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No. 72505-0-I

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

KEVIN J. SELKOWITZ

Appellant,

vs.

LITTON LOAN SERVICING LP, et al.,

Respondents.

BRIEF OF RESPONDENT QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation

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INTRODUCTION

Kevin Selkowitz does not dispute defaulting on his loan. Mr. Selkowitz also does not dispute that no foreclosure sale has been completed and that he remains in possession of the property pledged as security for payment on the defaulted loan. Rather, Mr. Selkowitz asserts that the simple inclusion of Mortgage Electronic Registration Systems, Inc. ("MERS") in his Deed of Trust, and again in an Appointment of Successor Trustee, without more and in and of itself renders the initiation of foreclosure wrongful and entitles him to damages.

The trial court granted Quality Loan Service Corporation of Washington's ("QLS's") motion for summary judgment and dismissed all claims against QLS. In doing so the court found, inter alia, that Litton Loan Servicing LP ("Litton") was the holder of the note entitled to foreclose; that QLS was entitled to rely on Litton's declaration; that QLS was duly appointed as successor trustee; and, that Mr. Selkowitz suffered no damages as the result of any acts on the part of QLS.

The trial court also separately granted MERS' and Litton's separate motions for summary judgment, dismissing Mr. Selkowitz's complaint against all defendants. (CP 2517-2527). Mr. Selkowitz assigns error to all three rulings.

STATEMENT OF ISSUES

Mr. Selkowitz alleges six claims against QLS in his complaint: i) violation of the Washington Consumer Protection Act ("CPA"); ii) violation of the Federal Fair Debt Collection Practices Act ("FDCPA"); iii) Libel/Defamation of Title; iv) Malicious Prosecution; v) Wrongful Foreclosure; and, vi) Quiet Title.

At summary judgment, Mr. Selkowitz conceded his claims for malicious prosecution and quiet title, apparently based on this Court's ruling in *Walker v. Quality Loan Service Corp, et al.*, 176 Wn.App.294, 308 P.3d 716(2013) (hereinafter "*Walker*") and *Bavand v. OneWest Bank, FSB, et al.*, 176 Wn.App.475, 309 P.3d 636 (2013), (hereinafter "*Bavand*").

Further, Mr. Selkowitz's appeal does not address dismissal of FDCPA claims against QLS, and thus this claim also appears conceded or abandoned.

Therefore, the only remaining claims raised and argued on appeal are those for slander of title; those based in alleged violation of the Deed of Trust Act,; and claims based in alleged violations of the CPA.

Recently, the Washington Supreme Court has made clear in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) that where, as here, no foreclosure sale has been completed, the Washington Deed of Trust Act ("DTA") does not create an independent cause of action for monetary damages based on alleged

violations of its provisions. Therefore, because no sale has occurred in the present case, it is without dispute that Mr. Selkowitz's claims under the DTA must fail.

Also quite recently, the Washington Supreme Court has held in *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 336 P.3d 1142 (Wash. 2014) that a claim under the CPA based on violations of the DTA must meet the same requirements applicable to any other CPA claim. *Lyons* 181 Wn.2d at 785.

Therefore, as framed by the *Frias* and *Lyons* decisions, the issues as to QLS are as follows:

1. Are there material issues for trial regarding whether QLS acted deceptively or unfairly and in violation of the provisions of the DTA (even assuming a violation of the DTA were possible absent a final sale) where Mr. Selkowitz was in default on his loan, Litton was the note holder entitled to foreclose, and, QLS reasonably relied on the Beneficiary Declaration provided to it by Litton that Litton held the note? Answer, no.
2. Are there material issues for trial to support the elements of Mr. Selkowitz's CPA claim, to wit,
    a. Did QLS commit an unfair or deceptive act or one that had the capacity to deceive where Mr. Selkowitz did not rely upon any documentation received from QLS and merely handed it to his attorney? Answer, no.

b. Did Mr. Selkowitz suffer any injury to his business or property due to any acts undertaken by QLS when he did not rely upon any documentation received from QLS but merely handed documents to his attorney for review; when it is acknowledged that QLS did not cause his default, prevent him from curing his default, or interfere in any manner with his loan modification negotiations, and, ceased all foreclosure proceedings upon being notified that he was in loan modification negotiations even before any loan modification agreement had been reached? Answer, no.

