. LEXIS 111683 (W.D. Wash. Oct. 20, 2010).....	3
<i>Kobza v. Tripp</i> , 105 Wn. App. 90, 95 (2001).....	6
<i>Massey v. BAC Home Loans Servicing LP</i> , 2012 U.S. Dist. LEXIS 154256 (W.D. Wash. Oct. 26, 2012).....	3
<i>Robinson v. Khan</i> , 89 Wn. App. 418 (1998).....	5

Statutes

RCW §7.28.230(1).....	6
RCW § 61.24.010(3).....	3
RCW § 61.24.030(7)(a)	3

INTRODUCTION

On August 16, 2012, the Supreme Court held in *Bain v. Metropolitan Mortgage Group, Inc.* that Mortgage Electronic Registration Systems, Inc. (“MERS”) is not a “beneficiary” as that term is defined by RCW 61.24.005. Respondents recognize that pursuant to the *Bain* decision, some of the arguments raised in Respondents’ earlier Brief are no longer viable. Additionally, because the present case was resolved by the trial court on a Motion for Judgment on the Pleadings, the factual record was not fully developed prior to dismissal. Nevertheless, Appellant’s claims are not saved from dismissal by the *Bain* decision. Appellant’s claims are predicated upon the theory of wrongful initiation of foreclosure. However, courts in Washington have consistently held, both before and after the *Bain* decision, that there is not claim in Washington for wrongful initiation of foreclosure when, as here, the foreclosure sale has been discontinued. Furthermore, Appellant’s claims for violation of the Fair Debt Collection Practices Act (“FDCPA”) and for Quiet Title are not impacted by *Bain*. Additionally, the trial court properly dismissed Appellant’s claim under the Consumer Protection Act (“CPA”) because Appellant did not allege any facts to establish the elements of injury or causation. For these reasons, the Court should affirm the trial court’s dismissal of Appellant’s causes of action for wrongful initiation of foreclosure, violations of the FDCPA, Quiet Title, and violations of the CPA.

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SUPPLEMENTAL ARGUMENT

II. BAIN HAS NO IMPACT ON APPELLANT'S WRONGFUL INITIATION OF FORECLOSURE CLAIM BECAUSE WASHINGTON DOES NOT RECOGNIZE SUCH A CLAIM WHERE THE FORECLOSURE HAS BEEN DISCONTINUED.

Appellant's Amended Complaint challenged the role of MERS, contending that MERS cannot be designated as beneficiary in a deed of trust as nominee for the lender or the lender's successors. Respondent's Brief filed in this matter contests this allegation. Additionally, Respondent's Brief contends that there is no claim for wrongful initiation of foreclosure where, as here, the foreclosure has been discontinued. The Supreme Court held in *Bain* that MERS does not fit the statutory definition of a "beneficiary" under the Deed of Trust Act. According to *Bain*, the "beneficiary" must be the holder of the instrument secured by the deed of trust, i.e. the holder of the promissory note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 98-99 (2012).

Appellant asks this Court to conclude that the foreclosure in the present case was invalid because neither MERS nor Select Portfolio Servicing was the holder of the note. (Appellant's Supp. Brief 5-6.) However, the record does not support Appellant's conclusion. The case came to this Court following the trial court's granting of a Motion for Judgment on the Pleadings. Nothing in the Motion or the trial court's Order would allow this Court to conclude that Select Portfolio Servicing was not the holder of the note. Simply, this factual issue was not

developed in the earlier proceedings. Likewise, Appellant asks the Court to conclude that Quality Loan Service Corporation breached its fiduciary duties by failing to verify that Select Portfolio Servicing was the holder of the note.¹ (Appellant's Supp. Brief 6 n.2.) Again, the record does not support a conclusion that Quality lacks evidence of Select's power to act in this case.

Furthermore, Appellant's claim for wrongful initiation of foreclosure fails as a matter of law. Courts in Washington have repeatedly rejected such a claim, both before and after *Bain*, where, as here, the foreclosure sale has been discontinued. Recently, for instance, citing both *Bain* and pre-*Bain* cases, the Western Washington District Court held in *Massey v. BAC Home Loans Servicing LP*, 2012 U.S. Dist. LEXIS 154256 (W.D. Wash. Oct. 26, 2012) that as a matter of law, there is no "cause of action for damages for violation of the DTA where the trustee's sale is discontinued."

Here, as in *Massey*, Appellant neither denies that he defaulted on his loan nor contends that the foreclosure sale ever took place and,

¹ As explained in Respondents' initial brief, the trustee does not owe fiduciary duties to the parties. (See Respondent's Brief 12); RCW § 61.24.010(3), (4); *Klinger v. Wells Fargo Bank, NA*, 2010 U.S. Dist. LEXIS 111683, at *10-11 (W.D. Wash. Oct. 20, 2010). Appellant's continued attempt to impose fiduciary duties on Quality Loan Service is therefore improper. Additionally, at the time the foreclosure in this case occurred, the Deed of Trust Act did not require the trustee to have proof that the beneficiary is the owner of the note before commencing foreclosure. (See Respondent's Brief 12-13); RCW § 61.24.030(7)(a), enacted by S.B. 5810, 61st Leg., 1st Sess. (Wash 2009).

accordingly, his claim for wrongful initiation of foreclosure fails as a matter of law and, as such, was properly dismissed.

