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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DJIBRIL DJIGAL, a married man as his sole and separate property, Appellant, v. QUALITY LOAN SERVICECORPORATION OF WASHINGTON, INC.; AURORA LOAN SERVICES, LLC; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; NATIONSTAR MORTGAGE, LLC; WILMINGTON TRUST COMPANY as Trustee for Lehman XS Trust Mortgage Pass - Through Certificates, Series 2007-6, and DOES 1-20, INCLUSIVE, Respondents.	No. 47595-2-II UNPUBLISHED OPINION

LEE, J. — Djibril Djigal appeals from the summary judgment dismissal of his claims for violations of the Consumer Protection Act (CPA), breach of duties under the Deed of Trust Act (DTA), and intentional and negligent misrepresentation against Quality Loan Service, Wilmington Trust Company, Aurora Loan Services, and Nationstar Mortgage. Djigal argues: (1) there is an issue of material fact as to who held the promissory note prior to July 1, 2012; (2) the October 26, 2012 appointment of successor trustee was improper under the DTA; (3) the declaration of beneficiary contains qualifying language not in compliance with the DTA; (4) an issue of material fact exist as to whether Djigal suffered an "injury" under the CPA and whether that "injury" was

"caused" by the defendants; and (5) an issue of material fact exist as to whether Djigal suffered an "injury" that was "caused" by the defendants to support his claims for intentional and negligent misrepresentation. We affirm the superior court's summary judgment dismissal of Djigal's claims.

FACTS

A. THE NOTE AND ITS MOVEMENT

On January 25, 2007, Djigal took out a mortgage on property he owns in Olympia, Washington (the Property). In doing so, Djigal executed a promissory note (the Note) in favor of Ward Lending Group, LLC,[1] and secured the Note with a deed of trust (the Deed of Trust) against the Property. The Deed of Trust identified Djigal as the Borrower, Ward as the Lender, Thurston County Title Company as the Trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary "acting solely as a nominee for Lender and Lender's successors and assigns." Clerk's Papers (CP) at 45-46. The Deed of Trust granted the power of sale to the Trustee upon Djigal's default.

Ward later indorsed the Note as payable to Lehman Brothers Bank, FSB. Lehman Brothers Bank, FSB then indorsed the Note to Lehman Brothers Holding, Inc.[2] Lehman Brothers Holding, Inc. then indorsed the Note to Aurora Loan Services, LLC (ALS). ALS then indorsed the Note in

[1] Ward is not a party to this suit.

[2] Neither Lehman Brothers Bank, FSB nor Lehman Brothers Holding, Inc. are parties to this suit.

blank on an allonge.[3] Neither the Deed of Trust nor the "note allonge" provide dates for the indorsements.

According to A.J. Loll, vice president of Nationstar Mortgage, LLC, the Note "was transferred into a securitization trust identified as Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6, of which Wilmington Trust Company is the trustee." CP at 277. ALS serviced the loan from February 26, 2007 to July 21, 2011, at which point servicing was transferred to the parent company of ALS, Aurora Bank, FSB (Aurora). ALS or Aurora maintained possession of the Note and Deed of Trust from February 26, 2007 until July 1, 2012, at which time Nationstar received the Note and Deed of Trust. CP at 277. From July 1, 2012 until February 5, 2014, Nationstar possessed the Note and Deed of Trust until they "were sent to Nationstar's counsel of record for use in this litigation. Since February 5, 2014, Nationstar's counsel has maintained possession of the Note and Deed of Trust on Nationstar's behalf." CP at 277-78.

B. QUALITY LOAN SERVICE'S AUTHORITY AS ATTORNEY-IN-FACT

On September 28, 2007, Nationstar signed a limited power of attorney appointing Quality Loan Service Corp. (QLS) as Nationstar's attorney-in-fact in executing specific documents enumerated in the limited power of attorney. The scope of authority that Nationstar granted to

[3] ALS's blank indorsement was made on an allonge. An allonge is a paper attached to a negotiable instrument for purposes of receiving further indorsements. BLACK'S LAW DICTIONARY 88 (9th ed. 2009); *see* UCC § 3-204 (defining "Indorsement"). A "blank indorsement" is an indorsement that does not identify a person to whom the instrument is payable. RCW 62A.3-205(a)-(b).