3. Did QLS slander title to Mr. Selkowitz's property by recording a notice of trustee sale when Mr. Selkowitz was in default on his loan, Litton was the note holder entitled to foreclose, Litton had QLS appointed as successor trustee prior to issuance of the notice of trustee sale, and, QLS relied on the Beneficiary Declaration provided to it by Litton that Litton held the note? Answer, no.

STATEMENT OF THE CASE

This action arises out of Mr. Selkowitz's default on his loan secured by real property located in King County commonly known as 6617 Southeast Cougar Mountain Way, Bellevue, WA 98006 (the "Property").

On or about October 30, 2006 Mr. Selkowitz purchased the Property. (CP 391 (6:11-20); CP 391 (11:2-4). The purchase price was approximately $380,000 (CP 393 (15:14-15), for which he borrowed almost all the purchase price (CP 414 (99:11-13)) taking out two loans, each secured by a deed of trust against the Property. (CP 393 (15:25-16:2)). The first loan, for $309,600, is the subject of this action. The first loan is evidenced by a note (the "Note") in favor of New Century Mortgage Corporation ("New Century") signed by Mr. Selkowitz. (CP 329-39). Mr. Selkowitz understood that he was promising to repay the money evidenced by the Note. (CP 396 (24:18-22)). Mr. Selkowitz also understood that New Century could transfer the Note (CP 329 para. 1) and that transfer of the note may result in a change of the Loan Servicer. He also understood that there may be one or more changes of the Loan Servicer. (CP 352).

New Century transferred the note to U.S. Bank National Association, as trustee for GSAA Home Equity Trust 2007-1, Asset-Backed Certificates, Series 2007-1. (CP 438 (21:3-12; CP 437 (14:18-22)). U.S. Bank and its servicers, including Litton, have had physical possession of the loan documents since 2006 through a custodian, Deutsche Bank. (CP 441 (42:17-43:15)). As custodian, Deutsche Bank kept the documents for U.S. Bank and its servicers and was required to provide the documents to the servicer on demand. (CP 384, 386-88).

The Deed of Trust signed by Mr. Selkowitz provides that if he defaults on the loan, the note holder can foreclose. (CP 341-66). Mr.

Selkowitz understood that if he defaulted on the loan, the noteholder would have the right to sell the Property in a foreclosure sale. (CP 396 (25:20-23, 27:5-6). Mr. Selkowitz made payments for at least a year after taking out the loan. (CP 398 (33:13-16)). Initially, he paid New Century (CP 398 (34:18-22). Subsequently he paid Avelo, a servicer for the loan, and thereafter, Litton, another servicer. (CP 398 (34:23-35:9, 35:19-25)).

Sometimes in 2008 or 2009, Mr. Selkowitz experienced financial difficulties and, as a result, stopped making payments on the Note. (CP 398 (35:19-21, 33:10-12)). Mr. Selkowitz knew that Litton was the servicer when he stopped making payments. (CP 398 (35:19-25)). He made payments to Litton before he defaulted. (CP 399 (37:5-6)). No one else was demanding payment from him and he had no reason to believe anyone other than Litton was his servicer. (CP 399 (36:12-20)).

At the time of default, Litton, as servicer for U.S. Bank, was in possession of Mr. Selkowitz's Note (through a custodian) and thus entitled to enforce it. (CP441 (42:17-43:15)).

On or about April 21, 2010 QLS received a referral from Litton to initiate foreclosure proceedings against the Property due to Mr. Selkowitz's default on his loan payments. At the time of the referral, Litton represented to QLS that Litton was the beneficiary under the Note authorized to foreclose on the Property. (CP 472 ¶3). On or about April 23, 2010, at Litton's request, QLS sent Plaintiff a Notice of Default as agent for the beneficiary of the Note. (CP 450 (59:8-14)). On or about May 12, 2010 QLS was appointed as Successor Trustee by Litton through

its agent, MERS. (CP 368-70). At the time of the Appointment, MERS was the record title beneficiary acting solely as a nominee for Lender and Lender's successors and assigns. (CP 341-66) The Appointment of Successor Trustee was recorded on May 20, 2010 as Instrument Number 20100520000866 in the office of the King County Auditor. (CP 475-476).

