

DEC 12 2013

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. WW-12-1534-TaKuD
)
 LORETTA J. BROWN,) Bk. No. 10-22724-TWD
)
 Debtor.) Adv. No. 11-01056-TWD
)
)
 LORETTA J. BROWN; MICHAEL B.)
 McCARTY, Chapter 7 Trustee,)
)
 Appellants,)
)
 v.) MEMORANDUM*
)
 BANK OF AMERICA, N.A.,)
 successor by merger to BAC)
 HOME LOANS SERVICING, LP;)
 RECONTRUST COMPANY, N.A.;)
 MORTGAGE ELECTRONIC)
 REGISTRATION SYSTEMS, INC.,)
)
 Appellees.)

Argued and Submitted on October 17, 2013
at Seattle, Washington

Filed - December 12, 2013

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Timothy W. Dore, Bankruptcy Judge, Presiding

Appearances: Richard Llewelyn Jones, Esq. for Appellants
 Loretta J. Brown and Michael B. McCarty, Chapter 7
 Trustee; Steven Andrew Ellis, Esq. of Goodwin
 Procter LLP for Appellees Bank of America, N.A.,
 successor by merger to BAC Home Loans Servicing,
 LP, ReconTrust Company, N.A., and Mortgage
 Electronic Registration Systems, Inc.

* This disposition is not appropriate for publication.
 Although it may be cited for whatever persuasive value it may
 have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Before: TAYLOR, KURTZ, and DUNN, Bankruptcy Judges.
2

3 **I. INTRODUCTION**

4 Debtor Loretta Brown ("Debtor") and her chapter 7¹ trustee
5 Michael McCarty ("McCarty") appeal from multiple adverse rulings
6 that disposed of the adversary proceeding they filed against
7 Debtor's mortgage lender, its servicer and agents, and MERS. The
8 bankruptcy court entered a final order that specifically
9 encompassed two prior dismissal orders, denial of a motion to
10 reconsider one of the dismissal orders, and its grant of summary
11 judgment - resolving all claims in favor of all of the
12 defendants.

13 After evaluating all issues properly reviewable in this
14 appeal,² we AFFIRM.

15 **II. PROCEDURAL AND FACTUAL BACKGROUND³**

16 **A. Pre-bankruptcy events**

17 In 2007, Debtor borrowed money from and executed a
18

19 ¹ Unless specified otherwise, all chapter and section
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
21 "Rule" references are to the Federal Rules of Bankruptcy
22 Procedure, Rules 1001-9037, and all "Civil Rule" references are
23 to the Federal Rules of Civil Procedure.

24 ² In addition, the first of the two dismissal orders is the
25 subject of a Civil Rule 60(b) motion filed by Appellants on
26 March 8, 2013, after Appellants filed the Notice of Appeal as to
27 the Final Judgment that initiated this appeal. The bankruptcy
28 court denied the motion by order entered on March 29, 2013, based
29 on lack of jurisdiction, and Appellants appealed, thus initiating
30 BAP No. 13-1170 (the "Related Appeal"). We address the Related
31 Appeal in a separate Memorandum.

32 ³ We exercised our discretion to review documents on the
33 bankruptcy court's electronic docket to assist us in ascertaining
34 the relevant procedural history. O'Rourke v. Seaboard Sur. Co.
35 (In re E.R. Fegert, Inc.), 887 F.2d 955, 958 (9th Cir. 1989).

1 promissory note ("Note") and a deed of trust ("Trust Deed") in
2 favor of Countrywide Home Loans, Inc. ("Countrywide"), as lender.
3 The Trust Deed encumbered Debtor's real property in Bellevue,
4 Washington (the "Property") and identified LandSafe Title of
5 Washington ("LandSafe") as trustee and MERS as beneficiary.
6 Later in 2007, the Federal National Mortgage Association
7 ("FannieMae") acquired an ownership interest in the Note.

