

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

CONNIE L. HOOKER,

Plaintiff,

v.

BANK OF AMERICA, N.A., WELLS FARGO

BANK, N.A., QUALITY LOAN SERVICE

CORPORATION OF WASHINGTON, INC. and

Doe Defendants 1 through 20, inclusive,

Defendants.

BANK OF AMERICA, N.A.,

Counterclaimant,

v.

CONNIE L. HOOKER, CITIMORTGAGE, INC.,

and UNITED STATES INTERNAL REVENUE

SERVICE,

Counterclaim

Defendants

This matter was tried to the court without a jury on November 30, 2015; December 1, 2015;

December 2, 2015; and December 15, 2015.

**Plaintiff Connie L. Hooker was represented by Melissa A. Huelsman of the Law Offices of
Melissa A. Huelsman, P.S.** Defendant Quality Loan Service of Washington, Inc. ("Quality") was
represented by Christopher Luhrs and Joseph McCormick of McCarthy Holthus, LLP.

Introduction

The principal questions presented in this case are whether Defendant Quality committed at least two violations of the Washington Deeds of Trust Act when it commenced the nonjudicial foreclosure of the Plaintiff's Deed of Trust: (1) a violation RCW 61.24.010(1)(a), which requires a

corporate Trustee to have at least one corporate officer who is a Washington resident; and/or (2) a violation RCW 61.24.010(2), which requires a Trustee of a deed of trust to have been appointed by the beneficiary of the deed of trust.

If Quality violated either or both of these statutory provisions, then the court must decide whether the evidence presented by the Plaintiff with respect to either violation sustains the Plaintiff's claim for damages against Quality pursuant the Consumer Protection Act, Chapter 19.86 RCW.

The court has carefully reviewed the witnesses' testimony, the exhibits that were admitted into evidence, and the arguments by counsel. For the reasons explained below, the court determines that the answer to all three questions is yes; and the court will enter a judgment in favor of the Plaintiff and against Defendant Quality.....

Defendant Quality is a Washington corporation whose principal business activity is serving as a Trustee for deeds of trust and conducting nonjudicial foreclosure sales.

Bank of America, N.A. ("Bank of America") purchased Ms. Hooker's note from Wells Fargo and took an assignment of the related deed of trust. Wells Fargo retained the servicing rights with respect to the note. In the fall of 2013, when Ms. Hooker defaulted on the note and the deed of trust, Wells Fargo appointed Defendant Quality to serve as Successor Trustee and caused a nonjudicial foreclosure proceeding to be commenced against Ms. Hooker's property.....

Nonjudicial Foreclosure Proceedings

On September 11, 2013, following the Plaintiff's default on the Note and the Deed of Trust, Wells Fargo executed an Appointment of Successor Trustee ("AST") (Tr. Ex. 13) recorded in King County under Auditor's File No. 20130919001086, appointing Quality to serve as Successor Trustee for purposes of a nonjudicial foreclosure proceeding. The description below the signature line identifies the signer as Jameka Young, Vice President Loan Documentation of "Wells Fargo Bank, N.A., as servicer and attorney-in-fact for Bank of America, N.A." Unlike Wells Fargo's earlier Assignment of DOT (Tr. Ex. 3), quoted above, Wells Fargo's Assignment of Successor Trustee does not identify a recorded power-of-attorney.

Also on September 11, 2013, on behalf of Bank of America, Wells Fargo executed and provided to the Successor Trustee, Quality, a statutorily-required Beneficiary Declaration (Tr. Ex. 14), which declares that Bank of America is the "actual holder" of the Note;" and which also declares, "The [Successor Trustee] may rely upon the truth and accuracy of the averments made in this declaration." The signature line of the Beneficiary Declaration states that the document is signed by "Bank of America, N.A., by Wells Fargo Bank, N.A., its Attorney in Fact." The Beneficiary Declaration does not identify a recorded power-of-attorney.

