

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LAWRENCE JAMETSKY, a single man,)	NO. 67176-6-I
))
Appellant,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
RODNEY A. and JANE DOE OLSEN; MATHEW and JANE DOE FLYNN,)	
)	
Respondents,)	FILED: October 29, 2012
)	
MICHAEL and JANE DOE HABER,)	
)	
Defendants.)	
)	

Leach, C.J. — Larry Jametsky appeals a trial court’s summary dismissal of his distressed property conveyances act (DPCA)¹ and Consumer Protection Act (CPA)² claims against Rodney Olsen, who purchased Jametsky’s house in 2008. Jametsky, however, failed to raise a genuine issue of material fact regarding whether his house was a “distressed property” at the time it was sold—a necessary element of a DPCA claim. And because Jametsky’s CPA claim entirely depended on him proving his DPCA claim, the trial court did not err by granting Olsen summary judgment. We affirm.

FACTS

¹ Ch. 61.34 RCW.

² Ch. 19.86 RCW.

In 2008, Jametsky approached a family friend, Roger Hager, for help to “save [his] house.” At the time, several debts encumbered Jametsky’s property. Hager introduced Jametsky to Michael Haber, a mortgage consultant who owned a company called Pine Mortgage. Haber contacted mortgage broker Matthew Flynn in October to ask whether Jametsky qualified for a home loan. Flynn met with Haber and Jametsky to assess Jametsky’s financial situation and determined that Jametsky did not qualify. Haber then told Flynn that Jametsky would consider selling his house. Flynn asked his acquaintance Rodney Olsen if he wanted to buy Jametsky’s house with a leaseback and option to purchase.³ Olsen agreed to buy Jametsky’s property for \$100,000.⁴

Olsen and Jametsky signed a real estate purchase and sale agreement on November 4.⁵ The next day, they entered into a lease-option agreement that allowed Jametsky to stay in the house for \$835 in monthly rent and gave him an 18-month option to repurchase the house for \$110,000. Olsen used the sales proceeds to pay off the liens on the property, including a \$58,221 mortgage loan, \$10,666 in unpaid property taxes (for the period from January 1, 2006, to January 1, 2009), \$1,819 in sewer charges, and two judgments totaling \$9,394.

³ Olsen explained in his declaration that he has known Flynn since 1998 and that “Flynn would contact me regarding investment opportunities.”

⁴ King County assessed the property’s value for tax purposes at \$272,000.

⁵ According to Jametsky, he did not realize that he was selling his house and thought the paperwork he signed was for a loan.

After the debts were paid, Jametsky received \$4,697 from the sale.⁶

Jametsky stopped paying rent after 15 months. On July 2, 2010, he filed a lawsuit against Olsen to quiet title under the theory that the property transfer violated the DPCA and the CPA.⁷ Jametsky named Olsen, Flynn, and Haber as defendants and asked the court to “[q]uiet title in favor of Plaintiff” and to “[a]ward damages, punitive damages, and penalties . . . jointly and severally against all Defendants.”⁸ Olsen sued Jametsky for unlawful detainer. The trial court consolidated the cases upon the parties’ stipulation and stayed Olsen’s unlawful detainer action as required by RCW 59.18.363.⁹

On March 24, 2011, Jametsky moved for partial summary judgment, arguing that his property was a “distressed home” under the DPCA because he was three years behind on his property taxes and feared King County would foreclose. Olsen moved to dismiss Jametsky’s complaint in its entirety on the basis that as a matter of law, Jametsky’s house was not a “distressed home.” Olsen argued that King County had not yet issued a certificate of delinquency

⁶ \$15,201 in “settlement charges” was also deducted from the sale proceeds.

⁷ Additionally, Jametsky alleged civil conspiracy but has not appealed the trial court’s dismissal of that claim.

⁸ Jametsky apparently never served Haber as a defendant.

⁹ RCW 59.18.363 requires “an automatic stay of [an unlawful detainer] action and a consolidation of the action with a pending or subsequent quiet title action when a defendant claims that the plaintiff acquired title to the property through a distressed home conveyance.”

and that no foreclosure action had been commenced against Jametsky's property due to the nonpayment of taxes. The trial court granted Olsen's motion and quieted title to the property in his name. Olsen moved for an award of attorney fees and costs based on a provision in the real estate purchase and sale agreement. The trial court awarded Olsen attorney fees and costs in the amount of \$14,453.67.¹⁰

Jametsky appeals.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court.¹¹ Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.¹² "A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation."¹³

This appeal also involves issues of statutory interpretation. "The meaning of a statute is a question of law we review de novo."¹⁴ When interpreting

¹⁰ The trial court also entered judgment for Olsen in the unlawful detainer action once the stay was lifted.

