

NO. 71995-5-I

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

FILED
Jun 17, 2015
Court of Appeals
Division I
State of Washington

CHETTIE MCAFEE,

Appellant,

v.

SELECT PORTFOLIO SERVICING, INC., NORTHWEST TRUSTEE SERVICES, INC.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. a/k/a MERSCORP, INC.,
JP MORGAN CHASE BANK, NA, WELLS FARGO BANK, NA AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II
INC., BEAR STEARNS MORTGAGE FUNDING TRUST 2007-AR2 MORTGAGE PASS-
THROUGH CERTIFICATES SERIES 2007-AR2,

Respondents.

Appeal from Superior Court for King County
The Honorable Monica Benton

APPELLANT'S SECOND AMENDED OPENING BRIEF

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I. INTRODUCTION

Ms. McAfee financed her personal residence in Seattle in 2007 with a mortgage loan that she believed was financed through Bear Stearns. However, the Deed of Trust stated that MERS was the beneficiary under the Deed of Trust. Ms. McAfee had no knowledge of MERS, and no knowledge at that time that MERS could not claim to be a beneficiary on her deed of trust. Also unknown to Ms. McAfee, Bear Stearns collapsed in 2008. In 2009, she sought to modify her loan through communication with the servicer at that time, JP Morgan Chase. Chase was the servicer working on behalf of Wells Fargo as Trustee for a mortgage-backed security known as SAMI-II. Chase told her to stop making her payments for three months before they would speak to her any further about a loan modification. She took their advice and stopped making payments, even though she had never been behind on her loan payments up to that time.

Over the course of the next year, she sent in her documents to Chase to apply for a loan modification at least nine times, but was never given a permanent loan modification. Eventually, in June 2012, Ms. McAfee received a Notice of Default from Northwest Trustee Services, indicating that they intended to foreclose on the property. Northwest Trustee Services was not appointed as the successor trustee when the NOD was issued. In January 2013, NWTS then issued a Notice of Trustee's Sale to sell the property on May 31, 2013. That sale was later postponed several times. In frustration and aggravation with Chase's actions and lack of actions (acting on behalf of Wells Fargo), Ms. McAfee contacted Chase to discuss a short

sale to avoid foreclosure. Chase manipulated the short sale process such that even offers in amounts previously demanded by Chase were rejected for no apparent reason, and Chase would give no explanation to Ms. McAfee. Very shortly before the latest trustee's sale date approached, the servicing was transferred to Select Portfolio Servicing, Inc. (SPS). SPS refused to discuss a short sale with Ms. McAfee.

She finally decided to take these parties to court to stop the foreclosure and to obtain remedies legally available to her for the acts of these parties. Ms. McAfee obtained a temporary restraining order to stop the sale, but was unable to post the bond in the required amount. In May 2014, NWTS finally sold Ms. McAfee's property at a trustee's sale. No third party purchased the property and it apparently reverted to Wells Fargo as Trustee for SAMI-II. NWTS moved swiftly to evict Ms. McAfee but the trial court granted a stay of the unlawful detainer action pending appeal. Ms. McAfee paid the required bond amount into the court registry to support the stay.

In addition to the property serving as Ms. McAfee's personal residence, she also provides housing for homeless women veterans and has done so for several years.

II. ASSIGNMENTS OF ERROR

1. The Trial Court Erred When It Dismissed Appellant's Claims For Consumer Protection Act Violations
2. The Trial Court Erred When It Dismissed Appellant's Claims for Violation of the Deed of Trust Act
3. The Trial Court Erred When It Dismissed Appellant's Claim for Fraud and Misrepresentation
4. The Trial Court Erred When It Dismissed Appellant's Claim for Breach of Contract

