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Case No. 86207-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Hon. John C. Coughenour, Presiding
Case No. 10-5523-JCC

KEVIN SELKOWITZ,

Plaintiff,

vs.

LITTON LOAN SERVICING LP, et al.,

Defendants.

**BRIEF OF DEFENDANT QUALITY LOAN SERVICE
CORPORATION OF WASHINGTON, INC.**

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INTRODUCTION

Quality Loan Service Corporation of Washington (“Quality”) was appointed Trustee of the subject Deed of Trust on May 12, 2010, and in its capacity as Trustee, is pursuing nonjudicial foreclosure of the subject property located in Bellevue, Washington. Quality was appointed by Mortgage Electronic Registration Systems, Inc. (“MERS”), which is named in the Deed of Trust as the beneficiary. This Court has been asked to determine whether the designation of MERS as beneficiary is permissible under RCW § 61.24.005(2), and if not, what is the legal effect of actions taken by MERS.

Quality will not weigh in on MERS’ standing at this time, but submits this Brief only to explain that regardless of how the Court decides the certified questions, no cause of action can be stated against trustees such as Quality that have relied on MERS’ apparent authority to exercise the powers of a beneficiary under Washington law. Quality reasonably relied on the face of the Deed of Trust, which explicitly permitted MERS to exercise the powers of the beneficiary. Because a trustee is entitled to rely on the information contained in the deed of trust, no deceptive or wrongful conduct can be found, and therefore no cause of action can be stated against the trustee under the Deed of Trust Act or the Consumer Protection Act.

STATEMENT OF THE CASE

Plaintiff Kevin Selkowitz ("Plaintiff") executed a Promissory Note and Deed of Trust on November 1, 2006, securing a \$309,600.00 loan with residential real property known as 6617 Southeast Cougar Mountain Way, Bellevue, WA 98006. (Dkt. 9, ¶¶ 1.1, 3.1).¹ The Deed of Trust designates MERS as the beneficiary, as agent for the lender New Century Mortgage Corp. and its successors. Further, the Deed of Trust states as follows:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

(Dkt. 9, Ex. A at 3.)

Plaintiff failed to make payments that became due on the loan. Upon Plaintiff's default, nonjudicial foreclosure proceedings were commenced. MERS, as beneficiary, appointed Quality Loan Service Corporation of Washington as the trustee, in place of the original trustee First American Title Insurance Company. (Dkt. 9, Ex. B.) Quality then issued a Notice of Trustee's Sale on May 27, 2010. (Dkt. 9, Ex. C.) In an

¹ All references to the record are based on those documents certified to the Court in the District Court's Certification Order. All documents are identified by the docket number where they appear in the District Court record.

attempt to avoid the foreclosure, Plaintiff filed a Complaint in the King County Superior Court on July 2, 2010. Defendants removed the action to the United States District Court for the Western District of Washington, where the matter remains pending.

Plaintiff does not dispute defaulting on his loan. Instead, his First Amended Complaint contends that all actions in furtherance of the foreclosure are improper because MERS was not an appropriate beneficiary under RCW § 61.24.005(2). He argues that MERS' designation renders the Deed of Trust void, so it cannot be enforced by anyone. (*See* Opening Br. 38-39.) On this theory, Plaintiff attempts to state claims for violation of the Deed of Trust Act, quiet title, and violation of the Consumer Protection Act, among others.

Defendants filed Motions to Dismiss the First Amended Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Finding that the question of MERS' ability to act as beneficiary under Washington law to be unsettled, the District Court certified three questions to this Court:

1. Is Mortgage Electronic Registration Systems, Inc. a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

2. If [not], what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?
3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

Quality respectfully submits this brief to address the certified questions *only* as they relate to trustees such as Quality, whose duties are limited to conducting foreclosure in accordance with the Deed of Trust Act. This Court should find that regardless of the answer to the first question, no cause of action for violation of the Deed of Trust Act or Consumer Protection Act can be stated against a trustee that relies in good faith on MERS' apparent authority to appoint a successor trustee, as beneficiary of the deed of trust.

ARGUMENT

I. PLAINTIFF CANNOT IMPOSE DUTIES ON THE TRUSTEE THAT ARE NOT CONTAINED IN THE DEED OF TRUST ACT.

The process of nonjudicial foreclosure in Washington is governed by the Deed of Trust Act, RCW § 61.24.005 et seq. These statutes contain the comprehensive statutory framework governing nonjudicial foreclosures. *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010). The Deed of Trust Act was enacted to

further three goals: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles.” *Plein v. Lackey*, 149 Wn.2d 214, 225 (2003) (citing *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985)). To further these goals, the Act clearly outlines each of the trustee’s duties. *See Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wn. App. 912, 920 (2010). As long as the trustee complies with the Act’s procedural requirements, foreclosure may be conducted without the need for judicial action. *Id.* at 920-921.