QLS to act as Nationstar's attorney-in-fact was

> restricted to the execution of the following documents in connection with such Non-Judicial Foreclosure proceedings or acceptance of a Deed in Lieu of Foreclosure:
>
> - Substitution of Trustee
> - Appointment of successor Trustee
> - Assignment of Deed of Trust
> - Notice of Default
> - Request for Reconveyance
> - Reconveyance of Deed of Trust
> - Execution of Declaration re Indebtedness
> - Grant Deed of Property following foreclosure sale
>
> Nationstar Mortgage, LLC, further gives to said attorney in fact the authority to perform any act which may be deemed necessary in the exercise of the foregoing as fully as might or could be done if a corporate officer was personally present, and hereby ratifies and confirms all that said attorney in fact shall lawfully do or cause to be done in exercising those powers by the authority herein granted.

CP at 489.

C. DJIGAL'S DEFAULT

In 2008, Djigal fell behind on his mortgage payments. On February 27, 2009, QLS issued a notice of default to Djigal. QLS signed the Notice of Default "as Agent for [MERS], the Beneficiary." CP at 76.

On March 5, 2009, MERS appointed QLS as successor trustee of the Deed of Trust via an Appointment of Successor Trustee that was signed by Sierra West, assistant secretary for MERS. This appointment of successor trustee was recorded with the Thurston County Auditor.[4]

[4] On April 2, 2009, QLS, as trustee, issued a notice of trustee's sale and recorded it in Thurston County. The trustee's sale was scheduled for July 10, 2009, but no sale was ever held.

Djigal acknowledges that by November 2009, his loan was being serviced by ALS,[5] and the record shows he worked with ALS on potential loan modifications from early November 2009 through February 2011. On November 2, a Home Affordable Modification Plan (HAMP) was set up for Djigal.

On December 30, 2009, MERS "as nominee for Ward," executed a notarized corporate assignment of deed of trust in favor of ALS. CP at 85 (some capitalization omitted). The same day, a senior vice president of ALS signed a declaration of ownership stating that ALS "is the actual holder of the Promissory Note evidencing" Djigal's loan. CP at 87, 354. The corporate assignment of deed of trust shows it was recorded in Thurston County on December 22, 2010.

On February 9, 2011, ALS sent Djigal a letter alerting him that the foreclosure alternative option had been denied because of "[i]nsufficient time to complete transaction." CP at 185. On February 17, Djigal and his wife filed a voluntary Chapter 13 Bankruptcy petition. The Chapter 13 case was dismissed by the Bankruptcy Court on July 26, 2012 for "failure to make plan payments." CP at 121.

On August 27, 2012, QLS, as trustee, recorded a third notice of trustee's sale[6] with Thurston County.[7] On October 17, a corporate assignment of deed of trust was recorded in

[5] Djigal's first amended complaint says, "Defendant Aurora" was the group servicing his loan. CP at 24. ALS is the only defendant listed in the caption with "Aurora" as part of its name. CP at 21.

[6] A notice of trustee's sale was recorded on April 6, 2009 and filed with Thurston County, but no sale was ever held. A second notice of trustee's sale was recorded in Thurston County on July 26, 2010, but the sale was never held.

[7] The trustee's sale was scheduled for December 28, 2012, but no sale was ever held.

Thurston County, wherein ALS assigned the Deed of Trust to Nationstar.[8] On October 26, Nationstar, as the beneficiary, appointed QLS as successor trustee in an appointment of successor trustee.

On March 12, 2013, an assistant secretary for Nationstar signed a declaration of beneficiary. The declaration of beneficiary stated that the "undersigned declares that it is the Beneficiary or the authorized Agent for the Beneficiary who is the actual holder of [the Note]," and that "Nationstar Mortgage LLC is the actual holder of the [Note]." CP at 356.

On April 23, 2013, QLS, as trustee, recorded a fourth notice of trustee's sale in Thurston County. The trustee's sale was scheduled for August 23. No trustee's sale was held and a notice of discontinuance of the trustee's sale was filed on December 13.