Issues Pertaining to Assignments of Error

1. Whether the court should have denied the motion to dismiss Appellant's claims against Northwest Trustee Services, Inc. for issuing a Notice of Default before being appointed as successor trustee (Assignment of Error No. 1, 2, 3).
2. Whether the court should have denied the motion to dismiss on Appellant's claims that SPS and Wells Fargo's acts were unfair and deceptive in the course of the loan modification process and the short sale process. (Assignment of Error No. 1, 3).
3. Whether the court should have denied the motion to dismiss Appellant's claim against Northwest Trustee Services for failing to act as a neutral party by claiming that JP Morgan Chase Bank, N.A. is its client on the Notice of Default. (Assignment of Error No. 1, 2).
4. Whether the court should have denied the motion to dismiss Appellant's claim against Wells Fargo and MERS when MERS recorded an unlawful assignment to Wells Fargo, and when Wells Fargo and NWTs unlawfully sold the property at a trustee's sale. (Assignment of Error No. 1, 2, 3).
5. Whether the court should have denied the motion to dismiss Appellant's claims against MERS that it violated the Deed of Trust Act, Consumer Protection Act, committed fraud and misrepresentation, and breach of contract when it named itself as the beneficiary on the Deed of Trust, and when it recorded an assignment of the Deed of Trust to Wells Fargo after Bear Stearns collapsed. (Assignment of Error No. 1, 2, 3, 4).

III. STATEMENT OF THE CASE

On or about January 3, 2007 Appellant entered into a financing arrangement with Bear Stearns Residential Mortgage Corporation to purchase property. This property is described as:

The North 78.5 feet of Lot(s) 1, Block 6, Brighton Beach, according to the plat thereof recorded in Volume 6 of plats, page(s) 98, in King County, Washington. Except the East 10 feet thereof.

More commonly known as 6330 52nd Avenue South, Seattle, Washington 98118.

On January 10, 2007, the Deed of Trust for the subject property was recorded in King County as instrument number 20070110001055. (CP 176-196). The alleged beneficiary on this deed of trust was named as Respondent MERS. The Lender was Bear Stearns Residential Mortgage Corporation, and the original Trustee was Ticor Title. MERS claims in paragraph (S) that it is “acting solely as nominee for Lender and Lender’s successors and assigns. **MERS is the beneficiary under this security instrument.**” (Bold in original). (CP 177).

Appellant remained current on her payments in 2009, but was interested in seeking a lower monthly payment and a lower interest rate, so she placed a call to Chase to discuss the request. During that phone call, Chase told Appellant to stop making her payments for three months, and then call them back.

On June 30, 2012, Northwest Trustee Services, Inc. issued a notice of default to Appellant, but no Appointment of Successor Trustee had been recorded as of this date, giving it the powers of the original trustee, as required by the Deed of Trust Act, RCW 61.24.010(2). (CP 200-202). On January 11, 2013, NWTS recorded an emergency non-standard recording of an Appointment of Successor Trustee wherein Payne Davis as Vice President of either Wells Fargo Bank as trustee for SAMI II 2007-AR2 or JP Morgan Chase Bank, NA (it is not clear which entity of which Mr. Payne purports to be the Vice President) purports to appoint Northwest Trustee Services, Inc. as successor trustee under the deed of trust. This appointment is recorded as instrument number 20130111002029. (CP 206-208).

The Notice of Default was issued a full six months before Northwest Trustee Services was conceivably lawfully appointed as successor trustee with all the powers of the original trustee. Not only is the Notice of Default invalid because it was issued by an entity which

was not a lawful trustee at the time it was issued, but Wells Fargo Bank as Trustee for SAMI II 2007-AR2, is not the true beneficiary because it only became the alleged beneficiary by an assignment from MERS who was not lawfully entitled to make the assignment.

On June 27, 2012, a Corporate Assignment of Deed of Trust was recorded in King County as instrument number 20120627001914, (CP 35, 198), wherein MERS, as alleged “nominee” for Bear Stearns Residential Mortgage Corporation, its successors and assigns, purports to “convey, grant, sell, assign, transfer and set over the described deed of trust with all interest secured thereby, all liens, and any rights due or to become due thereon to Wells Fargo Bank, N.A. Successor by Merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.A., Solely as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns Mortgage Funding Trust 2007-AR2, Mortgage Pass-Through Certificates, Series 2007-AR2, whose address is 700 Kansas Lane, MC 8000, Monroe, LA 71203 (866) 756-8747, its successors or assigns, (Assignee).” The illegible signature on this assignment is dated June 4, 2012, by someone purporting to be “Natasha ?, Vice President” of MERS, upon information and belief, a “robo-signer.”

MERS’ assertion that it was the beneficiary on the deed of trust is fraudulent, whether in its own right or as a nominee for Bear Stearns Mortgage.