Plaintiff argues that MERS is not a proper “beneficiary” within the meaning of RCW § 61.24.005(2), and as a result, Quality’s initiation of foreclosure after being appointed trustee by MERS was wrongful. (Opening Br. 14.) Consequently, Plaintiff argues that Defendants are liable for damages for violation of the Deed of Trust Act. (*Id.*) But regardless of how the Court’s resolves the first issue, no claim for damages can be stated against Quality for purported violations of the Deed of Trust Act. A trustee is not required to independently verify the beneficiary’s authority to foreclose, and should be entitled to rely in good faith on the information provided to it.

This Court has repeatedly confirmed that a trustee does not have the freedom to either circumvent or expand its statutory duties. For instance, in *Udall v. T.D. Escrow Servs., Inc.*, the trustee refused to deliver a trustee's deed to the high bidder at the sale, and instead attempted to declare the sale void because trustee's agent erroneously opened the bidding at \$100,000 lower than the trustee had instructed. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 906 (2007). This Court found the trustee did not have the ability to repudiate the sale, as no such power was given to it under the Deed of Trust Act. *Id.* at 911, 915-916. Because the Act mandates that a trustee deliver the trustee's deed to the higher bidder following the sale, the trustee had no choice but to comply. *Id.*

Giving the trustee broad authority to invalidate sales based on defects that the trustee believes to exist would undermine the Act's goals to maintain efficiency and stability in foreclosures. Yet this is precisely the situation proposed by Plaintiff, as he would have trustees independently determine whether the beneficiary named in the deed of trust has the actual authority to foreclose, and then refuse to foreclose if the trustee believed, on whatever basis, that the beneficiary lacked such authority. This cannot be the case. Trustees must have clearly defined duties, and requiring trustees to perform independent legal analyses of

each beneficiary's standing to foreclose would undermine the trustee's limited role.

The Deed of Trust Act does not impose any duties on a trustee to independently verify that the beneficiary commencing the foreclosure is authorized to do so. RCW § 61.24.030(7), which was added to the code effective July 26, 2009, now 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 commencing foreclosure. RCW § 61.24.030(7)(a), *enacted by S.B. 5810, 61st Leg., 1st Sess. (Wash 2009)*. However, the trustee is entitled to rely in good faith on the beneficiary's declaration that it is the owner of the obligation without engaging in its own independent investigation. RCW § 61.24.030(7)(b). The final version of the statute reflects a balance between homeowners' interests in knowing the identity of the entities with authority to pursue foreclosure, and the need to maintain trustees' impartiality and ability to fulfill their statutory duties without being "caught in the middle" of disputes between homeowners and lenders. *See Senate Committee on Financial Institutions, Housing & Insurance Report, 61st Leg., Senate Bill Report ESB 5810; House Committee on Judiciary, 61st Leg., House Bill Report ESB 5810.* Earlier statutory proposals would have required the trustee to be in possession of the original note and to have proof that the beneficiary was

the holder of the note, however these provisions were not made part of the final bill. *Compare* Engrossed S.B. 5810 § 7(7)(k)(i) (as read Feb. 3, 2009) *with* S.B. 5810 § 8(7)(a) (as passed by Senate Apr. 20, 2009). Instead, the final version of the bill reflects the Legislature's desire to insulate the trustee from liability, even if the identity of the beneficiary disclosed to the trustee later turns out to be inaccurate.

The history of RCW § 61.24.030(7)(a) makes clear that the Legislature intended not to impose onerous duties on a trustee to determine whether the foreclosing beneficiary has the actual authority to foreclose. Instead, the trustee may rely in good faith on the beneficiary's representation of authority. The same should be true with regard to a trustee's ability to rely in good faith on the face of the deed of trust to determine whether an entity such as MERS, which is explicitly identified as the beneficiary, is legally entitled to appoint a successor trustee in accordance with the Deed of Trust Act.