On or about October 15, 2013, Quality, identifying itself as Trustee, executed and served a Notice of Default (Tr. Ex. 15) that itemizes the amounts in arrears with respect to the Note. The Notice of Default states that the owner of the Note secured by the Deed of Trust is "Bank of America, N.A., c/o Wells Fargo Bank, N.A.," at a Wells Fargo address in Iowa. Notice of Default, at p. 1 (Tr. Ex. 15). The Notice of Default does not identify a recorded power of attorney.

On November 19, 2013, signing as "Trustee," Quality executed a Notice of Trustee's Sale ("NOTS") (Tr. Ex. 16). Quality recorded the NOTS under King County Auditor's File No. 20131121000949.

On July 3, 2014, after having continued the sale date several times, Quality recorded a Notice of Discontinuance of Nonjudicial Foreclosure Sale (Tr. Ex. 19). Quality has not commenced another nonjudicial foreclosure proceeding against the Plaintiff's home.

Plaintiff's Consumer Protection Act Suit for Damages

On April 21, 2014, the Plaintiff filed her complaint (Dkt. 1) and her amended complaint (Dkt. 9), naming as Defendants Bank of America, Wells Fargo and Quality. She alleges that the Defendants violated the Deeds of Trust Act, Chapter 61.24 RCW; and she seeks damages pursuant to the Consumer Protection Act, Chapter 19.86 RCW.

On April 24, 2014, a commissioner issued a Temporary Restraining Order (Dkt. 15), which restrained the sale and set a hearing on the Plaintiff's Motion for Preliminary Injunction for May 23, 2014, but required that the Plaintiff was required to deposit her regular monthly Note payments of \$2,901.24 into the registry of the court.

On May 23, 2014, the court issued a Preliminary Injunction (Dkt. 23A) restraining the sale on basically the same terms and conditions as the Temporary Restraining Order.

On October 6, 2015, the court signed a Stipulation and Order of Dismissal of Claims Against Bank of America, N.A. and Wells Fargo Bank, N.A. and for Disbursal of Funds in the Court Registry (Dkt. 127). The order of dismissal recites that it does not affect the Plaintiff's claims against Quality.....

Deeds of Trust Act Violations

Deeds of Trust Act

The Deeds of Trust Act (Chapter 61.24 RCW) ("DTA") creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale. The act furthers three goals: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles.Because the Act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor.....

The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale.

Plaintiff's Claim Based on RCW 61.24.010(1)(a)

RCW 61.24.010(1) provides:

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, *30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; ...

**The Plaintiff's complaint alleges that Quality violated the DTA because:
... there is no officer of Defendant [Quality] who is a resident of this state and ... Defendant [Quality] has falsely represented that a low level employee who is not an actual officer has been named as an officer in order to try to meet the requirements of the Deed of Trust Act.**

Amended Complaint, at ¶ 2.16, p. 10 (Dkt. 9). The Defendant denies the Plaintiff's claim

and asserts that it satisfied the “Washington-resident-officer” requirement because “from not later than 2012,” one of its Washington-based employees, Sierra Herbert-West, “served as either a Secretary or Assistant Secretary” of Quality. Quality’s Trial Brief, p. 5.

Pursuant to the Washington Business Corporation Act, “officers” and “assistant officers” are two distinct categories of persons. An “officer” is appointed by a corporation’s board of directors. RCW 23B.08.400(1). By contrast, an “assistant officer” is appointed by a “duly appointed officer.” RCW 23B.08.400(2). “Assistant officers” answer to “officers” and they necessarily have a lower rank than officers in the corporate hierarchy. From this the court concludes that the terms “officer” and “assistant officer” are not interchangeable terms. This statutory distinction is important for purposes of the DTA and the court is not at liberty to ignore it. RCW 61.24.010(1)(a) requires at least one “officer” to be a Washington resident. It does not state that at least one officer “or assistant officer” must be a state resident. A person with the rank of “assistant officer” does not satisfy the “officer” requirement of RCW 61.24.010(1)(a).