On or about May 25, 2010 QLS received a Declaration from Litton attesting that Litton was the actual holder of the Promissory Note secured by the Deed of Trust and that the promissory Note has not been assigned or transferred to any other person or entity. (CP 472 ¶6). QLS relied upon the Declaration in advancing the foreclosure proceedings. (CP 472 ¶7). The Notice of Trustee Sale dated May 27, 2010 was recorded on June 1, 2010. (CP 472 ¶8.)

Mr. Selkowitz was not confused about the identity of the entity to whom he was required to make payments. When he received the notice of default, he assumed it was from Litton. (CP 2496 (25:22-25); 2500 (47:21-25)).

Mr. Selkowitz did not rely upon any of the information contained in the Notice of Trustee Sale. At his deposition, he was not positive that he had ever even seen that document prior to the date of his deposition. (CP 2501 (111:13-17)

Mr. Selkowitz did not rely upon any of the information contained in the foreclosure documents he received from QLS as he did not do anything with them other than to hand them over to his attorney Richard Jones who was already representing him at that time. (CP 2503-4 (114-5:

19-25, 1-3).

On or about June 10, 2010 QLS was notified that Plaintiff was in negotiations with Litton to modify his loan. Accordingly, on June 10, 2010 the sale was cancelled and the file was placed on loss mitigation hold. The property was never sold at foreclosure and no further foreclosure proceedings were undertaken by QLS . (CP 473 ¶9).

When Mr. Selkowitz attempted to modify his loan with Litton, he knew that he should contact Litton to discuss a loan modification.. (CP 400 (40:23-41:5)), (CP 401 (44:15-18). At that time, he was already in communication with his attorney Richard Jones. (CP 2502 (112: 2-16)).

Mr. Selkowitz and Litton failed to reach a loan modification agreement. (CP 401 (47:8-20)). Mr. Selkowitz filed his lawsuit on June 24, 2010 at a time when no foreclosure sale was pending. The case was removed to the United States District Court pursuant to *28 USC 1446(a)* on July 27, 2010. During the proceedings the Honorable John Coughenour certified three questions to the Washington Supreme Court. These questions were answered in the matter of *Bain v. Metropolitan Mortgage,* 175 Wn.2d 83, 285 P.3d 34 (2012). Judge Coughenour remanded the case back to the Superior Court on or about November 14, 2012. (CP 161).

In June 2014 each of the Respondents brought their respective motions for summary judgment against Mr. Selkowitz. (CP 290-453; 456-470; 797-820). The trial court granted Respondents' motions for summary judgment on July 24, 2014. (CP 2517-2527). Mr. Selkowitz filed a motion for reconsideration on August 4, 2014 (CP 2528-2622) which motion was

denied on September 15, 2014. (CP 2670). Mr. Selkowitz filed his Notice of Appeal with this Court on September 18, 2014. (CP 2671-2687).

STANDARD OF REVIEW

This Court reviews a summary judgment order de novo, performing the same inquiry as the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott v. Pac. W. Mt. Resort,* 119 Wn2d 484, 502, 834 P.2d 6 (1992). "A material fact is one that affects the outcome of the litigation." *Owen*, 153 Wn.2d at 789.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Knox v. Microsoft Corp.*, 92 Wn.App. 204, 207, 962 P.2d 839 (1998). Once the moving party produces evidence showing the absence of disputed material facts, the burden shifts to the nonmoving party to produce admissible evidence setting forth facts showing a genuine issue for trial. CR 56(e). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Discover Bank v. Bridges*, 154 Wn.App. 722, 727, 226 P.3d 191 (2010) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

ARGUMENT

Mr. Selkowitz's theory of liability against QLS has expanded during the course of the litigation. His initial theory was premised on the proposition that initiation of non-judicial proceedings were wrongful and he is entitled to damages because the Substitution of Trustee appointing QLS as Substitute Foreclosure Trustee bears the name of "MERS" as the executing entity when MERS never possessed the Note and never received payments on the note. In his response to the summary judgment motions and on appeal, in apparent understanding that the Supreme Court in *Bain* authorized a Beneficiary's use of an agent and that this claim must fail for the reasons set out in subsequent decisions in this and other cases, Mr. Selkowitz adds or changes his theory to one premised on the proposition that only the owner of the note, i.e., the entity entitled to the stream of revenue, is entitled to foreclose and, if he can prove that the holder was not the "owner" as he uses that term, he should be entitled to damages. Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a). An appellate court generally will not review an issue, theory, argument, or claim of error not presented at the trial court level. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). Accordingly, Mr. Selkowitz's arguments pertaining to the "ownership" of the note should not be reviewed by this Court as they were not raised below.

