IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

BRIAN A. HEBERLING, Appellant, v. JPMORGAN CHASE BANK, a national association, Respondent, and WASHINGTON MUTUAL BANK, FA, a federal savings bank, and BANK of AMERICA, NA, Nation Association as trustee for WAMU Mortgage Pass-Through Certificates Series 2006-AR11, Defendants.	)	No. 67629-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 24, 2012

Spearman, J. — Brian Heberling appeals from summary judgment in favor of JPMorgan Chase Bank ("Chase") on his Consumer Protection Act (CPA) claim. Heberling alleges the manner in which Chase serviced his request for a loan modification constituted an unfair and deceptive act or practice in violation of the CPA. Holding there is no genuine issue of material fact as to the elements

of unfair act or practice or public interest, we affirm.

FACTS

On July 11, 2006, in consideration for a mortgage loan, Heberling executed a promissory note in the amount of $1,700,000, payable to Washington Mutual Bank, FA ("WaMu"), and a deed of trust in favor of WaMu.[1] The deed encumbered a piece of real property, which the parties refer to as the "1660 Property," located in King County. CP 454-76. The deed of trust states:

> ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

Clerk's Papers (CP) at 467. Heberling also executed promissory notes and deeds of trust in favor of WaMu for two other properties, one in King County ("1090 Property") and the other in Manzanita, Oregon ("Manzanita Property").

Sometime after executing these notes and deeds of trust, Heberling began experiencing financial hardship. Around July 24, 2008, he wrote to WaMu that he needed a cash infusion of $500,000 so that the 1660 Property could be resold. On July 31, he spoke with WaMu employee Christie Long, who advised him to submit financial information. On September 18 and 19, Heberling told Long he was facing cash flow difficulties and wanted to discuss options with WaMu. Long said a negotiator would review the available options. Heberling

[1] The deed of trust was recorded on July 13, 2006.

contacted Long several times between September 23 and October 10 without response. During this period, Chase, facilitated by the Federal Deposit Insurance Corporation (FDIC), acquired the WaMu's assets and assumed its qualified financial contracts. The terms of the purchase are set forth in a Purchase and Assumption Agreement, which states that Chase "assumes all mortgage servicing rights and obligations of the Failed Bank."[2] CP at 624.

Long contacted Heberling on October 14 and apologized for the delay, attributing it to processing changes and the reassignment of Heberling's file. She noted that "Brokers Price Opinions" had been ordered and once they were received a negotiator would move forward with his request for loan modifications. A week later, Heberling was told Michael Lemon had been assigned as the negotiator. Chase would not provide direct contact information for Lemon.

Heberling attempted to make loan payments at a local Chase branch on October 31, but they were refused. As of November 1, he did not make payments on the 1660 Property. On November 10, Lemon provided Heberling a modification proposal with specific interest rates for all three mortgage loans. When Heberling expressed concern about possible foreclosure for nonpayment due to the bank's refusal of payments, Lemon advised him it was customary for

[2] Chase employee Harold Galo explained the WaMu-to-Chase transition process during his deposition. He explained that after September 25, 2008, Chase took over for WaMu, and Chase was the entity doing business. Given this testimony, we will use "Chase" when referring to the bank for events after September 25, 2008, even where other evidence in the record refers to the acting entity as "WaMu."

the system to not allow for payments during the loan modification process. Lemon stated Heberling should not worry because all three loans were being modified and the missed payments would be rolled into the terms of the new loan. Heberling was told he should receive the modification paperwork by Thanksgiving.

On December 15, Lemon informed Heberling of a delay due to title report issues with all three properties. Lemon stated that the modification terms had changed and provided revised terms for the three loans. Heberling confirmed he was not making payments and was again advised that payments would not be accepted by the bank until the modification process was complete. The same day, Chase sent Heberling a letter and a debt validation notice informing him of the amount due on his loan for the 1660 Property. The following day, Heberling sent Lemon documentation to address the title report issues.

Chase informed Heberling on or about January 31, 2009 that loan modification for the 1660 Property was denied because of a title issue. Heberling contacted the bank and was told the documents he had sent had not been received. On February 24, he again sent documents to Lemon and a Chase representative in California. In early March, Heberling contacted Lemon to verify that the title issues had been resolved. On March 24, Lemon told Heberling the title issues on the 1660 Property had been cleared and the files were being transferred so that formal modification documents could be drawn up.