In a declaration filed in March 2015 (Tr. Ex. 31) Ms. Herbert-West described herself as a “Trustee Sales Officer” in Quality’s Seattle office. At trial Ms. Herbert-West testified that in March 2013, she was appointed to serve as an “assistant secretary” of the corporation. This testimony is corroborated by Tr. Ex. 46, a corporate consent form dated April 25, 2013, which shows Ms. Herbert-West to be an “Assistant Secretary;” and Tr. Ex. 23, a corporate consent in lieu of a corporate directors’ meeting dated as of July 30, 2013, which lists Ms. Herbert-West as being one of 20 “Assistant Secretaries” of the corporation.

Ms. Herbert-West also testified that in March 2014, she was appointed to be the “secretary” of Quality. Her testimony is corroborated by Tr. Ex. 23, which includes a corporate consent in lieu of a corporate directors’ meeting dated as of March 19, 2014, which lists Ms. Herbert-West as one of three “Secretaries” of the corporation. However, her testimony and this corporate consent appear to be inconsistent with an April 18, 2014, corporate report filed with the Secretary of State which identifies John Valkus as the only person with the rank of “Secretary” as of that date. Ms. Herbert-West’s name is not included on the corporate report. That same corporate report states that as of April 18, 2014, all of Quality’s corporate officers, including Mr. Valkus, are California residents.

Regardless of whether this apparent inconsistency can be reconciled, **the fact remains, and the court finds that Ms. Herbert-West was only an “assistant officer,” not an “officer” of Quality during most if not all of the period September 19, 2013 – July 3, 2014, when Quality was acting as the Successor Trustee for the nonjudicial foreclosure against the Plaintiff’s home.**

Based on this, **the court is constrained to conclude that Quality was not legally qualified under Washington law to act as the Successor Trustee of the Plaintiff’s Deed of Trust; and that Quality therefore violated the DTA when it recorded and served the Notice of Trustee Sale.**

Claim Based on RCW 61.24.010(2)

Pursuant to RCW 61.24.010(2), a beneficiary of a deed of trust may appoint a Successor Trustee to replace the original Trustee named in the deed of trust. **Absent a proper appointment by the beneficiary, however, the Successor Trustee lacks the authority to conduct a nonjudicial foreclosure sale.....**

A beneficiary of a deed of trust may act through an agent in appointing a Successor Trustee.....

The person claiming to be an agent has the burden to prove not only its alleged agency relationship with the principal, but also its specific authority to do the particular act in question..... The person claiming to be an agent also must prove that the purported principal actually

controls the agent and that the purported agent is accountable to the principal..... If the scope and nature of the alleged agency relationship between the beneficiary/noteholder/principal and alleged agent is not proved, then the alleged agent has no authority to appoint a Successor Trustee; and any actions taken by the improperly appointed Trustee constitute material violations of the DTA..... **Based on the record at trial, the court concludes that the relationship between Wells Fargo and Bank of America was an independent-contractor relationship, not a principal-agent relationship, because Quality failed to prove by a preponderance of the evidence that Bank of America appointed Wells Fargo to serve as its attorney in fact. As a consequence, Wells Fargo did not act as Bank of America's attorney in fact when Wells Fargo appointed Quality to serve as the Successor Trustee of the Plaintiff's DOT; and Quality was not a duly appointed Successor Trustee when it commenced the foreclosure sale of the Plaintiff's Deed of Trust.**

Wells Fargo's Independent-Contractor Status

The servicing agreement between the two banks precludes Bank of America from being a "principal" and Wells Fargo from being an "agent." Wells Fargo carefully preserved its independence in the servicing agreement. **The two banks defined their relationship as an independent-contractor relationship, and not as a principal-agent relationship..... The two banks having taken care to preserve Wells Fargo's independent-contractor status in the written servicing agreement, and Quality having failed to introduce into evidence any written power of attorney that might establish a principal-agent relationship between the banks, the court must conclude that Bank of America lacked the control over Wells Fargo that is necessary in order to establish a principal-agent relationship.....**