¹¹ Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003).

¹² Michak, 148 Wn.2d at 794-95 (quoting CR 56(c)).

¹³ Hulbert v. Port of Everett, 159 Wn. App. 389, 398, 245 P.3d 779, review denied, 171 Wn.2d 1024, 257 P.3d 662 (2011).

¹⁴ Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 624, 278 P.3d

statutory language, we aim to carry out the legislature's intent.¹⁵ "We determine the plain meaning of a statutory provision based on the statutory language and, if necessary, in the context of related statutes that disclose legislative intent about the provision in question."¹⁶ If a statute's meaning is plain on its face, we give effect to that plain meaning.¹⁷ Only if statutory language is ambiguous do we resort to aids of construction, including legislative history.¹⁸

ANALYSIS

Distressed Property Conveyances Act

The Statutory Scheme: The DPCA took effect on June 12, 2008. Its purpose is to protect financially strapped homeowners from "equity skimming" and foreclosure rescue scams.¹⁹ In its findings, the legislature states,

[P]ersons are engaging in patterns of conduct which defraud innocent homeowners of their equity interest or other value in residential dwellings under the guise of a purchase of the owner's residence but which is in fact a device to convert the owner's equity interest or other value in the residence to an equity skimmer, who fails to make payments, diverts the equity or other value to the skimmer's benefit, and leaves the innocent homeowner with a resulting financial loss or debt.

173 (2012).

¹⁵ Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 519, 22 P.3d 795 (2001).

¹⁶ Delyria v. Wash. State Sch. for the Blind, 165 Wn.2d 559, 563, 199 P.3d 980 (2009).

¹⁷ City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802 (2006).

¹⁸ Drebeck, 156 Wn.2d at 295.

¹⁹ RCW 61.34.010.

The legislature further finds this activity of equity skimming to be contrary to the public policy of this state and therefore establishes the crime of equity skimming to address this form of real estate fraud and abuse.^[20]

In response to the legislature's findings, the DPCA establishes requirements for the sale of "distressed homes." RCW 61.34.020(2) defines a "distressed home" as either (1) "a dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes" or (2) "a dwelling that is in danger of foreclosure or that is in the process of being foreclosed due to a default under the terms of a mortgage." While the legislature did not define "at risk of loss due to nonpayment of taxes," "in danger of foreclosure" means any of the following:

(a) The homeowner has defaulted on the mortgage and, under the terms of the mortgage, the mortgagee has the right to accelerate full payment of the mortgage and repossess, sell, or cause to be sold, the property;

(b) The homeowner is at least thirty days delinquent on any loan that is secured by the property; or

(c) The homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds, and the homeowner has reported this belief to:

(i) The mortgagee;

(ii) A person licensed or required to be licensed under chapter 19.134 RCW;

(iii) A person licensed or required to be licensed under chapter 19.146 RCW;

²⁰ RCW 61.34.010.

(iv) A person licensed or required to be licensed under chapter 18.85 RCW;

(v) An attorney-at-law;

(vi) A mortgage counselor or other credit counselor licensed or certified by any federal, state, or local agency; or

(vii) Any other party to a distressed home consulting transaction.^[21]

To protect owners of distressed homes, contracts between distressed homeowners and distressed home consultants must adhere to the DPCA's requirements. A "distressed home consultant" is a person who "solicits or contacts a distressed homeowner in writing, in person, or through any electronic or telecommunications medium and makes a representation or offer to perform any service that the person represents" will financially assist the distressed homeowner to save his or her home.²² Additionally, an individual may be a

²¹ RCW 61.34.020(11).

²² An individual may be labeled a "distressed home consultant" if he or she promises to do any of the following:

(i) Stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale;

(ii) Obtain forbearance from any servicer, beneficiary, or mortgagee;

(iii) Assist the distressed homeowner to exercise a right of reinstatement provided in the loan documents or to refinance a loan that is in foreclosure or is in danger of foreclosure;

(iv) Obtain an extension of the period within which the distressed homeowner may reinstate the distressed homeowner's obligation or extend the deadline to object to a ratification;

(v) Obtain a waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a distressed home or contained in the mortgage;