8 In documents dated October 14, 2010: MERS purported to
9 assign the Trust Deed and Note to BAC Home Loans Servicing, LP
10 ("BAC"), fka Countrywide Home Loans Servicing (the "MERS
11 Assignment"); and BAC appointed ReconTrust Company, N.A.
12 ("ReconTrust") as successor trustee under the Trust Deed (the
13 "Successor Trustee Appointment"). Promptly thereafter, Debtor
14 received a Notice of Default ("Notice of Default") executed on
15 behalf of ReconTrust as the duly authorized agent for BAC. The
16 Notice of Default identified BAC as "Owner of Note" and
17 "Servicer" and provided notice, among other things, that Debtor
18 must submit a cure payment of \$11,677.09 to avoid foreclosure.

19 **B. Initial bankruptcy events**

20 On October 22, 2010, Debtor filed a voluntary bankruptcy
21 petition under chapter 7 and scheduled "BAC Home Loans" as a
22 creditor with debt secured by first and second deeds of trust
23 against the Property. Within a month of Debtor's petition, BAC
24 sought relief from the automatic stay to allow it to foreclose.
25 Debtor did not oppose the motion. Instead, Debtor filed a
26 complaint initiating adversary proceeding no. 11-01056 (the
27 "Adversary Proceeding").

28 Debtor filed the Adversary Proceeding against Countrywide,

1 LandSafe, ReconTrust, BAC, and MERS and sought a temporary
2 restraining order and permanent injunction, quiet title, and
3 damages under various legal theories, including wrongful
4 foreclosure, the Consumer Protection Act ("CPA"), the Fair Debt
5 Collection Practices Act ("FDCPA"), and malicious prosecution.
6 Before any responsive pleadings were filed, Debtor and McCarty
7 together filed an amended complaint.

8 **C. First Amended Complaint and Motion to Dismiss**

9 In the amended complaint ("FAC"), McCarty joined as a party
10 plaintiff. Otherwise, the FAC substantially mirrors the
11 initially filed complaint.⁴ In general, Debtor and McCarty
12 ("Appellants") alleged that BAC and ReconTrust violated the CPA
13 by promulgating, recording, and relying on documents they should
14 have known were false, in particular: the MERS Assignment, the
15 Successor Trustee Appointment, and the Notice of Default.
16 Appellants also alleged that ReconTrust's issuance and use of the
17 Notice of Default violated the FDCPA and that ReconTrust's
18 attempts to dispossess Debtor of her property constituted
19 malicious prosecution.

20 As to the claim for wrongful foreclosure ("Wrongful
21 Foreclosure Claim"), Appellants alleged that the defendants⁵

23 ⁴ As in the initially filed complaint, the caption of the
24 FAC lists not only the claims for relief contained therein, but
25 also breach of contract, libel/defamation of title, and violation
of the Real Estate Settlement Procedures Act, U.S.C. § 2601,
claims never pled or even discussed in the FAC.

26 ⁵ Generally, both the FAC and the subsequently filed
27 version of the complaint suffer from lumping of "defendants,"
inexact references to other parts of the pleadings that lead
28 nowhere (especially as to alleged "injury," as discussed later

(continued...)

1 violated the Washington Deed of Trust Act⁶ ("Trust Deed Act")
2 when they designated MERS as a beneficiary in the Trust Deed and
3 MERS subsequently executed the MERS Assignment. Appellants
4 contended that BAC's authority to execute the Successor Trustee
5 Appointment and ReconTrust's authority to execute the Notice of
6 Default derived solely from the invalid MERS Assignment,
7 invalidating both documents. They alleged that these
8 transactions constituted a "sham" and, therefore, invalid
9 transactions under the Trust Deed Act.⁷ Appellants similarly
10 based their action to quiet title ("Quiet Title Action") on their
11 argument that the defendants' allegedly invalid transactions
12 irreparably severed the Note from the Trust Deed.