Wells Fargo's Sophistication Regarding Powers of Attorney

The evidence establishes that Wells Fargo was fully aware of the importance of documenting any attorney-in-fact relationship. As noted above, when Wells Fargo assigned the Plaintiff's Deed of Trust to Bank of America in 2010, it did so through an attorney in fact. Wells Fargo specifically included the recording number of the power of attorney as part of the Assignment of Deed of Trust (Tr. Ex. 3). The signature line of the Assignment of Deed of Trust identifies the signer as:

Wells Fargo Bank, N.A., By Heather Smith as Assistant Vice President of Northwest Trustee Services, Inc., Attorney in Fact by Power of Attorney recorded 1/4/10 under Auditor's File No. 20100104000781 December 2010 Assignment (Tr. Ex. 3).

By contrast, in Wells Fargo's 2013 Appointment of Successor Trustee (Tr. Ex. 5) and the related Beneficiary Declaration (Tr. Ex. 7), Wells Fargo omitted to identify any power of attorney under which Wells Fargo might have been authorized to act as an attorney in fact in executing those documents.

No power of attorney having been introduced as a trial exhibit, and in the absence of any reference to a specifically applicable power of attorney in any other trial exhibits, the court has no substantial factual basis to find that: (1) Wells Fargo was Bank of America's attorney in fact; (2) Wells Fargo had any specific authority to execute the Appointment of Successor Trustee (Tr. Ex. 5) or the Beneficiary Declaration (Tr. Ex. 7); or (3) Quality had any authority to act as a Successor Trustee with respect to the nonjudicial foreclosure against the Plaintiff's home.

Quality Is Not Entitled to Rely on the Beneficiary Declaration

Quality asserts in its trial brief and argued at trial that Quality reasonably assumed – and that RCW 61.24.030(7) permitted Quality to rely upon its assumption – that Wells Fargo was Bank

of America's duly-appointed attorney in fact, because the signature line in the Beneficiary Declaration (Tr. Ex. 7) indicates that Wells Fargo was signing as an "attorney in fact" for Bank of America.

RCW 61.24.030(7) provides, in relevant part:

It shall be requisite to a trustee's sale:

(7)(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.

[Emphasis added]

This statute does not provide a safe haven that is so broad as Quality urges. The statute does create a limited conditional presumption that permits a Trustee to rely on the beneficiary's declaration, but only to the extent that the declaration "stat[es] that the beneficiary is the actual holder of the promissory note..." The statute does not permit a Trustee to rely on the declaration as proof of any other fact.

Here, RCW 61.24.070(7)(a) does not permit Quality to use the statute as a basis to justify Quality's assumption, based merely on the signature line in the beneficiary's declaration, that Bank of America had signed a power of attorney or that Wells Fargo was acting as Bank of America's duly-appointed attorney in fact.

Moreover, RCW 61.24.030(7)(b) denies the limited presumption altogether where a Trustee has violated its RCW 61.24.010(4) duty of good faith to the borrower/grantor. **Here, Quality violated RCW 61.24.010(1)(a) by initiating the nonjudicial foreclosure without being qualified to act as a Trustee; and also violated RCW 61.24.010(2) by failing to be appointed by the beneficiary or a validly-appointed attorney-in-fact of the beneficiary. Having violated these statutes, Quality has violated its duty of good faith to the Plaintiff, and so Quality cannot claim to have satisfied its duty of good faith to the Plaintiff.**

The court concludes that Quality had a duty to require Wells Fargo to produce adequate proof that Bank of America actually had appointed Wells Fargo to act as an attorney in fact; that Quality acted at its peril when it initiated the nonjudicial foreclosure without having procured that proof; and that Quality may not invoke the protection of RCW 61.24.030(7) to excuse its violations of the DTA.