On July 22, 2013, Nationstar sent Djigal a letter stating Djigal was in default and that Nationstar would accelerate the loan, potentially resulting in foreclosure. The letter stated it was providing "formal notice by [Nationstar], the Servicer of the above-referenced loan, on behalf of '[Wilmington] as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6', the Creditor to whom the debt is owed." CP at 446.

Djigal filed suit on August 21, and then filed his first amended complaint on August 30. In his first amended complaint, Djigal requested a temporary restraining order and preliminary injunction to enjoin the fourth notice of trustee's sale, and asserted violations of the CPA, breach of duties under the DTA, and intentional and/or negligent misrepresentation. Djigal admitted that he was unable to pay the amount required in arrears on the fourth notice of trustee's sale.

[8] The document states that the date of assignment was June 29, 2012, and it was signed before a notary on July 2.

On January 10, 2014, the superior court dismissed all of the causes of action against MERS; all claims for violations of the CPA that were based on conduct occurring before August 21, 2009; all of the claims for breach of duties under the Deed of Trust Act that were based on conduct occurring before August 21, 2010; and claims of intentional and negligent misrepresentation that were based on conduct occurring before August 21, 2010. This order was never appealed.[9]

On March 6, 2015, ALS, Nationstar, Wilmington, and QLS moved for summary judgment. Argument was held on April 17, for both motions. The superior court granted summary judgment in favor of ALS, Nationstar, Wilmington, and QLS, dismissing the lawsuit against them in its entirety. Djigal appeals.

ANALYSIS

A. STANDARD OF REVIEW ON SUMMARY JUDGMENT

We review summary judgment orders de novo. *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

[9] In the "Statement of the Case" section of Djigal's brief, he "maintains that those rulings were incorrect as well." Br. of Appellant at 10. But no notice of appeal from the January 10, 2014 ruling exists in the record on this appeal. Djigal only assigns error to the orders from the April 17, 2015 motions for summary judgment; Djigal does not assign error to the January 10, 2014 order in his assignments of error. Even if an appeal from the January 10, 2014 order was before this court, Djigal does not present any argument, authority, or discussion on the issue. Therefore, the January 10, 2014 order is binding, and we do not consider conduct occurring before August 21, 2009 to support Djigal's current CPA claims, or conduct occurring before August 21, 2010 to support Djigal's breach of duties under the DTA and misrepresentation claims. RAP 2.4(a); RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, although MERS is named in the caption as a defendant in this case, no cause of action against MERS remains.

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

A defendant who moves for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once that burden is met, the burden shifts to the party with the burden of proof at trial to "'make a showing sufficient to establish the existence of an element essential to that party's case.'" *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In demonstrating the existence of material facts, the nonmoving party may not rely on "mere allegations . . . , but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." CR 56(e). We draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

B. NOTEHOLDER AND SUCCESSOR TRUSTEE

Djigal argues that "[t]here was no credible, uncontroverted evidence regarding the identity of the loan owner and noteholder in connection with the multiple attempted nonjudicial foreclosures." Br. of Appellant at 7. Specifically, Djigal argues that (1) there is an issue of material fact as to who held the Note prior to July 1, 2012; and (2) under the DTA, the October 26, 2012 appointment of successor trustee was improperly signed by QLS, rather than Nationstar, and it was improperly filed after the third notice of trustee's sale was filed. We disagree.

1. Noteholder Before July 1, 2012

Djigal argues that the court erred in granting summary judgment because no documentation supported the statements made in the declaration by A.J. Loll, the Nationstar vice president, regarding who held the Note prior to July 1, 2012. We hold that Djigal fails to establish a genuine issue of material fact exists as to who held the Note prior to July 1, 2012.

"When indorsed in blank, an instrument becomes payable to bearer." RCW 62A.3-205(b). A "'[h]older with respect to a negotiable instrument" is a "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(21)(A).[10] The "holder" of the note is not necessarily the "owner," and a holder does not need to own a note to enforce the note. *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 525, 359 P.3d 771 (2015). However, "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 nonjudicial foreclosure on real property." *Bain v. Metro. Mortg. Grp, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). Similarly, a loan "servicer" is not necessarily the owner, but the servicer must be a holder of the Note in order to enforce the Note.