A Notice of Trustee’s Sale (NOTS) was issued by Northwest Trustee Services, Inc. declaring that the property would be sold on May 31, 2013 at their office in Bellevue, not a public facility. This NOTS was recorded on January 29, 2013 as instrument number 20130129001792. (CP 39-42, 298-302). The Notice of Trustee’s Sale was signed by Heather Smith on January 14, 2013, but the notarization of the signature was dated January 28, 2013, indicating a fraudulent jurat.

The Trustee's Sale was postponed until July 5, 2013. A Notice of Postponement was issued by Northwest Trustee Services, Inc. on May 31, 2013 postponing the sale to July 5, 2013. (CP 218). Another Notice of Postponement pursuant to RCW 61.24.040(6)(a) was issued by Northwest Trustee Services, Inc. on July 5, 2013 declaring that the sale was postponed again until August 9, 2013. (CP 34, 219).

On or about February 21, 2013, Appellant began the process of negotiating a short sale on her property with JP Morgan Chase, allegedly the servicer of the loan at that time. As of August 1, 2013 the short sale file was "service released" to Select Portfolio Servicing, who JP Morgan Chase asserted "will work the short sale moving forward."

On July 25, 2013, Select Portfolio Servicing, Inc. sent a letter to Appellant asserting that the servicing of Appellant's mortgage loan "will be transferred from JP Morgan Chase Bank NA to Select Portfolio Servicing, Inc. (SPS) effective 08/01/2013."

On August 12, 2013, SPS sent Appellant a letter entitled "VALIDATION OF DEBT NOTICE." This letter declares that SPS is "collecting the debt on behalf of Wells Fargo Bank, NA as Trustee" for SAMI II, "the investor who currently owns your mortgage loan." This letter continues to recite the fiction that Wells Fargo Bank as trustee for SAMI II is a lawful beneficiary. The August 12 letter gave Appellant 30 days to dispute the validity of the debt. Appellant filed her lawsuit within that 30-day period and gave notice that she disputed the debt at that time. Nothing in the letter apprises Appellant of her options to avoid foreclosure, that SPS is the party she must negotiate with on a short sale or a request for a loan modification, or any other options to avoid foreclosure and keep her home.

Appellant has provided housing in the subject property for homeless women veterans for several years and continues to provide such housing on the property.

Appellant made at least nine attempts to apply for a loan modification prior to requesting a short sale, and Wells Fargo as trustee for SAMI-II continually acted in bad faith by requesting the same documents over and over again. Appellant submitted the requested documents each and every time. Respondent Wells Fargo as Trustee for SAMI-II rejected a valid short sale offer that was on the table in an amount that was previously demanded by the trust. Wells Fargo Bank as Trustee acted in bad faith and in an ongoing unfair and deceptive manner throughout the entire short sale process, causing harm to Appellant. These respondents also acted in bad faith throughout the loan modification process.

On September 3, 2013, Appellant filed the present lawsuit in Superior Court for violation of the Consumer Protection Act, violation of the Deed of Trust Act, Fraud and Misrepresentation, and Breach of Contract. On September 24, 2013, the court granted a temporary restraining order, (CP 140-142), but Appellant was unable to pay the bond to secure the restraining order. On May 9, 2014, Respondent Northwest Trustee Services Inc. sold Appellant's property at a trustee's sale. Appellant moved for a stay of the subsequent unlawful detainer action and the stay was granted on October 21, 2014. As a term of the stay, Appellant paid \$4,569.24 into the court registry on October 22, 2014.

IV. SUMMARY OF ARGUMENT

Respondents violated the Deed of Trust Act and the Consumer Protection Act in their actions involving Appellant's request for a loan modification, short sale, and foreclosure proceedings. The property was sold at a trustee's sale on May 9, 2014, so damages under the Deed of Trust Act are available to Appellant. Many of the same actions by Respondents that violate the Deed of Trust Act were also unfair and deceptive acts as defined by the Washington Consumer Protection Act, RCW 19.86 et seq., that caused

economic harm to Appellant and she lost her home to foreclosure because of them. Respondents should also be held liable for common law fraud and misrepresentation and for breach of contract. The fraudulent statements in documents recorded with King County caused economic harm to Appellant because respondents used those documents to foreclose on the property. The contract (Appellant's Deed of Trust) was breached by respondents, in part because MERS was noted as the beneficiary on the deed of trust when it had no right to do so, and because respondents breached their duty of good faith and fair dealing that inheres in every contract negotiation.