Quality's Violation of Consumer Protection Act Consumer Protection Act

Violations of the Deeds of Trust Act may be actionable under the Consumer Protection Act, Chapter 19.86 RCW, even where no foreclosure sale has been completed. Such claims are

governed by the ordinary principles applicable to all CPA claims..... Here, the Plaintiff has proved by a preponderance of the evidence that Quality committed acts in the course of its business that had the capacity to deceive when it executed, recorded and served the Notice of Trustee's Sale:

1. Without having satisfied the legal residency requirements to operate as a Trustee in Washington under RCW 61.24.010(1)(c); and
2. Without having been appointed to serve as a Trustee by the beneficiary or the beneficiary's duly-appointed agent, as required by RCW 61.24.010(2).

Third Element: Public Interest

With respect to the public interest element, RCW 19.86.093(a) provides:

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: ...

- (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

The Plaintiff introduced into evidence findings and conclusions from a Snohomish County Superior Court case, FNMA v. Brevick, No. 12-2-05605-4 (Tr. Ex. 40), in which that court found that Quality wrongfully had failed to determine what entity actually had authority to appoint Quality to serve as the Successor Trustee (Findings 13 & 15); that Quality was not lawfully appointed to serve as Successor Trustee (Finding 20); and that quality therefore lacked authority to exercise the power of sale in the debtor's deed of trust, resulting in a void nonjudicial foreclosure sale (Id.). This evidence is sufficient to satisfy the public interest element because it shows that in at least one other case Quality has engaged in acts or practices that are similar to its conduct in this case; that such acts and practices injured at least one other person; and that its acts and practices have the capacity to injure other persons.

Based on the evidence presented, the court finds that Quality's wrongful foreclosure activities proximately caused the Plaintiff to sustain the following injury to her property:

Legal Fees Incurred by Plaintiff

to Obtain Temporary Restraining Order \$4,000.00

Fees Paid by Plaintiff to Superior Court Clerk

(April 2014 – June 2015 (15 months)) \$ 150.00

Total Injury \$4,150.00

Plaintiff's Claim for Treble Damages

The Plaintiff's Amended Complaint requests an award of treble damages. Pursuant to RCW 19.86.090, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained, provided that the increased damage award for a violation of RCW 19.86.020 may not exceed twenty-five thousand dollars. Based on the evidence presented at trial, the court believes that it is appropriate to treble the \$4,150.00 damage award, resulting in a total award in the amount of \$12,450.00.

Plaintiff's Request for Attorneys' Fees and Costs

As the prevailing party, and pursuant to RCW 19.86.090, the Plaintiff is entitled to recover and the court will award the Plaintiff her reasonable costs of suit, including a reasonable attorneys' fee.

Conclusion

For the reasons stated above, the court concludes that Defendant Quality committed two violations of the Washington Deeds of Trust Act when it commenced the nonjudicial foreclosure of the Plaintiff's Deed of Trust: (1) Quality violated RCW 61.24.010(1)(a), which requires a

corporate Trustee to have at least one corporate officer who is a Washington resident; and/or (2) Quality violated RCW 61.24.010(2), which requires a Trustee of a deed of trust to have been appointed by the beneficiary of the deed of trust.

Quality's violations of the Deeds of Trust Act are grounds to sustain Plaintiff's claim for damages against Quality pursuant the Consumer Protection Act, Chapter 19.86 RCW. The Plaintiff is entitled to a judgment in her favor and against Quality for treble the amount of her injury, along with her costs of suit, including her reasonable attorneys' fees.

<http://www.predatorylendinglaw.com/index-2.html>

Melissa A. Huelsman is a Seattle-based attorney admitted to practice in Washington and California (inactive), and before the Ninth Circuit Court of Appeals, United States District Courts for the Western and Eastern Districts of Washington, and the United States District Court for the Central District of California. Her practice involves plaintiffs' civil litigation in the areas of predatory lending and mortgage loan servicing, fraud and foreclosure rescue scams. She also practices in the United States Bankruptcy Courts in those districts in which she is admitted.