[10] The Note at issue here is a "negotiable instrument." As relevant here, a "negotiable instrument" is "an unconditional promise or order to pay a fixed amount of money" if three requirements are met. RCW 62A.3–104(a). The instrument must (1) be "payable to bearer or to order at the time it is issued or first comes into possession of a holder"; (2) be "payable on demand or at a definite time"; and (3) concern only a promise to pay money, rather than any other performance (except for certain limited exceptions that allow nonmonetary performance, including that the instrument may include an undertaking or power to give, maintain, or protect collateral to secure payment). RCW 62A.3-104(a)(1)-(3). Here, as to the first element, the note at issue here is indorsed in blank, and thus, the note is payable to the bearer. RCW 62A.3-205(b). As to the second element, the note is payable at a definite time, namely the first day of every month until February 1, 2037. *See also* RCW 62A.3-108(b). As to the third element, the note concerns only Djigal's obligation to pay money and no other performance.

Brown, 184 Wn.2d at 523. "[A] party's undisputed declaration submitted under penalty of perjury that the party is the holder of the note satisfies the DTA's proof of beneficiary provisions." *Id.* at 514.

Here, Loll submitted a declaration stating ALS serviced the loan from February 26, 2007 to July 21, 2011, at which point servicing was transferred to the parent company of ALS, Aurora. Loll also stated that ALS or Aurora maintained possession of the Note and Deed of Trust until July 1, 2012, at which time Nationstar received the Note and Deed of Trust.

Beyond Loll's declaration, the record shows that the Note was indorsed to ALS and then ALS indorsed the Note in blank. After ALS indorsed the Note in blank, the person or entity in possession was the holder of the Note. RCW 62A.1-201(21)(A); RCW 62A.3-205. A declaration of ownership signed on December 30, 2009, states that ALS was the "actual holder" of the Note. CP at 354. The record also contains a declaration of beneficiary signed on March 12, 2013, that states Nationstar was the "actual holder" of the Note. CP at 356. This record is consistent with Loll's declaration that ALS was servicing the Note between February 26, 2007 and July 21, 2011, Aurora had possession of the Note from July 21, 2011 until July 1, 2012, and Nationstar and its attorneys have held the Note since July 1, 2012.

Djigal does not identify anything in the record that contradicts, or creates a question of fact regarding, who held the Note. Djigal's argument that "no credible evidence" supports Loll's declaration does not create an issue of material fact. Br. of Appellant at 23 (boldface omitted). Loll's declaration is, in fact, evidence, and Djigal does not point to anything that challenges the content of Loll's declaration. Thus, Djigal fails to establish a genuine issue of material fact exists as to who held the Note prior to July 1, 2012.

2. October 26, 2012 Appointment of Successor Trustee

Djigal contends that (1) the October 26, 2012 appointment of QLS as successor trustee was improper because it was signed by QLS rather than by Nationstar, and (2) the October 26, 2012 appointment of successor trustee was "improper" because "[it] was signed and recorded **two months** after QLS issued a [notice of trustee sale]." Br. of Appellant at 7. His arguments fail.

a. QLS was Nationstar's agent

Djigal first contends the appointment of successor trustee was "improper" because it was signed by a QLS employee, rather than a Nationstar employee. This argument fails because QLS was Nationstar's agent with specific authority to sign appointment of successor trustee documents.

"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." *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 306, 308 P.3d 716 (2013) (footnotes omitted). Noteholders can have their interests represented by agents. *Bain*, 175 Wn.2d at 106. "'[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.'" *Id.* (quoting *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)). "[A]gency requires a specific principal that is accountable for the acts of its agent." *Id.* at 107.

Here, Nationstar was the lawful beneficiary of the Note when the appointment of successor trustee was signed and filed because Nationstar was in possession of the Note indorsed in blank.

See CP at 277-78 (stating that Nationstar and its attorneys have held the Note since July 1, 2012); *Bain*, 175 Wn.2d at 89 ("only the actual holder of the promissory note . . . may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property."). Accordingly, Nationstar had the authority to appoint a successor trustee on October 26, 2012.