A. Summary Judgment In Favor Of QLS Should Be Affirmed Because The Supreme Court In *Frias* Made Clear That Without A Sale, There Is No Viable Cause Of Action In This Case For Violation Of The Deed Of Trust Act.

There is no dispute in the record that the foreclosure sale was never completed. The Supreme Court in Frias explained that "[t]here is no actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale." *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 429, 334 P.3d 537 (2014). Because it is undisputed that in this case there is no completed foreclosure sale, it should be similarly undisputed that no claim based on alleged violations of the DTA can survive.

Notwithstanding the lack of legal basis for a DTA violation in this case, the alleged errors in the pre-sale foreclosure process do not give rise to compensable cause of action. QLS acted properly as agent of the beneficiary in issuing the NOD, QLS was appointed properly by an agent for the owner and holder, and QLS was entitled to rely on the beneficiary declaration together with Litton's claim that the loan was in default and that Litton was authorized to foreclose.

1. Selkowtiz's Allegations Regarding The Insufficiency Of The NOD Fail To Establish A Violation Of The DTA

Mr. Selkowitz alleges the NOD was defective because it failed to clearly identify the owner of the Note secured by the Deed of Trust. Mr. Selkowitz also argues that a trustee cannot be an agent for the beneficiary

in issuing the NOD without violating its duty of good faith to the borrower. Finally, Mr. Selkowitz asserts that these alleged defects caused him injury and damages. The plain language of the law rejects Mr. Selkowitz's theory on the ability of QLS to issue the NOD and the facts do not support any claim of injury or damage related to the NOD in any event.

The NOD was sent by QLS as agent for Litton, not as Trustee. The NOD, which may be sent either by the beneficiary or by the trustee under RCW 61.24.030(8), was sent by QLS on April 23, 2010 as agent for Litton. Under the DTA, a notice of default may be issued by the "beneficiary or trustee or an authorized agent." RCW 61.24.030(8); *see also* RCW 61.24.031(1)(a) ("A trustee, beneficiary, or authorized agent" may issue a notice of default). *Meyer v. U.S. Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 47745, 28 (W.D. Wash. Apr. 9, 2015)

Mr. Selkowitz has put forward no facts establishing that he suffered any injury or damages as a result of the information contained in the NOD. On the contrary, Mr. Selkowitz's own testimony by deposition established that i) He defaulted on his loan because he could not pay; not because of any information contained in the NOD; ii) At the time of default and shortly before his default he knew that he was to contact Litton in connection with issues pertaining to his loan, that he was in active loan modification negotiations with Litton at the time of default, and that the information contained in the NOD did not affect his default or these negotiations; and iii) Plaintiff was already represented by his counsel,

Richard Jones, when he received the NOD such that all foreclosure documents received were turned over to Mr. Jones with little or no review. (CP 2503-4 (114-15: 19-25, 1-3).

Consequently, Mr. Selkowitz's allegations concerning the sufficiency of the NOD fail to establish a violation of the DTA, even if a cause of action could lie for violation of the DTA absent a completed sale.

2. QLS Was Duly Appointed By The Holder Of The Note When Taking The Preliminary Steps In The Foreclosure Of The Loan.

Selkowitz erroneously argues that the beneficiary of the DOT must be the owner and holder of the note. The Supreme Court in *Bain* clearly and unambiguously held that the "beneficiary" of an instrument under the Deed of Trust Act is the actual holder of the promissory note. *Bain, supra.,* at 89. Therefore, this claim must fail.

Further, Mr. Selkowitz's challenge of QLS's authority to act as trustee on the grounds that the Appointment of Successor Trustee was executed by an agent for the actual holder is similarly without support as the trial court in fact had evidence supporting the authority of the agent.

a. Background on foreclosure standing in Washington.