(vi) Assist the distressed homeowner to obtain a loan or

“distressed home consultant” if he or she “[s]ystematically contacts owners of property that court records, newspaper advertisements, or any other source demonstrate are in foreclosure or are in danger of foreclosure.”²³ Among other requirements, a contract between a distressed home consultant and a distressed homeowner must include a form notice that the contract could result in the loss

advance of funds;

(vii) Save the distressed homeowner’s residence from foreclosure;

(viii) Avoid or ameliorate the impairment of the distressed homeowner’s credit resulting from the recording of a notice of trustee sale, the filing of a petition to foreclose, or the conduct of a foreclosure sale;

(ix) Cause a contract to purchase an interest in the distressed home to be executed or closed within twenty days of an advertised or docketed foreclosure sale, unless the distressed homeowner is represented in the transaction by an attorney or a person licensed under chapter 18.85 RCW;

(x) Arrange for the distressed homeowner to become a lessee or tenant entitled to continue to reside in the distressed homeowner’s residence, unless (A) the continued residence is for a period of no more than twenty days after closing, (B) the purpose of the continued residence is to arrange for and relocate to a new residence, and (C) the distressed homeowner is represented in the transaction by an attorney or a person licensed and subject to chapter 18.85 RCW;

(xi) Arrange for the distressed homeowner to have an option to repurchase the distressed homeowner’s residence; or

(xii) Engage in any documentation, grant, conveyance, sale, lease, trust, or gift by which the distressed homeowner clogs the distressed homeowner’s equity of redemption in the distressed homeowner’s residence.

RCW 61.34.020(3)(a).

²³ RCW 61.34.020(3)(b). The DPCA specifically excludes some actors from this definition, including financial institutions, nonprofit credit counseling services, licensed mortgage brokers, attorneys, and real estate agents. RCW 61.34.020(3)(b).

of the homeowner's property.²⁴ The statute also establishes fiduciary obligations owed by distressed home consultants to a distressed homeowner.²⁵

Contracts between the purchaser of a distressed home and distressed homeowners must also conform to the DPCA's requirements.²⁶ In addition,

²⁴ RCW 61.34.050. Additionally, the contract must be in writing, in at least 12-point font, and if the homeowner customarily speaks a language other than English, it must be translated into that language. It must also disclose the "exact nature of the . . . consulting services to be provided," be dated and signed, and contain the consultant's full contact information.

²⁵ RCW 61.34.060.

²⁶ The contract must contain

(1) The name, business address, and telephone number of the distressed home purchaser;

(2) The address of the distressed home;

(3) The total consideration to be provided by the distressed home purchaser in connection with or incident to the sale;

(4) A complete description of the terms of payment or other consideration including, but not limited to, any services of any nature that the distressed home purchaser represents that he or she will perform for the distressed homeowner before or after the sale;

(5) The time at which possession is to be transferred to the distressed home purchaser;

(6) A complete description of the terms of any related agreement designed to allow the distressed homeowner to remain in the home, such as a rental agreement, repurchase agreement, or lease with option to buy;

(7) A complete description of the interest, if any, the distressed homeowner maintains in the proceeds of, or consideration to be paid upon, the resale of the distressed home;

(8) A notice of cancellation as provided in RCW 61.34.110; and

(9) The following notice in at least fourteen-point boldface type if the contract is printed, or in capital letters if the contract is typed, and completed with the name of the distressed home purchaser, immediately above the statement required in RCW 61.34.110;

"NOTICE REQUIRED BY WASHINGTON LAW

Until your right to cancel this contract has ended,(Name) or

distressed home purchasers must avoid specific activities that violate the DPCA.²⁷ For example, the statute requires a distressed home purchaser to verify the distressed homeowner's ability to pay the terms of any lease-option agreement and ensure that the distressed homeowner receives at least 82 percent of the distressed property's fair market value.²⁸ A distressed homeowner may cancel any contract with a distressed home purchaser within five days and must be given written notice of this right.²⁹ Until the right to cancel has expired, neither the distressed home purchaser nor his or her agent may ask the distressed homeowner to sign a deed.³⁰

Failure to adhere to the DPCA can result in both civil and criminal penalties.³¹ "Any person who willfully engages in a pattern of equity skimming is guilty of a class B felony."³² Additionally, a violation of the DPCA constitutes "an unfair method of competition" under the CPA.³³ In a personal action brought by a distressed homeowner, the court may award up to three times the amount of actual damages, not to exceed \$100,000.³⁴

anyone working for (Name) CANNOT ask you to sign or have you sign any deed or any other document."
RCW 61.34.090.

²⁷ RCW 61.34.120.