QLS was appointed by Nationstar to act as Nationstar's attorney-in-fact on September 28, 2007, through a limited power of attorney. The limited power of attorney was signed by a vice president of Nationstar and limited the scope of QLS's power of attorney to the execution of an enumerated list of documents. Included in the list of documents QLS was entitled to execute as Nationstar's attorney-in-fact was the "Appointment of successor Trustee" documents. CP at 489. Thus, QLS was Nationstar's agent because the limited power of attorney was a clear "manifestation of consent by" Nationstar that QLS "shall act on [its] behalf," with respect to the execution of appointment of successor trustee documents. *Bain*, 175 Wn.2d at 106. It was proper for QLS to sign the October 26, 2012 appointment of successor trustee because QLS was Nationstar's (the Noteholder's) agent with specific authority to execute appointment of successor trustee documents.

b. Absence of authority for sequence of filings argument

Djigal next contends that the October 26, 2012 appointment of successor trustee was "improper" because "it was signed . . . and recorded **two months** after QLS issued a NOTS [notice of trustee's sale]." Br. of Appellant at 7. Djigal's contention is without merit because he filed suit to challenge the fourth notice of trustee's sale that QLS, as trustee, filed on April 23, 2013. Thus, QLS had already been appointed successor trustee by the time QLS filed the notice of trustee sale on April 23, 2013. Djigal's contention fails.

c. No cause of action under the DTA

Djigal cannot succeed on claims under the DTA because a foreclosure sale has not been completed on the Property. In *Frias v. Asset Foreclosure Services., Inc.*, 181 Wn.2d 412, 433, 334 P.3d 529 (2014), our Supreme Court held that a plaintiff cannot maintain a claim for monetary damages under the DTA in the absence of a completed nonjudicial foreclosure sale of the property. Although notice of trustee's sales were issued against Djigal's property, the trustee sales were cancelled and a nonjudicial foreclosure never occurred. Accordingly, under *Frias*, Djigal cannot, as a matter of law, bring a DTA claim for monetary damages, and we affirm the superior court's dismissal of those claims.

C. DECLARATION OF BENEFICIARY SATISFIES RCW 61.24.030(7)

Djigal argues the superior court erred because the "2012 Beneficiary Declaration had qualifying language . . . not in compliance with the requirements of the DTA."[11] Br. of Appellant at 7. We disagree.

Nonjudicial foreclosures are controlled by RCW 61.24.030(7), which states,

> (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
>
> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

[11] A "2012 Beneficiary Declaration" does not exist in our record and Djigal provides no citation to the record. The only similar document is the "Declaration of Beneficiary" that was signed and dated on March 12, 2013. CP at 356. Consequently, we assume "2012" was a scrivener's error and review the contents of the 2013 declaration of beneficiary for error.

In *Lyons v. U.S. Bank National Association*, our Supreme Court considered a beneficiary declaration executed by a Wells Fargo employee that said, "'Wells Fargo Bank, NA, is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation.'" 181 Wn.2d 775, 780, 336 P.3d 1142 (2014) (quoting the record). The court held that this declaration did not comply with RCW 62.42.030(7)(a) because, on its face, the declaration was ambiguous as to which of the three grounds under RCW 62A.3-301[12] beneficiary status was claimed. *Lyons*, 181 Wn.2d at 790. The court further held that the person or entity purporting to be the beneficiary satisfies RCW 61.24.030(7)(a) by providing a declaration that states it is the "actual holder" of the note. *Lyons*, 181 Wn.2d at 790; *see also Brown*, 184 Wn.2d at 542 ("a trustee can rely on a declaration consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder").

In *Trujillo v. Northwest Trustee Services, Inc.*, our Supreme Court again considered a beneficiary declaration that stated, "'Wells Fargo Bank, NA is the actual holder of the promissory note . . . *or* has the requisite authority under RCW 62A.3-301 to enforce said [note].'" 183 Wn.2d 820, 826, 355 P.3d 1100 (2015) (quoting the record) (alteration in original). The court again held

[12] RCW 62A.3-301 states:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

"that a trustee cannot rely on a beneficiary declaration containing such ambiguous language." *Id*.