On or about April 2, Chase sent Heberling a letter and notice of collection activity for the 1660 Property, which stated that he had failed to make monthly payments since November 1, 2008. The letter stated that he might be eligible for a loan modification program but that approval could not be guaranteed. On or about April 30, Heberling received letters that stated he was approved for a three-month modification trial period for the 1090 Property and the Manzanita Property. He did not receive modification documents for the 1660 Property. He called and was told the documents would be coming.

On or about May 14, Heberling received a notice of default regarding the 1660 Property. The notice indicated he could lose the property at a foreclosure sale if he failed to respond. It stated he could cure the default by paying a specified amount. Heberling did not cure the default. On or about June 15, he received a notice of foreclosure and notice of trustee sale, stating the sale would be held on September 18, 2009. After he received these documents, he contacted Chase and was told to submit a new hardship letter. He sent documents to support his loan modification request. When Heberling expressed concerns about the foreclosure notices to Michelle Crawford, another Chase employee, he was told not to worry because the notices were automatically generated and it took time to get through the system. On or about September 14, a Chase representative told him the trustee sale was being postponed so that modification paperwork could be completed.

On September 21, Heberling was informed he did not qualify for a loan modification for the 1660 Property because his income was insufficient for the amount of credit requested. Although Heberling realized modification might not be granted, he believed the denial was based on incorrect data and sought to have the data corrected. A few days later, Heberling received a letter from Chase that stated modification was still pending and requested additional information from him. Heberling complied with the request. On October 20, a Chase representative informed him the data was accurate, the modification was denied, and the sale would continue unless he paid a sum over $100,000 within the next two days. Heberling considered borrowing money to cure the default, but ultimately did not do so. He also did not restrain the trustee sale through court action. On October 23, 2009, the foreclosure was completed with a trustee sale of the 1660 Property.

On November 19, 2009, Heberling filed a complaint against WaMu, Bank of America,[3] and Chase, asserting five causes of action for the defendants' alleged actions in orally representing to him that a loan modification would be granted for the 1660 Property and telling him not to worry about the foreclosure notices or about making payments, but then foreclosing on the property. The defendants moved for summary judgment. The trial court granted summary

[3] Heberling appears to have named Bank of America as a defendant because, according to the complaint, WaMu assigned its beneficial interest in the 1660 Property at some point prior to foreclosure to Bank of America.

judgment in the defendants' favor as to the claims for breach of contract, promissory estoppel, and negligence. The parties then engaged in discovery, taking depositions of Heberling and a Chase representative. On June 24, 2011, the defendants moved for summary judgment on the remaining claims for negligent misrepresentation and violation of the CPA. The court ruled there was no genuine issue of material fact and the defendants were entitled to judgment as a matter of law on these claims. Heberling appeals the dismissal of the CPA claim. Chase is the only defendant involved in this appeal.[4]

DISCUSSION

An order granting summary judgment is reviewed de novo. Beaupre v. Pierce County, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). Summary judgment is appropriate only when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

To prevail in a private action under the CPA, RCW 19.86.090, a plaintiff

[4] This court granted WaMu and Bank of America's motion to be dismissed as respondents from the appeal.

must establish the following elements: (1) the defendant engaged in an unfair or deceptive act or practice; (2) the act or practice occurred in the conduct of trade or commerce; (3) the act or practice impacted the public interest; (4) the plaintiff suffered injury in its business or property; and (5) a causal link exists between the unfair or deceptive act or practice and the injury suffered. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-93, 719 P.2d 531 (1986). Failure to meet any of these elements is fatal. Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Chase contends summary judgment was proper because Heberling's evidence did not create a genuine issue of material fact as to the first, third, fourth, and fifth elements. We agree regarding the first and third elements and affirm.[5]

Unfair or Deceptive Act or Practice

"Whether an action constitutes an unfair or deceptive practice is a question of law." Columbia Physical Therapy, Inc., PS v. Benton Franklin Orthopedic Associates, PLLC, 168 Wn.2d 421, 442, 228 P.3d 1260, 1270 (2010). An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. State v. Pacific Health Center, Inc., 135 Wn. App. 149, 170, 143 P.3d 618, 628 (2006). "Implicit in the definition of 'deceptive'

[5] Chase also argues that summary judgment should be affirmed because (1) Heberling's complaint did not allege that Chase—as opposed to WaMu—made promises to him; (2) Chase had no potential liability under the purchase and assumption agreement with the FDIC; and (3) Heberling's claims were barred under 12 U.S.C. § 1821(d)(13)(D). We do not reach these alternative arguments, and we also do not reach the fourth and fifth elements of the CPA claim.