For over 50 years, Washington's negotiable instrument law has been Article 3 of the Uniform Commercial Code ("UCC"). Under that law, a promissory note is a negotiable instrument. RCW 62A.3-104(a), (b), and (e). A note may be enforced by, "the holder of the instrument...." RCW 62A3-101. In turn, "holder" is the "person in possession of a negotiable

instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201 (b)(21)(A). Thus, the holder possesses a note payable or indorsed to itself or in blank.

In addition, "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument[.]" RCW 62A.3-101. The Washington Supreme Court recognized more than forty years ago that – for enforcement – what matters is who holds the Note, not who owns the rights to payments on the Note: "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-23 (1969) (citation omitted).

The Washington Supreme Court found as controlling the above UCC provisions defining "holder" and "person entitle to enforce" in nonjudicial foreclosure cases. *Bain, supra*, 175 Wn.2d at 103-104. It stated that to enforce a Note, and thus foreclose on any deed pledged to secure payment of the note, "a beneficiary must either actually possess the promissory note or be the payee," and a non-owner may enforce. *Id.*

This was recently affirmed in *Trujillo v. Nw. Tr. Servs., Inc.*, 326 P.3d 768, 776 (Wash. Ct. App. 2014). In finding that the trustee need not obtain proof of ownership, the Court stated as follows:

> We have no reason to conclude that the legislature intended to depart from either the common law, as

articulated in *John Davis*, or the UCC, as articulated in RCW 62A.3-301, in enacting RCW 61.24.030(7)(a) regarding proof of who is entitled to enforce a note that is secured by a deed of trust. The language of the first sentence of RCW 61.24.030(7)(a) could have more clearly stated that a beneficiary who is the owner of a note is not always the holder of the note. The holder is entitled to enforce it. Better still, the legislature could have eliminated any reference to "owner" of the note in this provision because it is the "holder" of the note who is entitled to enforce it, regardless of ownership.

Nevertheless, when we consider the second sentence of this statute, specifying that the beneficiary must be the holder of the note for purposes of proof, together with the case authority and other related statutes we have discussed, we must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note.

b. The *Bain* Court Expressly Recognized that MERS could Act as an Agent for the Note Holder and was authorized to appoint a successor Trustee.

The *Bain* court expressly recognized that it was "likely true" MERS could act as an agent for the Note holder principal, so long as the principal controlled MERS's actions. *Bain, supra,* at 106.

The principal that an agent may act for a Note holder is consistent with more than 100 years of Washington law. *See, e.g., Carr v. Cohn,* 44 Wn. 586, 588 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher,* 124 Wn. 517, 534-36 (1923) (bond holders' agent authorized to prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).

In the proceedings below, MERS conclusively established its authority to act as an agent for Litton, the actual holder of the Note. The deed of trust indicates that MERS was acting as the nominee for the original Lender and its successors and assigns (CP 342 at 2.), and MERS was authorized to take from and rely on instructions from Litton, the servicer and holder of Selkowitz's loan. (CP 428 (92:21-93:10).)

Litton, as holder of the Note, had the right to foreclose on the Property after Plaintiff's default. In furtherance of enforcing the Note and Deed of Trust, Litton had the right to appoint QLS as successor trustee, either directly or through an agent. As such, QLS was properly appointed and duly authorized to initiate foreclosure proceedings under the DTA.

c. QLS was entitled to rely on the beneficiary declaration in support of its actions to initiate a foreclosure.

Plaintiff cites *Lyons* in support of his argument that QLS was not entitled to rely on the Litton beneficiary declaration. Notwithstanding the obvious differences between the beneficiary declaration used in the *Lyons* case and the declaration in the case at bar, Mr. Selkowitz argues that the trustee had an obligation to determine what party was ultimately entitled

to the stream of revenue regardless of who actually held the note. Neither the *Lyons* case nor any other published decision supports this argument.

Contrary to Mr. Selkowitz's implication that the *Lyons* case stands for the proposition that only the owner, i.e., the entity entitled to the stream of revenue, is entitled to foreclose, the *Lyons* Court unequivocally held that, as the plain language of the statute provides, a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note ... shall be sufficient proof required of the trustee. *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 789-790, 336 P.3d 1142, 1150 (2014).