Here, the 2013 declaration of beneficiary does not suffer the same ambiguity as in the beneficiary declarations in *Lyons* and *Trujillo*. The 2013 declaration of beneficiary stated the following:

> The undersigned declares that it is the Beneficiary or the authorized Agent for the Beneficiary who is the actual holder of that certain Promissory Note or other obligation which is secured by the below referenced Deed of Trust, and hereby represents and declares further as follows:
>
> . . . .
>
> 3) Nationstar Mortgage LLC is the actual holder of the Promissory Note dated 1/25/2007, in the principal amount of $524, 800.00, which is secured by the Deed of Trust recorded in THURSTON County under Auditor s File No. 3898833.

CP at 356. The signature lines on the declaration of beneficiary were as follows:

> Dated: March 12, 13 Nationstar Mortgage LLC
>
> Beneficiary/Authorized Agent for Beneficiary
> By: [signature] 3.12.13
> Its: Eric Acklin Assistant Secretary

CP at 356.

There is no ambiguity in the language that states, "Nationstar Mortgage LLC is the *actual holder* of the Promissory Note dated 1/25/2007, in the principal amount of $524,800.00, which is secured by the Deed of Trust recorded in THURSTON County under Auditor s File No. 3898833," because it does not have the "or" language that plagued the declarations in *Lyons* and *Trujillo*. CP at 356 (emphasis added). The 2013 declaration of beneficiary can be relied upon by a trustee because the declaration states that the beneficiary, Nationstar, is the "actual holder" of the Note. *Lyons*, 181 Wn.2d at 790; *see also Brown*, 184 Wn.2d at 542 ("a trustee can rely on a declaration

consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder").

To the extent Djigal's argument refers to the introductory language at the top of the 2013 declaration of beneficiary that states, "The undersigned declares that it is the Beneficiary *or* the authorized Agent for the Beneficiary who is the actual holder of that certain Promissory Note . . . , and hereby represents and declares further as follows," this argument also fails. CP at 356 (emphasis added). Any ambiguity in the introductory language goes to whether the person making the declaration is the beneficiary or the beneficiary's agent. *Lyons*, *Trujillo*, and *Brown* were concerned with whether there is ambiguity in the language as to who the actual holder of the promissory note is, not whether the declaration is made by the beneficiary or the beneficiary's agent.

Moreover, agency law requires that if the beneficiary is a corporation, then an agent of the beneficiary necessarily must make the declaration. Where the beneficiary of the promissory note is a corporation, it would be impossible for the corporation to make a declaration swearing under penalty of perjury that it is the beneficiary without the use of an agent because corporations are necessarily only able to act through their agents. *See e.g. Frigidaire Sales Corp v. Union Props., Inc.*, 88 Wn.2d 400, 405, 562 P.2d 244 (1977); ("Although the corporation was a separate entity, it could act only through its board of directors, officers, and agents."); *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) ("A corporation can act only through its agents, and when its agents act within the scope of their authority, their actions are the actions of the corporation itself."); *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wn. App. 249, 263, 254 P.3d 827 (2011) ("LLCs, like corporations, are artificial entities that act only through

member/agents."). And, as noted above, agents are allowed to represent noteholders. *Bain*, 175 Wn.2d at 106. Thus, there is nothing ambiguous about language in a declaration of beneficiary that states that the person making the declaration under penalty of perjury is either the beneficiary or the beneficiary's agent, when the substance of the declaration unambiguously states who the actual holder of the note is, and the declaration of beneficiary is signed by the beneficiary's agent. Accordingly, to the extent Djigal's argument refers to the language at the top of the 2013 declaration of beneficiary that states, "The undersigned declares that it is the Beneficiary *or* the authorized Agent for the Beneficiary," such argument fails. CP at 356 (emphasis added).

Djigal also argues that the DTA was violated because QLS "accept[ed] a defective 'beneficiary declaration' that was not signed by the loan owner or noteholder." *See e.g.* Br. of Appellant at 4. However, a beneficiary declaration does not need to be signed by a loan owner; it is sufficient if it is signed by the actual holder. *Brown*, 184 Wn.2d at 542 ("a trustee can rely on a declaration consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder"). Here, the undisputed evidence shows that the beneficiary declaration was signed by Nationstar's agent under penalty of perjury that Nationstar was the "actual holder" of the note. Djigal's argument fails.