²⁸ RCW 61.34.120(1), (2)(b).

²⁹ RCW 61.34.100, .110.

³⁰ RCW 61.34.090.

³¹ RCW 61.34.030, .040.

³² RCW 61.34.030.

³³ RCW 61.34.040(1).

Jametsky's DPCA Claim: Jametsky's appeal turns on whether his property was a "distressed home." The parties dispute the meaning of "at risk of loss due to nonpayment of taxes," which the DPCA does not define. Jametsky argues that his property was at risk of loss because he was behind in his property tax payments and feared he would lose his house as a result. Olsen responds that a property is not at risk of loss until the county treasurer issues a certificate of delinquency, initiating the foreclosure process. RCW 84.64.050 describes what occurs when a property owner fails to pay his or her property taxes:

After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs.

. . . .

The treasurer shall file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer shall thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates.

Under RCW 84.64.050, a property is not subject to foreclosure until three years from the date of delinquency. Here, Olsen bought Jametsky's house in November 2008. At the time of the sale, Jametsky was delinquent on his 2006

³⁴ RCW 61.34.040(2).

taxes.³⁵ Therefore, the end of RCW 84.64.050's three-year grace period was still several months away when Jametsky sold his house to Olsen. Under these circumstances, Jametsky fails to raise a genuine issue of material fact regarding whether his property was a "distressed home."

For the purpose of reviewing the summary dismissal of Jametsky's claim, we accept that he may have truly feared that he would ultimately lose his house based on a failure to pay his property taxes. But this subjective, good faith belief that the property was at risk of loss for nonpayment of taxes does not meet the statute's requirements. The legislature adopted two alternative definitions for a "distressed home": (1) a dwelling in danger of foreclosure or at risk of loss due to nonpayment of taxes or (2) a dwelling in danger of or being foreclosed due to a default under the terms of a mortgage.³⁶ In the definition of "in danger of foreclosure," the legislature explicitly incorporated a good faith belief component: "[t]he homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds."³⁷ It did not include a parallel provision for when a party fears a risk of loss due to the nonpayment of taxes. Thus, the plain words of the DPCA do not make a good faith belief relevant to whether a dwelling is at risk for nonpayment

³⁵ An October 2008 title report prepared by Rainier Title lists the delinquent tax years on the property as 2006, 2007, and 2008.

³⁶ RCW 61.34.020(2).

³⁷ RCW 61.34.020(11)(c).

of taxes.

We also note that a dwelling may be in danger of foreclosure for nonpayment of taxes if the nonpayment is a default under the terms of an existing mortgage.³⁸ In this circumstance, a good faith belief would be relevant. But Jametsky did not provide the trial court with a copy of his mortgage or advance this argument. For these reasons, the trial court did not err by dismissing Jametsky's DPCA claim.

Consumer Protection Act

The CPA declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.³⁹ Generally, to prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.⁴⁰ Here, the legislature has provided that a DPCA violation is also a violation of the CPA. RCW 61.34.040(1) reads,

[T]he legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of

³⁸ RCW 61.34.020(12) defines mortgage as "a mortgage, mortgage deed, deed of trust, security agreement, or other instrument securing a mortgage loan and constituting a lien on or security interest in housing."

³⁹ RCW 19.86.020.

⁴⁰ Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

applying chapter 19.86 RCW [the CPA]. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair method of competition for the purpose of applying chapter 19.86 RCW.

Jametsky argues that because he has established a violation of the DPCA, he has also established a violation of the CPA. But Jametsky cannot prevail on his DPCA claim, therefore his CPA argument, which he bases entirely on the CPA's relationship to the DPCA, likewise fails. The trial court did not err by granting Olsen's summary judgment motion.

Attorney Fees

Olsen requests attorney fees and costs on appeal. In Washington, parties may recover attorney fees if allowed by statute, contract, or some well-recognized principle of equity.⁴¹ Here the real estate purchase and sale agreement and the lease both provide for an award of fees to the prevailing party in a dispute concerning the agreements. Because Olsen is the prevailing party on appeal, we award him attorney fees and costs conditioned on his compliance with RAP 18.1.

CONCLUSION

Because Jametsky has failed to raise a genuine issue of material fact regarding whether his property was at risk of loss due to nonpayment of taxes at

⁴¹ Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009).

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the time Olsen purchased it, we affirm the trial court's order granting Olsen summary judgment. We also award Olsen his reasonable attorney fees and costs on appeal.

Leach, C. J.

WE CONCUR:

Schiveller, J.

Grosse, J.