Litton was the holder of the Note at the time QLS initiated foreclosure and Litton provided QLS with the beneficiary declaration stating that it was the holder of the Note. Here, QLS relied upon the Beneficiary Declaration from Litton. (CP 472 ¶¶ 6,7) Under the DTA, the trustee is entitled to rely upon the Beneficiary Declaration when initiating non-judicial foreclosure proceedings on behalf of a beneficiary. Absent conflicting evidence, the declaration should be taken as true. *Trujillo v. Nw. Tr. Servs., Inc.*, 326 P.3d 768 (Wash. Ct. App. 2014).

In returning the case to the Superior Court, the Supreme Court in *Lyons* held that under the totality of circumstances as alleged, Ms. Lyons had a viable CPA against NWTS for violation of its duty of good faith. Among the facts in *Lyons* not present in the case at bar include a communicated transfer of servicing of the loan, allegations that requests were made of the trustee to cancel the sale but that no action was taken

quickly enough, and perhaps most important, the use of a Beneficiary Declaration that did not assert only that the beneficiary was the actual holder of the note.

Here, there are no facts concerning any transfer of the loan mid-foreclosure. Further, there is no argument concerning contact with the trustee. Finally, there are no assertions of any irregularity with the beneficiary declaration. The only beneficiary declaration provided to QLS was signed by a representative of Litton and attested that Litton was the actual holder of the Note.

Consequently, no legitimate argument calling into question the reliance of QLS upon the Beneficiary Declaration can be advanced in the case at bar.

3. The Court Should Disregard Mr. Selkowitz's Argument That Only The Note Owner May Foreclose As It Was Not Raised At The Trial Court.

Mr. Selkowitz argues that only the note owner, as contrasted with the note holder, has the authority to foreclose. Accordingly, QLS was required to ascertain who "owned" the Note before commencing foreclosure proceedings. (Plaintiff's Opening Brief at 27-30). This argument was not raised at the trial court and should be disregarded. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a).

B. Mr. Selkowitz's Claim Against QLS For CPA Violations Fails

Mr. Selkowitz's claim against QLS for violations of the DTA giving rise to a violation of the CPA fails. QLS was duly appointed successor trustee by Note holder Litton and authorized to initiate foreclosure proceedings under the DTA. Further, QLS was entitled to rely on Litton's Beneficiary Declaration in initiating the foreclosure proceedings. Thus, Plaintiff's CPA claim fails as a matter of law because Plaintiff cannot establish that QLS engaged in an unfair or deceptive act; that the conduct of QLS has any impact on the public interest; that any injury to Plaintiff's business or property occurred because of an action by QLS; or that any action of QLS caused any injury. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 739 (1987).

The purpose of the CPA is to protect consumers from harmful practices, which is why the plaintiff must show an actual or potential impact on the general public, not merely a private wrong. *Lightfoot v. Macdonald,* 86 Wn.2d 331, 333 (1976). A deceptive act must have the capacity to deceive a substantial portion of the population. *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 30 (1997).

1. No Deceptive Act Has Been Shown.

"[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.,* 162 Wn.2d 59. 74 (2007). A plaintiff can meet the first CPA element in only two ways, either by showing "that an act or practice "[i]'has a capacity to deceive a substantial

portion of the public' or [ii] that 'the alleged act constitutes a per se unfair trade practice.'" *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (*quoting Hangman Ridge*, 105 Wn.2d at 785-86). Plaintiff must therefore allege and prove facts showing Defendant's acts have the capacity to deceive a substantial portion of the public or cite to a *per se* unfair trade practice as set out by the Legislature. Here, Mr. Selkowitz can do neither.

QLS did not commit any *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being *per se* "unfair." *Hangman Ridge*, 105 Wn.2d at 787. Mr. Selkowitz cites no statutory violation that is a legislatively declared *per se* CPA violation, and thus there is no basis for a CPA claim tied to a *per se* "unfair" act or practice. Notably, MERS involvement alone is not itself an actionable injury under the CPA. *Bain, supra*, 175 Wn.2d at 120.

To show a defendant acted "unfairly" under the CPA – outside the context of a *per se* unfair trade practice -- a plaintiff must show that the defendant took some action violating the public interest, which typically requires a showing that the defendant's practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves or outweighed by countervailing benefits." *Klem v. Wash. Mut. Bank,* 295 P.3d 1179, 1187, ¶33 (Wash. 2013).