under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

Heberling argues that Chase's acts had the capacity to deceive a substantial portion of the public for two reasons. First, because Chase's "standard form" said that the loan modification was approved. He contends a misrepresentation made to only one person has the capacity of deceiving a substantial portion of the public if made in a standard form, (citing Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 845, 942 P.2d 1072, 1078 (1997) and Henery v. Robinson, 67 Wn. App. 277, 291, 834 P.2d 1091 (1992)). He contends the document in question showed that loan modification had been approved because it stated, under "Step 5: Final Decision," "Offered Step Rate IO Balloon per manager approval." CP at 227. Second, he contends it was part of Chase's "established programs for loan modifications" to make false oral representations to customers that their loan modification requests would be approved.

We hold Heberling's evidence fails to create a genuine issue of material fact that Chase's actions in conducting the loan modification process in his case constitute an unfair or deceptive act or practice. First, the "standard form" in question was an internal Chase document of which Heberling was unaware during the loan modification transactions and that he did not receive until after

discovery began; accordingly, there was no misrepresentation by way of that document.[6] Second, although Heberling claims the false assurances he received were part of Chase's loan modification process, he points to no evidence that the representations were made to any other person or that they were otherwise a routine part of Chase's loan modification program. As such, Heberling's claim that any oral representations to him were part of Chase's "established programs" for loan modification, and thus had the capacity to deceive a substantial portion of the public, is not supported by the record.

Public Interest Impact

An act or practice is injurious to the public interest if it "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons."[7] RCW 19.86.093(3). A plaintiff must show "not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest." Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (citing Hangman Ridge, 105 Wn.2d at 788; Lightfoot v. MacDonald, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976)). As this court has recently stated:

[6] Moreover, Chase's representative testified in a deposition that this document did not mean Heberling had been offered a loan modification; rather, modification approval was "just a suggestion," and the "internal employee who created this is suggesting this but would need a manager approval." CP at 665.

[7] RCW 19.86.093, enacted in 2009, codifies the test for establishing injury to the public interest. Post-statute cases continue to apply the pre-statute principles of Hangman Ridge in determining whether the public interest element is met. See, e.g., Behnke ex rel. G.W. Skinner Children's Trust v. Ahrens, 169 Wn. App. 360, 372, 280 P.3d 496 (2012) (citing Hangman Ridge, 105 Wn.2d at 790-91).

> Where the transaction was essentially a private dispute rather than essentially a consumer transaction, it may be more difficult to show that the public has an interest in the subject matter. Hangman Ridge, 105 Wn.2d at 790, 719 P.3d 531. 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. . . . It is the likelihood that additional plaintiffs 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. Hangman Ridge, 105 Wn.2d at 791.

Behnke ex rel. G.W. Skinner Children's Trust v. Ahrens, 169 Wn. App. 360, 372, 280 P.3d 496 (2012).

Here, Heberling asserts in conclusory fashion that Chase's conduct has the capacity to injure other persons because it affects every homeowner who seeks a modification and results in foreclosures contrary to the assurances of Chase employees. But he does not offer evidence to show that the oral representation that forms the basis of his complaint, i.e., that his request for loan modification would be approved, was a "consumer transaction" rather than a private dispute between himself and Chase or that there is a "likelihood that additional plaintiffs have been or will be injured in exactly the same fashion." Behnke, 169 Wn. App. at 372 (citing Hangman Ridge, 105 Wn.2d at 791). Heberling admits he has no evidence that Chase or its employees made, to any other customer, an oral assurance that a loan modification would be approved.[8] In other words, he offers no evidence creating an issue of fact that Chase's

[8] Counsel for Heberling confirmed at oral argument before this court that there is no evidence in the record that oral assurances like the ones made to Heberling were made to anyone else.

conduct does in fact affect other homeowners.

Attorney's Fees and Costs on Appeal

Chase requests attorney's fees on appeal based on RAP 18.1(a) and the deed of trust, which contains the following attorney fee provision:

> Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal.

CP at 467. We do not award attorney's fees based on the deed of trust. Heberling's CPA action is not one "to construe or enforce" any term in the deed of trust.[9]

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Leach, C.J.

Cox, J.

[9] Chase's request for costs under RAP 14.2 and RAP 14.3(a) should be directed to the commissioner or court clerk. See RAP 14.2 ("A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.").