D. INJURY UNDER THE CPA

Djigal argues that he "clearly articulated his 'injury' caused by the Defendants, as well as monetary damages, such that he is entitled to relief under the CPA." Br. of Appellant at 8. Djigal appears to contend that an issue of material fact remains as to whether he suffered an "injury," and that an issue of material fact remains as to whether the defendants "caused" that "injury." We disagree.

To prevail on a CPA claim, a "plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). "[W]here a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007). "Washington requires a private CPA plaintiff to establish the deceptive act caused injury." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009).

"[T]he injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" *Panag*, 166 Wn.2d at 57 (quoting *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). "[D]amages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag*, 166 Wn.2d at 57. Similarly,

> [c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. . . . [T]he latter is insufficient to show injury to business or property, the former is not. Investigation expenses and other costs resulting from a deceptive business practice sufficiently establish injury.

Panag, 166 Wn.2d at 62.

Djigal relies on a declaration he provided in opposition to the motions for summary judgment to support his argument that issues of material fact exist as to whether he has suffered an injury caused by the defendants under the CPA. The declaration states:

> I continue to face the loss of my home and have been trying to prevent it for years. I am challenging all of the amounts that have been added to his [sic] loan balance related to all of the attempts to foreclose that were done by entities who did not have the legal authority to do so. I know that I am responsible for making my mortgage payments, but that does not excuse the Defendants from complying with the law. In connection with my efforts to save my home, I had to pay Ms. Huelsman an initial consultation fee related to obtaining her assistance in investigating my claims and the issues related to all of the wrongful attempts at foreclosure. I also had to pay Ms. Huelsman $4,000.00 in attorneys' fees related to the work done on enjoining the foreclosure sale. This amount is separate from the retainer agreement that I have with Ms. Huelsman related to the affirmative work being done on pursuing my claims. In addition, I have spent at least $200.00 in travel and parking costs related to meeting with Ms. Huelsman initially and attending the hearing seeking enjoinder of the foreclosure, as well as other costs incurred in connection with pursuit of this lawsuit, including the $240. 00 filing fee and service of process costs totaling $480.00 and deposition costs in the amount of $459.58.

CP at 419-20.

Djigal does not explain how the various statements made in this declaration constitute injury or establish causation under the CPA. Consequently, we address whether each statement made in the declaration constitutes an injury or establishes causation.

1. First Sentence

First, Djigal states, "I continue to face the loss of my home and have been trying to prevent it for years." CP at 419. This assertion fails to substantiate a claim under the CPA because Djigal does not present any evidence to satisfy the causation element.

Djigal faces the loss of his home because, as he admits, he defaulted on the loan payments. The Deed of Trust accompanying the mortgage that Djigal signed granted the power of sale to the trustee upon Djigal's default. Djigal does not present argument or point to evidence of a misrepresentation by the defendants that can be causally linked to this alleged injury. *Indoor Billboard/Washington, Inc.*, 162 Wn.2d at 83 (requiring a CPA plaintiff to demonstrate "a causal

link between the misrepresentation and the plaintiff's injury"). Djigal's assertion that he continues to face the loss of his home because he defaulted on the loan does not create an issue of material fact as to the element of causation in a CPA claim.

2. Second and Third Sentence

Next, Djigal states,

> I am challenging all of the amounts that have been added to his [sic] loan balance related to all of the attempts to foreclose that were done by entities who did not have the legal authority to do so. I know that I am responsible for making my mortgage payments, but that does not excuse the Defendants from complying with the law.

CP at 419-20. This assertion fails because Djigal does not identify unlawful conduct that has caused amounts to be added to his loan balance. *Panag*, 166 Wn.2d at 57 (requiring "proof [that] the plaintiff's 'property interest or money is diminished because of the unlawful conduct'" (quoting *Mason*, 114 Wn.2d at 854)). As explained above, Djigal fails to identify an issue of material fact suggesting that notices of trustee's sale were initiated by an entity other than the holder of the Note, and that only the holder of the Note (rather than its agent) has the power to appoint a trustee to proceed with a nonjudicial foreclosure. Section B, *supra*; *Bain*, 175 Wn.2d at 89. Therefore, even assuming the amounts that have been added to Djigal's loan related to the various foreclosure actions were injuries under the CPA, Djigal fails to establish that these amounts were the result of unlawful conduct. Djigal fails to establish the causation element.