Melissa sits on the Board of CENTS, a local financial literacy program. Ms. Huelsman is a member of the King County Bar Association and has participated extensively in its Volunteer Legal Services Program by handling numerous predatory lending and foreclosure scam pro bono cases, in addition to volunteering at a local Debt Clinic. Ms. Huelsman was named KCBA's Pro Bono Lawyer of the Year in 2006 and was previously recognized by VLS as one of its Volunteers of the Year. She has received a similar award from the Urban League of Seattle/Metropolitan King County. Ms. Huelsman was previously the Chairperson of the PLACE Subcommittee of the Seattle-King County Coalition for Responsible Lending. She is also a proud member of the National Association of Consumer Advocates.

Melissa has spoken on the issues of predatory lending, foreclosure defense and foreclosure rescue scams at numerous CLEs and Bar functions, including sessions for the National Consumer Law Center and NACA; for the Washington State Bar Association; Oregon State Bar Association; King County Bar Association; King County Housing Authority; the Urban League; Solid Ground; International District Housing Alliance; HomeSight and other community organizations. She has been interviewed by the New York Times, Wall Street Journal, BusinessWeek, Seattle Times, Seattle Post-Intelligencer, Los Angeles Times, the Daily Journal of Los Angeles, Bloomberg.com, Huffington Post, MSNBC, the Tacoma News Tribune (Knight Rider publications), Seattle Weekly and many others. She was quoted in the NCLC Report, Dreams Foreclosed, and contributed to NCLC's Foreclosure Manual. Ms. Huelsman has also been interviewed by Nightline, CNBC, CNN, NPR, KOMO News, KING 5 News, KIRO News, on local and public radio stations and by a French investigative television program. Ms. Huelsman previously served on the Board for the King County Bar Bulletin and has written numerous articles for that publication, as well as for the ABA Solo Practitioner publication. She helped write the treatise on foreclosure rescue scams for Lexis-Nexis.

Ms. Huelsman received her Bachelor's Degree in English from California State University at Fullerton and her Juris Doctorate from Southwestern University School of Law in Los Angeles. During law school, Ms. Huelsman was the Managing Editor of The Commentator, President of The Criminal Law Society and received an award for her community service efforts assisting victims of domestic violence.

Bar Admissions

California - 1997 (currently inactive)

U.S. District Court for the Central District of California - 1997

Washington - 2001

U.S. District Court for the Western District of Washington - 2002

U.S. District Court for the Eastern District of Washington - 2004

U.S. Court of Appeals, Ninth Circuit - 2005

Education

Southwestern University School of Law, Los Angeles, CA - 1997

Juris Doctorate

- Managing Editor - The Commentator

- Criminal Law Society, Founder and President

- Community Service Award - 1997

University of California, Fullerton - 1993

Bachelor of Arts in English

Honors and Awards

Pro Bono Attorney of the Year, King County Bar Association - 2006

Volunteer Attorney of the Year, King County Bar Association - 2003

Professional Associations and Memberships

National Association of Consumer Advocates

CENTS (Consumer Education and Training Services) - 2006 to Present

Board Member

Seattle/King County Coalition for Responsible Lending - 2002 to Present

PLACE Sub-Committee Chair

King County Bar Association

Classes/Seminars Taught

"Foreclosure: How to Assist Homeowners," Live Webinar Sponsored by the Maine Trial Lawyers Association, April 2009

"Representing the Resident: Advocacy in the Shadow of Foreclosure," Northeastern University Law Journal 2009 Symposium, March 2009

"Predatory Lending and the Housing Debacle," Credit Abuse & Predatory Lending, Seattle University School of Law, September 2008

"Identify and Prevent Real Estate/Mortgage Fraud," Kinja Real Estate Education, November 2005

Articles Written

"A Brief Primer on Fighting Predatory Lending Practices" (PDF), American Bar Association, 2005

"Fraud for Lawyers and/or Fools" (PDF), King County Bar Association, 2005

"Consumer Law Clinic Formed at Seattle University" (PDF), King County Bar Association, 2003
"Profile: Ivan Orton" (PDF), King County Bar Association, 2003