Before 2008, RCW § 61.24.010 imposed a fiduciary duty on a trustee to act for the interests of both the borrower and the beneficiary. The statute was amended in 2008 to remove this requirement and replace it with the much lower good faith standard. 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). Nonetheless, under both the current and

former versions of the statute, courts have confirmed that a trustee's duty centers on reasonableness. *See, e.g., Albice*, 157 Wn. App. at 934; *Cox v. Helenius*, 103 Wn.2d 383, 389 (1985). In reviewing the certified questions in the present case, the Court must ask, it is inherently unreasonable for a trustee to pursue foreclosure after being appointed by an entity that is identified as the beneficiary in the Deed of Trust? The answer is a clear "no." Accordingly, regardless of how the Court decides the question of MERS' standing to act as beneficiary, the Court should find that a trustee relying in good faith on MERS' designation as beneficiary cannot be liable to the borrower for violation of the Deed of Trust Act.

II. PLAINTIFF CANNOT ESTABLISH ANY FALSE OR MISLEADING CONDUCT BY A TRUSTEE THAT RELIES ON THE DEED OF TRUST.

Washington's Consumer Protection Act ("CPA"), RCW § 19.86 set seq., creates a private right of action for unfair or deceptive business practices that both injure the plaintiff and impair the public interest. *Hangman Ridge Training Stables, Inc v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Plaintiff argues that if the Court finds MERS is not a proper beneficiary under RCW § 61.24.005(2), then Quality's conduct in advancing the nonjudicial foreclosure necessarily constitutes a deceptive practice under the CPA. (Opening Br. 47.) This argument must be

rejected, as a trustee's good-faith reliance on the information contained in the deed of trust, including the identification of the beneficiary, should not subject the trustee to CPA liability.

To establish a violation of the CPA, the plaintiff must first prove an unfair or deceptive act or practice. RCW § 19.86.020. "Implicit in the definition of 'deceptive' is the understanding that the actor *misrepresented* something of material importance." *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730 (1998). Although the plaintiff need not show that defendant specifically intended to deceive him, he still must show some degree of *knowing* conduct in order to state a CPA claim. *See Robinson v. Avis Rent a Car Sys.*, 106 Wn. App. 104, 116 (2001) (finding the "knowing" failure to reveal material fact was deceptive under the CPA); *Svendsen v. Stock*, 143 Wn.2d 546 (2001) (real estate agent who knowingly failed to disclose material defects violated CPA). No "knowing" conduct can be found where a trustee commences foreclosure in reliance on the information contained in the deed of trust.

Furthermore, "acts or practices performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 810-811 (1984); *see also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 143-144 (2001) (finding good faith mistake by

insurer could not form basis of CPA claim). Numerous courts have confirmed that MERS may act as beneficiary in its capacity, under both the law of Washington and the laws of similar nonjudicial foreclosure states. *See, e.g., Salmon v. Bank of America*, 2011 U.S. Dist. LEXIS 55706, at *17 (E.D. Wash. May 25, 2011); *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1125 (W.D. Wash. 2010); *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 U.S. Dist. LEXIS 50223, at *17-18 (W.D. Wash. May 20, 2010); *Gomes v. Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1157-58 (2011); *Silvas v. GMAC Mortgage, LLC*, 2009 U.S. Dist. LEXIS 118854, *8 (D. Ariz. Dec. 1, 2009). In light of the weight of authority on this issue, trustees such as Quality have had a good-faith basis for believing that MERS could properly be designated as beneficiary in a deed of trust, even if this Court were now to find the opposite. Hence, any actions taken in reliance on MERS' status as beneficiary cannot give rise to a claim for deceptive practices under the CPA.

The Deed of Trust executed by Plaintiff identifies MERS as the beneficiary of the instrument, and empowers MERS to foreclose under state law in the event of a default. Relying on the authority given to it by the contract, MERS appointed Quality as the successor trustee. Because it is reasonable for a trustee to rely on the express provisions of the deed of

trust, the Court should find no claim can be stated against a trustee for deceptive business practices, regardless of the resolution of the other questions before the Court.

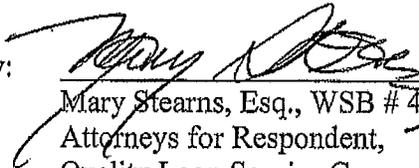
CONCLUSION

For the foregoing reasons, the Court should find that even if MERS were found not to be a proper beneficiary under the Deed of Trust Act, no cause of action can be stated against a trustee that relies in good faith on the deed of trust's designation of MERS as such.

Dated: October 20, 2011

Respectfully Submitted,
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By:



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CERTIFICATE OF SERVICE

I certify that on October 20, 2011, I served a true and correct copy of the foregoing document, described as **BRIEF OF RESPONDENT QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, INC.**, 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. Executed at Poulsbo, Washington on October 20, 2011.

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