V. LEGAL ARGUMENT

A. Standard Of Review For CR 12(b)(6) Motion to Dismiss

Statutory interpretation is a question of law that the court reviews de novo. *Cashmere Valley Bank v. Dep't of Revenue*, 334 P.3d 1100, 1104 (2014). All questions of law are reviewed de novo. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007) citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005); *Klem v. Washington Mutual Bank*, 295 P.3d 1179, 176 Wn.2d 771 (Wash. 2013); *Albice v. Premier Mortgage Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

For purposes of a 12(b)(6) motion, the court presumes the allegations in the complaint to be true. *Cutler v. Phillips Pet. Co.*, 124 Wn.2d 749, 755, 881 P.2d 219 (1994). Dismissal of actions under CR 12 is appropriate only if it appears beyond a doubt that the Appellant can prove no set of facts, consistent with the complaint, which would entitle the Appellant to relief. *Holiday Resort Community Ass'n. v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987). A CR 12(b)(6) motion should

be granted “sparingly and with care” and “only in the unusual case in which Appellant includes factual allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Holiday Resort Community Ass’n*, at 218, citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

A claim is factually plausible when it contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949, 173 L. Ed. 2d 868 (2009). Washington courts hold that “we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Davenport v. Washington Education Association*, 147 Wn. App. 704, 715, 197 P.3d 686 (2008), citing *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 122, 11 P.3d 726 (2000). Under CR 12(b)(6), a motion to dismiss for failure to state a claim “should be granted only if the Appellant cannot prove any set of facts which would justify recovery.” *Postema*, 142 Wn.2d at 122. “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support Appellant’s claim.” *Bravo v. Dolsen*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995). Such motions “should be granted only ‘sparingly and with care.’” *Bavand v. OneWest Bank, FSB*, 309 P.3d 636, 176 Wn.App. 475, 485 (2013). The court reviews “questions of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the Appellant.” *Davenport*, 147 Wn. App. at 715.

B. Respondents Violated the Washington Consumer Protection Act

The CPA prohibits unfair or deceptive business practices, and these claims are analyzed in view of the five elements of *Hangman Ridge Training Stables v. Safeco*, 105

Wn.2d 778, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest (5) and caused injury to Appellant in her or her business or property. *Id.* at 780. All respondents' actions meet all five elements of a CPA claim. In the case below, Respondents did not attempt to argue the first three elements, only the fourth and fifth.

The CPA does not define "unfair" or "deceptive." Instead, courts have developed standards on a case-by-case basis. *Ivan's Tire Service v. Goodyear Tire*, 10 Wn.App. 110, 517 P.2d 229 (1973). "To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public. Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law that we review de novo." *State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011). (emphasis added). The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

Appellant's Complaint alleges that all Respondents engaged in a pattern and practice of unfair and unlawful servicing and foreclosure activities that ultimately resulted in premature default and in unfair, deceptive, and unlawful foreclosure proceedings. In fact, actual deception is not required in order to state a CPA claim, but the question is whether the conduct has the capacity to deceive. Even if Respondents' actions would be considered lawful, this does not absolve them of liability under the Consumer Protection Act, because even accurate information may be deceptive if there is a representation, omission or practice

that is likely to mislead. There is no question that the deceptive conduct by Respondents' (in the loan modification and short sale processes) occurred, and the conduct was alleged in the complaint.

In 2009, the U.S. Department of the Treasury launched the Home Affordable Modification Program (HAMP) to help distressed homeowners with delinquent mortgages. This program required the Secretary of the Treasury to "implement a plan that seeks to maximize assistance for homeowners and...encourage the servicers of the underlying mortgages...to take advantage of...available programs to minimize foreclosures..." Home loan servicers signed Servicer Participation Agreements with the Treasury that entitled them to \$1,000.00 for each permanent modification they made, but required them to follow Treasury guidelines and procedures. *Corvello v. Wells Fargo Bank*, No. 11-16234, No. 11-16242, 2013 WL 4017279 at *1 (9th Cir. Aug. 8, 2013).

The clear guidance given by Congress and supported by the Court in *Corvello* is unequivocal in that the HAMP program should maximize assistance for homeowners and gives incentives to the servicers to take advantage of the program to minimize foreclosures. The Respondents unfairly and deceptively did just the opposite: they attempted to thwart every attempt by Appellant to protect her interests in her home by seeking a loan modification and following the rules for applying for a loan modification by submitting the required documents in a timely manner. They also attempted to thwart Appellant's efforts to arrange a short sale. This invidious behavior is unfair and deceptive to borrowers who attempt to avail themselves of the HAMP program and avoid foreclosure.