Here, Mr. Selkowitz neither alleges nor has facts to prove that QLS acted unfairly, let alone in a manner "likely to cause substantial injury to consumers." QLS relied upon the Beneficiary's Declaration in

advancing the foreclosure sale as it was authorized to do under the DTA. (CP 472 ¶¶6-7). Further, QLS was duly appointed by the Note holder Litton.

Mr. Selkowitz likewise cannot offer evidence establishing any deceptive practice by QLS. To be "deceptive," the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn.App. 726, 167 P.3d 1162, 1166 (2007). An act or practice may be deceptive under the CPA even if no intent or actual deception is shown. However, to be deceptive, the act or practice must have "the capacity to deceive a substantial portion of the public." *Bain, supra, at* 175 Wn.2d 115. Plaintiff has not shown any deceptive practices because he has failed to identify a single fact that QLS misled him about let alone, "a substantial portion of the public".

Mr. Selkowitz's claims against QLS, as expressed in his appeal, stem from assertions that QLS was purportedly erroneously appointed as trustee because i) MERS executed the appointment even though MERS was not the note holder (Opening Brief §C); ii) Litton was not the owner of the note, i.e., did not own the stream of revenue from the note (Opening Brief); and, iii) there were errors on the Deed of Trust and the Notices associated with the foreclosure. None of these assertions constitute grounds for deception. Mr. Selkowitz concedes that he never saw the appointment of trustee before his deposition and admitted that MERS's status as beneficiary did not matter to him. (CP 397 31:11-21)). Further, he concedes that he was never mislead or confused by any documentation

received from QLS regarding whom he should contact about his loan and admits that he entered into loan modification negotiations with his loan servicer, Litton. (CP 401 (44:15-18)). Finally, QLS was entitled to rely on Litton's Beneficiary Declaration. Accordingly, Plaintiff cannot meet the deception element of a CPA claim and this claim fails.

2. The Facts Do Not Show Any Public Interest.

Additionally, a plaintiff asserting a CPA claim must show that the act complained of impacts the public interest. *Hangman Ridge*, 105 Wn.2d at 788. The Court must consider this element in light of the context in which the alleged act was committed. *Id.* at 780. Because Plaintiff complains of a consumer transaction, the following factors are relevant:

> (1) Were the alleged acts committed in the course of the 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 plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Id. at 790. To the extent Mr. Selkowitz complains of errors in the Notice of Default and Notice of Trustee Sale, he makes no attempt to show any public interest in his claims. Further, he has not shown any likelihood of repetition of this complained-of conduct. This falls short of demonstrating a pattern or practice of QLS that is likely to be repeated in the future.

Accordingly, Mr. Selkowitz has failed to meet the public interest element of a CPA claim as to these allegations.

3. Plaintiff Has Not Shown Injury and Causation.

To prevail on a CPA claim, a plaintiff must also plead and prove a causal link between the alleged deceptive practice and her purported injury. Here, Mr. Selkowitz cannot establish causation or injury. Causation requires showing a causal link between the allegedly unfair act and Plaintiff's alleged injury. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277 (Wash. 2011). ("A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.') *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 81-82 (2007). To survive a motion for summary judgment, Mr. Selkowitz must allege and prove facts showing that but for QLS's' allegedly unfair or deceptive practice, he would not have been harmed. *Id.* Here, no such facts are alleged and Plaintiff has no evidence to prove such facts. Any purported damages he may have suffered were the result of his failure to meet his debt obligations that led to a default and ultimately the initiation of the foreclosure proceedings. The thrust of Mr. Selkowitz's arguments as to the Notice of Default (NOD) and Notice of Trustee Sale (NTS) appears to be that these notices were insufficient to provide him with adequate notice thereby causing him injury. His arguments on these grounds fail because he has no facts to establish that he relied in any way on these documents; that these documents failed to provide him with sufficient notice; or, that

he suffered any damages or injury as a result of these documents.

4. Damages for Attorney's Fees and Emotional Distress are not Compensable under the CPA as a Matter of Law.

The CPA requires evidence of an actual injury separate and distinct from attorneys' fees incurred in pursuing the lawsuit. While investigation expenses "and other costs resulting from a deceptive business practice" may constitute an injury under the CPA, the cost of "consulting an attorney to institute a CPA claim" does not constitute an injury. *Panag*, 166 Wn.2d 27, 62 (2009) citing *Demopolis v. Galvin,* 57 Wn. App. 47, 54-55 (1990) with approval.