III. BAIN HAS NO IMPACT ON APPELLANT'S FDCPA CAUSE OF ACTION.

In his Amended Complaint, Appellant contended that Quality Loan Service Corporation violated the Fair Debt Collection Practices Act ("FDCPA") by making "false and misleading representations" about the authority of MERS to foreclose. As explained in Respondents' earlier Brief, no FDCPA cause of action was asserted against Select Portfolio Servicing in the Amended Complaint. (*See* Respondents' Brief 14.) Hence, all that is at issue here is Appellant's FDCPA claim against Quality. Regardless of whether Appellant's contentions regarding MERS could form a valid basis for an FDCPA claim, no cause of action can be stated against Quality because it is not a debt collector under the statute, and it is therefore not subject to the FDCPA's requirements. (*See* Respondents' Brief 16-18.)

IV. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CPA CLAIM BECAUSE HE DID NOT ALLEGE INJURY OR CAUSATION.

Appellant's Supplemental Brief argues that the Court should reverse the dismissal of his Consumer Protection Act ("CPA") cause of action because the *Bain* court found the role of MERS *could* provide the basis for a CPA claim. (Appellant's Supp. Brief 8-9.) But that does not change the fact that Appellant's Amended Complaint did not allege facts

that would establish the necessary elements of injury and causation. A plaintiff must plead and prove a causal link between the alleged deceptive practice and his purported injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 81-82 (2007). Here, Appellant complains of “out-of-pocket expenses for postage, parking, and consulting an attorney[,]” (Opening Br. 27), which are not tied to any specific conduct by either Quality or SPS. Without any facts to show he suffered injuries that are directly attributable to specific, deceptive actions by Respondents, Walker’s claim for violation of the CPA fails.

V. APPELLANT STILL HAS NOT STATED A VALID CLAIM FOR QUIET TITLE.

As explained in Respondent’s initial Brief, Appellant’s quiet title claim failed because he did not allege – and still has not alleged – the ability or willingness to tender repayment of the debt. Even if there were an irregularity in the foreclosure procedure, Appellant cannot quiet title to the property free and clear of the Deed of Trust without repaying the loan that he voluntarily obtained in 2007 and supported with his signature on a Promissory Note and Deed of Trust. *See Evans v. BAC Home Loans Servicing LP*, 2011 U.S. Dist. LEXIS 136282, at *10-11 (W.D. Wash. Dec. 10, 2010).

The *Bain* Court specifically rejected the argument that the designation of MERS as beneficiary of a Deed of Trust renders the instrument void or unenforceable. *Bain*, 175 Wn.2d at 112, 114. Rather,

the question is simply *who* is entitled to enforce it. But regardless of whether the entity entitled to foreclosure is Select Portfolio Servicing or some other entity not present before the Court, the Deed of Trust remains a valid encumbrance on the property until the loan it secures has been repaid. *See Robinson v. Khan*, 89 Wn. App. 418, 422 (1998) (plaintiff must demonstrate he is entitled to remove the cloud on title to state a quiet title claim).

Additionally, as argued in Respondent's Brief, Appellant's Quiet Title claim fails as a matter of law because it does not lie when the interest claimed is a lien as in the instant case. *Kobza v. Tripp*, 105 Wn. App. 90, 95 (2001). The Washington statute governing quiet title actions recognizes that deeds of trust and mortgages create only secured liens on real property, and do not convey any ownership interest or right to possession of the subject property. *See* RCW §7.28.230(1) ("A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law").

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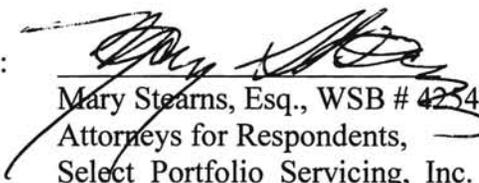
CONCLUSION

For the foregoing reasons, as well as the reasons explained in Respondents' initial Brief, the Court should affirm the dismissal of Appellant's causes of action for wrongful initiation of foreclosure, violation of the FDCPA, CPA, and for Quiet Title.

Dated: November 13, 2012

Respectfully Submitted,
McCarthy & Holthus, LLP

By:


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Quality Loan Service Corporation of
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CERTIFICATE OF SERVICE

I certify that on November 13, 2012, I served a copy of the foregoing document, described as **RESPONDENTS' SUPPLEMENTAL BRIEF** on the following persons by U.S. First Class Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, and that this Declaration was executed in Poulsbo, Washington.

Dated: November 13, 2012


Gina Stuteville, Legal Assistant
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