The unlawful assignment of the deed of trust and the appointment of successor trustee are also unfair and deceptive acts. It is not clear from the record when Chase became the

servicer on this loan, even if the assignment was lawful. The Court in *Walker v. Quality Loan Services of Washington, Inc.* held that violations of the Deed of Trust Act of having unlawful beneficiaries appointing unlawful successor trustees to initiate foreclosure proceedings, and which rendered the foreclosure void or voidable, may constitute unfair and deceptive acts under the CPA. *Walker v. QLS*, 176 Wn.App. 294, (2013). It is clear from the *Bain* decision that a party cannot contract around a statute. *Bain v. Metro. Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).¹ If unlawful beneficiaries appointing unlawful successor trustees to initiate foreclosure proceedings can constitute unfair and deceptive acts under the CPA, then the unlawful actions of the unlawful trustee should also be considered unfair and deceptive under the CPA. In *Klem v. Washington Mutual Bank*, the Supreme Court held that “a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.”

In *Walker v. Quality Loan Services*, Mr. Walker raised claims that the Trustee and the servicer violated the CPA. The facts of that case are similar to the facts in the present case. “(1) Quality sent a notice of default to Mr. Walker even though it did not meet the requirements of a successor trustee; (2) Quality and Select facilitated a deceptive and misleading effort to wrongfully execute and record documents that contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; ... and as a result of this conduct, Quality and Select knew that their conduct amounted to wrongful

¹ “The legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.”

² *Bain*, 175 Wn.2d at 118, quoted in *Bavand* at 507.

³ “The supreme court has repeatedly stated that the Deed of Trust Act ‘must be construed in favor of borrowers

foreclosure...” *Walker v. Quality Loan Service Corp. of Washington*, 176 Wn.App. 294 (2013). These are virtually identical facts as the present case, where Wells Fargo as Trustee for SAMI-II allegedly attempted to appoint NWTs as the successor trustee when it was not a lawful beneficiary. The actions flowing from that unlawful appointment should also be considered unfair and deceptive and impacting the public interest.

2. Respondents’ Acts Impact the Public Interest

There is ample documentation that the acts of Respondents that caused harm to Appellant are acts that impact the public interest. Appellant may show that a deceptive commercial act or practice has affected the public interest by satisfying any of five different factors.

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving Appellant?
- (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving Appellant?
- (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Hangman Ridge, 105 Wn.2d at 790; *Bavand v. OneWest Bank*, 176 Wn.App. 475, 506-507. *Lightfoot v. McDonald* held that private wrongs do not affect the public interest, but *Lightfoot* was a case involving a dispute between an attorney and client and has no resemblance to the present case. The court in *Hangman Ridge* continued their analysis, finding in this context that:

Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Lightfoot v. MacDonald*, *supra* 86 Wash. at 334, 544 P.2d 88. However, it is the likelihood that additional Appellants 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. *McRae v. Bolstad*, *supra*, 101 Wash. at 166, 676 P.2d 496. Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular Appellant,

indicating potential solicitation of others? (4) Did Appellant and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the “consumer” and “private dispute” contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

Hangman Ridge, 105 Wn.2d at 790-791.

The loan modification process and Appellant’s interactions with Respondent Wells Fargo as trustee for the secured trust, during that process and the short sale process were more than just a private dispute. This trust is engaged in the same processes with countless other borrowers and homeowners and the identical behavior likely has been, and is likely to be repeated. Appellant was seeking a loan modification under the HAMP program, a publicly-funded federal program available to millions of homeowners. This is simply not a private dispute.

It is also especially salient that Appellant and Wells Fargo as Trustee for SAMI-II certainly occupied unequal bargaining positions. Like many homeowners seeking to modify their mortgage loan under HAMP or other loan modification programs, the borrower has no choice but to negotiate according to the whims of the lender’s decision-making process and must rely on the lender, who often has no compunction to offer a loan modification, for their advice and expertise in the loan modification process. Respondents and other servicers and lenders clearly seem to prefer a foreclosure to other “loss mitigation” options that would make the loan more affordable and keep the homeowner in the home.