3. Fourth Sentence

Next, Djigal states, "In connection with my efforts to save my home, I had to pay Ms. Huelsman an initial consultation fee related to obtaining her assistance in investigating my claims and the issues related to all of the wrongful attempts at foreclosure." CP at 420. Consulting with an attorney to "dispel uncertainty regarding the nature of an alleged debt" is sufficient to show injury, as are "[i]nvestigation expenses and other costs resulting from a deceptive business practice." *Panag*, 166 Wn.2d at 62. Thus, there may be at least a question of fact as to the existence of an injury for the cost of Huelsman's investigation into Djigal's claims. But Djigal has not shown there is an issue of material fact as to "a deceptive business practice" that necessitated a consultation and investigation. *Panag*, 166 Wn.2d at 62; *see also Babrauskas v. Paramount Equity Mortg.*, C13-0494RSL, 2013 WL 5743903, at *4 (W.D. Wash. Oct. 23, 2013) ("the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation."). Therefore, Djigal's claim fails because he has not shown that the claimed injury was caused by "a deceptive business practice." *Panag*, 166 Wn.2d at 62.

4. Fifth, Sixth, and Seventh Sentences

Finally, Djigal states,

> I also had to pay Ms. Huelsman $4,000.00 in attorneys' fees related to the work done on enjoining the foreclosure sale. This amount is separate from the retainer agreement that I have with Ms. Huelsman related to the affirmative work being done on pursuing my claims. In addition, I have spent at least $200.00 in travel and parking costs related to meeting with Ms. Huelsman initially and attending the hearing seeking enjoinder of the foreclosure, as well as other costs incurred in connection with pursuit of this lawsuit, including the $240.00 filing fee and service of process costs totaling $480.00 and deposition costs in the amount of $459.58.

CP at 420. Expenses incurred for defending against a collection action and prosecuting a CPA counterclaim are insufficient to show injury. *Sign-O-Light, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) ("mere involvement in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property."). Therefore, the fifth, sixth, and seventh sentences of Djigal's declaration do not establish an injury under the CPA.

E. MISREPRESENTATION CLAIMS

Djigal argues that his misrepresentation claims should not have been dismissed on summary judgment because he claims he proved the elements of misrepresentation and established damages. We disagree.

To establish a claim of fraud or intentional misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence:

> (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.

Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012). A claim of negligent misrepresentation requires clear, cogent, and convincing evidence that:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). Thus, to prevail under either theory, a plaintiff must establish by clear, cogent, and convincing evidence that the defendant told the plaintiff something false.

Here, Djigal asserts that the misrepresentations made to him by the defendants were:

> who could sign a Beneficiary Declaration and the language required under the DTA, who could appoint a successor trustee, cause a[ ] NOD [notice of default] to be issued, the authority to foreclose, including the creation, execution and recording of an Appointment of Successor Trustee document signed by someone other than the beneficiary and loan owner; the timing of the recording of the 2012 Appointment of Successor Trustee document in relation to the issuance of the 2012 NOTS [notice of trustee's sale], and QLS' reliance upon two Beneficiary Declarations that it knew to be signed by servicers who were not noteholders.

Br. of Appellant at 37-38. Djigal does not present argument or citations to the record for his assertions of misrepresentations. He similarly does not present argument as to how any of the elements for intentional or negligent misrepresentation are met. Arguments unsupported by authority and citation will not be considered on appeal. RAP10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal).

CONCLUSION

We hold that Djigal has not identified any issues of material fact as to (1) who held the Note, (2) whether Djigal suffered an "injury" under the CPA and whether that "injury" was "caused" by respondents, and (3) his claims for intentional and negligent misrepresentation. We also hold that because there is no completed foreclosure sale, Djigal has no cause of action under

the DTA. We further hold that the declaration of beneficiary is not ambiguous. Accordingly, we affirm the superior court's summary judgment dismissal of Djigal's claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, P.J.

We concur:

Melnick, J.

Sutton, J.