Courts have repeatedly held that in cases where no foreclosure sale has taken place, such as here, funds spent pursuing a CPA claim are not recoverable injuries under the CPA. *Thurman v. Wells Fargo Home Mortg.*, 2013 U.S. Dist. LEXIS 109066 (D. Wash. 2013) citing *Gray v. Suttel & Assocs.*, No. 09-251, 2012 U.S. Dist. LEXIS 43885 at *20 (E.D. Wash. Mar. 28, 2012) ("[T]ime and financial resources expended to . . . pursue a WCPA claim do not satisfy the WCPA's injury requirement."); *Coleman v. Am. Commerce Ins. Co.*, No. 09-5721, 2010 U.S. Dist. LEXIS 97757, at *10 (W.D. Wash. Sept. 17, 2010) ("The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property."). In *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 U.S. Dist. LEXIS 46943 (W.D. Wash. Mar. 27, 2014) the court explained that even with fees and costs which may be deemed compensable such as investigative fees or other professional fees, such fees still do not

constitute injury and are not compensable unless the plaintiff is able to meet the causation component of the CPA claim and show that because of defendant's wrongful conduct plaintiff had to expend the fees.

Here, Mr. Selkowitz cannot show that because of QLS's wrongful conduct he had to expend fees. First, QLS's conduct was not wrongful. Second, Mr. Selkowitz has produced no evidence that he has expended any fees other than those in prosecution of the instant action.

Recovery under the CPA is limited to injury to business or property. Personal injuries including damages for stress, mental distress, inconvenience, and embarrassment are not compensable under the CPA. *Lyons* 181 Wn.2d at 786; *Panag v. Farmers Ins. Co. of Wash.,* 166 Wn2d 27, 57 (2009); *White River Estates v. Hiltbruner,* 134 Wn.2d 761, 765-766 (1998). Consequently, as a matter of law, Mr. Selkowitz could not recover for his alleged stress and mental anguish.

C. Mr. Selkowitz's Libel/Defamation of Title Claim Fails

Mr. Selkowitz's claim for Libel/Defamation of Title ("slander of title") is based on Defendants' alleged "recording and publishing Notices of Trustee's Sale [without] legal right to do so." (CP 6). This claim fails first because it is based on an erroneous theory concerning the authority of the trustee to act. Because QLS was duly authorized to act, this claim does not lie.

Further, Mr. Selkowitz does not and cannot prove the essential elements of a slander of title claim: (1) false words; (2) maliciously published; (3) with reference to a pending sale or purchase of the property;

(4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss. *Rorvig v. Douglas*, 123 Wn.2d 854, 859 (1994).

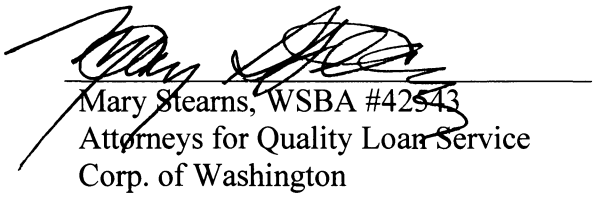
Mr. Selkowitz has not shown that the contents of the Notice of Turstee's Sale were false, that the Notice was recorded with any malicious intent or that he had a pending sale that was somehow disturbed by the notice and that there was any loss directly attributable to any of the notices recorded in this case. The record established in the trial court shows that Selkowitz stopped making payments on his loan and defaulted and any losses he might have suffered were due to the "economy tank[ing]" and the impact that had to his business. (CP 399 (37:25-38:13). Furthermore, Selkowitz admitted in his deposition that he didn't attempt to sell or lease the property during the foreclosure process. (CP 567 (122:14-20)). Because he fails to satisfy any of the elements of the slander of title claim, it must fail.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's order granting summary judgment for QLS.

RESPECTFULLY SUBMITTED this 15th day of May, 2015.

McCarthy & Holthus, LLP



Mary Stearns, WSBA #42543
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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on May 15, 2015, I caused the attached **BRIEF OF RESPONDENT QUALITY LOAN SERVICE CORPORATION OF WASHIGNTON,** to be served via U.S. Mail to the following addresses:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Anderson McLaurin, Civil Paralegal
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