In *Bavand*, the court held that “In the context of a similar CPA claim based on MERS’s representation that it was a beneficiary, the *Bain* court noted that ‘there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state)...’ It then concluded that ‘[i]f in fact the language is unfair or

deceptive, it would have a broad impact. This element is also presumptively met.”² Here, as in *Bavand*, “MERS’s status as the named beneficiary in this deed of trust presumptively meets the public interest element of a CPA claim. As in *Bain*, the alleged acts of MERS were done in the course of its business, and MERS listing as a “beneficiary” was a generalized practice that was a course of conduct repeated in hundreds of other deeds of trust.” *Bavand* at 507.

3. Appellant Suffered Damages From Respondents’ Acts

As the court in *Hangman Ridge* concluded, “the injury need not be great, but it must be established.” But, as the supreme court noted in *Panag v. Farmers Insurance Co. of Washington*, “ ‘Injury’ is distinct from ‘damages.’ Monetary damages need not be proved; unquantifiable damages may suffice.” *Panag*, 166 Wn.2d at 58, quoted in *Bavand* at 508. Because of the unfair and deceptive acts of Respondents, Appellant suffered damage to credit, the expense of legal fees, and loss of her home to foreclosure. Damages were alleged in the complaint, but need not be proven at this stage since this was a CR 12(b)(6) motion to dismiss, not a summary judgment motion.

C. Respondents Violated The Deed of Trust Act RCW §61.24 et seq. and Appellant Suffered Damages Available Under the DOTA

On June 30, 2012, Northwest Trustee Services, Inc. issued a notice of default to Appellant, but no Appointment of Successor Trustee had been recorded as of that date, giving it the powers of the original trustee, as required by the Deed of Trust Act, RCW 61.24.010(2). (CP 200-202). On January 11, 2013, NWTS recorded an emergency non-standard recording of an Appointment of Successor Trustee wherein Payne Davis as Vice President of either Wells Fargo Bank as trustee for SAMI II 2007-AR2 or JP Morgan Chase

² *Bain*, 175 Wn.2d at 118, quoted in *Bavand* at 507.

Bank, NA (it is not clear which entity of which Mr. Payne purports to be the Vice President) purports to appoint Northwest Trustee Services, Inc. as successor trustee under the deed of trust. This appointment is recorded as instrument number 20130111002029. (CP 206-208).

The Notice of Default was issued a full six months before Northwest Trustee Services was conceivably lawfully appointed as successor trustee with all the powers of the original trustee. Not only is the Notice of Default invalid because it was issued by an entity which was not a lawful trustee at the time it was issued, but Wells Fargo Bank as Trustee for SAMI II 2007-AR2, is not the true beneficiary because it only became the alleged beneficiary by an assignment from MERS who was not the beneficiary and therefore not lawfully entitled to make the assignment.

On May 9, 2014, Respondents sold Plaintiff's property at a trustee's sale in King County. The Deed of Trust Act provides that "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: ... (c) Failure of the trustee to materially comply with the provisions of this chapter." RCW 61.24.127. The Washington Supreme Court recently held that: "Without question, this provision explicitly recognizes an independent cause of action for damages premised on a trustee's material DTA violations." *Frias v. Asset Foreclosure Services, Inc.*, 334 P.3d 529, 181 Wn.2d 412, 423 (2014). The Deed of Trust Act, RCW 61.24.127(a) and (b), also allow for damages when claims are brought for "(a) Common law fraud or misrepresentation; (b) A violation of Title 19 RCW..." Appellant brought claims under all three provisions.

The court in *Frias* held that: "Under the existing statutory framework, we hold there is no actionable, independent cause of action for monetary damages under the DTA based on

DTA violations absent a completed foreclosure sale.” *Id.* at 429. However, in the case at bar, a foreclosure sale *did* take place on May 9, 2014, and the trustee committed material violations of the Deed of Trust Act, as alleged in the complaint. Appellant also brought claims for damages for fraud and misrepresentation and a violation of RCW 19.86 *et seq.* Therefore, pursuant to RCW 61.24.127 and the holdings in *Frias*, money damages *are* available to Plaintiff for violation of the Deed of Trust Act by Respondents. NWTS was acting at the direction of its client Select Portfolio Servicing, Inc., as servicer for Wells Fargo as Trustee for SAMI-II.

D. Fraud and Misrepresentation Were Properly Plead in Accordance With the Civil Rules

Appellant stated a claim for common law fraud under the prescribed legal elements. The elements of fraud that Appellant must ultimately establish at trial (but not necessarily plead in the Complaint) are (1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that it be acted upon by the Appellant; (6) Appellant’s ignorance of the falsity; (7) Appellant’s justified reliance; and (8) damages. *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 194 P.3d 280 (2008), *review granted in part*, 210 P.3d 1019 (2009). Civil Rule 9(b) states that malice, intent, knowledge, and other conditions of the mind may be averred generally. CR 9(b) also states that the circumstances constituting fraud or mistake shall be stated with particularity, but does not require that all the elements of *proof* be plead in the Complaint. These elements are elements of *proof*, not necessarily elements that need to be plead in the Complaint.

1. MERS Cannot Take the Actions of a Beneficiary Because it Never Held the Note

Because lenders do not need the authority of the courts to initiate foreclosure proceedings, the Deed of Trust Act must be strictly construed in favor of the borrowers, and this principle has been repeatedly upheld by the Washington courts. *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn 2d 903, 915-16, 154 P.3d 882 (2007), *Bavand v. OneWest Bank*, 176 Wn. App. 475, 309 P.3d 636 (2013),³ *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013), *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 93, 285 P3d 34 (2012).

The Court in *Walker* also held that:

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 trustee's sale. [See RCW 61.24.010(2)] *Walker* at 7.

The Deed of Trust in question states clearly in paragraph (E) in bold type: “**MERS is the beneficiary under this security instrument.**” The Supreme Court in *Bain* held explicitly that “MERS is an ineligible beneficiary within the terms of the Washington Deed of Trust Act, if it never held the promissory note or other debt instrument secured by the deed of trust.” *Bain* at 110.

The Appointment of Successor Trustee was fraudulent because it was executed by MERS who is not a beneficiary. NWTS, the purportedly appointed “successor trustee,” was

³ “The supreme court has repeatedly stated that the Deeds of Trust Act ‘must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.’” *Bavand* 176 Wn.App at 486 quoting *Schroeder v. Excelsior Mgmt. Group, LLC* 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013).

therefore not authorized to issue a Notice of Default or a Notice of Trustee's Sale. The Court in *Bavand v. OneWest Bank* concluded that MERS was not authorized to appoint a successor trustee because MERS is not a proper beneficiary under the Deeds of Trust Act. *Bavand v. OneWest Bank*, 176 Wn. App. At 507. "The reason for this is that a proper beneficiary under the Act must be a 'holder' of the note or other secured obligation. MERS is not a holder of the Note in this case." *Bavand* at 507, citing *Bain* at 102-104. The *Bain* court held that "A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a non-judicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary." *Bain*, 175 Wn.2d at 89.

Neither the Respondents nor any other party, can contract around a statute. The Supreme Court in *Bain* rejected the notion that the courts should give effect to a contractual modification of a statute. The Court held that "The legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals." *Bain* at 108.

The Deed of Trust does not give MERS authority to transfer the promissory note. MERS seems to presume by their assignment of the deed of trust, that the assignment, standing alone, would entitle Wells Fargo as Trustee for SAMI II to enforce the underlying Notes. Since it is at minimum inconclusive that the promissory note was properly transferred, MERS could only transfer whatever interest it held in the Deed of Trust. Since MERS had no authority to transfer the Note or the Deed of Trust in June 2012, the

assignment to SAMI-II and Chase as the unlawful servicer or attorney-in-fact should be of no force or effect. As a result, SAMI-II is without any interest in the subject Note or Deed of Trust.

2. The Appointment of Successor Trustee and Assignment of Deed of Trust Are Based on Fraud

In the Assignment of Deed of Trust recorded June 27, 2012 Respondent MERS, “solely as nominee for Bear Stearns Residential Mortgage Corporation,” purports to assign to Respondent Wells Fargo Bank as Trustee for SAMI-II 2007 AR-2. MERS could not assign the Deed of Trust because it was not the lender or the beneficiary. The Assignment was signed by a “Natasha” (last name unknown), who is very likely a robo-signer and did not read or verify the contents of the document. Pursuant to RCW 61.24.020, a deed of trust is subject to all laws relating to mortgages on real property. An assignment of a mortgage is not effective until recording. RCW 61.16.020; see *Price v. Northern Bond & Mortg. Co.*, 161 Wash. 690, 696, 297 P. 786 (Wash. 1931) (where the assignment of a mortgage is not recorded, purchaser has right to assume no assignment has been made).

The appointment of successor trustee was signed by Heather Smith on January 14, 2013 but her signature is notarized on January 28, 2013, which is a fraudulent jurat. NWTS sent a notice of trustee’s sale recorded January 29, 2013, wherein it alleged that the sale would be performed to secure an obligation in favor of MERS solely as nominee for Bear Stearns Residential Mortgage Corporation, its successors and assigns. Bear Stearns collapsed in 2008, so not only was there no obligation in favor of MERS in 2013, but neither was there an obligation to Bear Stearns in 2013, since it no longer existed.

In sum, Appellant adequately pled a claim of common law fraud and misrepresentation: Elements 1-3 are met, as statements by Respondents on the recorded

documents are material representations that are false. Elements 4-5 are met, as MERS and Wells Fargo knew the statements in the assignments and appointment were false, and since they were recorded, they clearly intended Appellant to rely on those statements. Elements 6-8 are met, as Appellant justifiably relied on the presumption that if a foreclosure would be initiated, it would be done by the proper parties entitled to foreclose. She also relied on the presumption that the Respondents would operate in good faith with her in the loan modification process. She had no knowledge of the falsity of the statements made by Respondents and suffered damages in the process. On these grounds, she has stated a claim for fraud against Wells Fargo as Trustee for SAMI-II, who acted in collusion with Bear Stearns, MERS, and Northwest Trustee Services, Inc.

E. Respondents Breached the Contract With Appellant

Good faith and fair dealing duties are implied in every contract. *Badgett v. Security State Bank*, 116 Wn.2d 842, 807 P.2d 356 (1991). Good faith and fair dealing duties obligate the parties to cooperate with each other so that each may obtain the full benefit of performance. *Id.* Good faith and fair dealing are defined as honesty and lawfulness of purpose. *Tank v. State Farm Fire and Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Good faith and fair dealing involve: “[a]n honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with an absence of all information, notice or benefit or belief of facts which render the transaction unconscientious.” *Holman v. Coie*, 522 Wn.App. 195, 522 P.2d 515 (1974) quoting Black’s Law Dictionary 822 (4th ed. 1951). These duties include a duty to disclose relevant facts while negotiating. *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980).

Withholding such facts is considered fraudulent concealment. *Id.*; see also Restatement of Contracts §472 (1932).

Given these simple principles, it should be amply clear that Appellant's complaint sufficiently alleged a claim for breach of the duty of good faith and fair dealing as to these respondents. As the complaint states, the respondents acted in bad faith throughout their communications with Appellant. They were less than honest and did not exhibit lawfulness of purpose. By law, they were required to adhere to these values in negotiations as to the loan modification process. They simply failed to do this.

Appellant requested a loan modification and sent in the requested application documents at least nine times. The respondents engaged in subterfuge and delay in hopes of ultimately foreclosing on the property. Wells Fargo as Trustee for SAMI-II instructed Appellant to stop making payments on the loan. Respondents attempted and intended to include MERS as a party to the contract (Appellant's Deed of Trust) knowing that MERS never held the note and could not be a beneficiary or a party to the contract. This forced Appellant, without her knowledge, to enter into a contract with a fraudulent party. A Deed of Trust is a three-party contract (the borrower, the lender, and the trustee), and there is no allowance in the law for MERS to be a nominee or a beneficiary on a deed of trust. Appellant felt compelled to take legal action to assert her rights and protect her property because of Respondents' actions.

The duties of good faith and fair dealing are not met simply because the respondents believe an end result is convenient or justifiable. Rather, the duties pertain to the negotiations and communications that produce the end result. Further, as the cited cases demonstrate, these duties require adherence to such ideals as cooperation, honesty, and

lawfulness. Respondents actions did not meet these standards in their negotiations with Appellant.

VI. CONCLUSION

Based on the foregoing facts and legal arguments Appellant respectfully requests this court hold that the Superior Court was in error in dismissing Appellant's claims, and reverse the decision of the Superior Court on all counts and remand the case to Superior Court for discovery and further action.

Respectfully submitted this 17th day of June 2015.

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DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this 17th day of June 2015, I caused to be served a true and correct copy of the foregoing Appellant's Opening Brief on the parties mentioned below via e-mail:

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