13 Defendants Countrywide, ReconTrust, BAC, and MERS brought a
14 motion to dismiss the FAC pursuant to Civil Rule 12(b)(6) ("First
15 Dismissal Motion"). Simply stated, the movants argued that:
16 (a) Appellants could not state a claim for wrongful foreclosure
17 because Appellants did not and could not allege that a
18 foreclosure had been noticed or conducted; (b) the FDCPA did not
19 apply to them, and they were not "collecting a debt" for purposes
20 of the FDCPA; (c) Appellants could not satisfy the required
21 elements to establish a CPA claim; (d) initiation of a
22 non-judicial foreclosure is not an "action for damages," and,

24 ⁵(...continued)
25 herein), and conclusory allegations - all of which tend to blur
together the elements of the various claims asserted therein.

26 ⁶ Washington Revised Code § 61.24 et seq.

27 ⁷ Appellants also contended that the MERS Assignment and
the Successor Trustee Appointment were invalid due to
28 "robo-signing" and improper notarization.

1 thus, no malicious prosecution claim could be pled; and (e) the
2 Quiet Title Action failed, as ownership was not in question and
3 Debtor did not satisfy her loan obligation.

4 The bankruptcy court granted the First Dismissal Motion by
5 order entered on January 10, 2012 (the "First Dismissal Order").⁸
6 The bankruptcy court dismissed the Wrongful Foreclosure Claim
7 "with prejudice to the extent that it seeks monetary damages or a
8 permanent injunction against the Defendants." Adv. dkt. #42 at
9 2:3-14. It dismissed all other claims without prejudice.⁹

10 Appellants sought reconsideration of the First Dismissal
11 Order under Civil Rule 59, requesting that they be allowed to
12 amend the Wrongful Foreclosure Claim. The bankruptcy court
13 denied the requested relief. In its order, the bankruptcy court
14 stated that the "Plaintiffs already have the relief they seek."
15 Adv. dkt. #47 at 2:18. The dismissal with prejudice only applied
16 to the extent Appellants sought monetary damages or a permanent
17 injunction, as the bankruptcy court held that neither form of
18 relief was allowed under the relevant statutes, RCW 61.24.130 and
19 RCW 7.40.020; however, Appellants were free to seek a temporary
20 injunction and could amend their complaint accordingly.

21
22
23 ⁸ The bankruptcy court stated its reasons for granting the
24 First Dismissal Motion orally on the record on December 22, 2011
25 (erroneously cited in the Hearing Transcript as December 14,
26 2011). During its oral ruling, the bankruptcy court stated that
the Appellants withdrew their claim for malicious prosecution,
requiring the bankruptcy court to rule only as to the remaining
four claims for relief.

27 ⁹ In documents filed both in the Adversary Proceeding and
28 this appeal, Appellants frequently use the term "cause of
action." As both the Rules and Civil Rules discuss "claims" and
not "causes of action," we do so as well herein.

1 **D. Second Amended Complaint and Motion to Dismiss**

2 Appellants filed a second amended complaint ("SAC") naming
3 only ReconTrust, BAC, and MERS as defendants. The SAC contained
4 three identified claims: abuse of process/wrongful civil
5 proceedings, violation of the FDCPA, and violation of the CPA;
6 and sought an injunction and damages. The factual allegations
7 are substantially similar to those alleged in the FAC.
8 Appellants again alleged that the MERS Assignment, the Successor
9 Trustee Appointment, and the Notice of Default supported the
10 asserted claims. In addition, the Appellants alleged that in
11 response to a request for information in December 2010,¹⁰ BAC
12 identified FannieMae as the "holder of the loan" and "current
13 owner" of the Note and itself as the servicer of the loan.
14 Appellants assert that these statements directly contradict the
15 statement of ownership of the Note by BAC contained in the Notice
16 of Default and, thus, support Appellants' allegations that
17 neither MERS nor BAC were ever the legal holder or owner of the
18 obligation.

19 ReconTrust, Bank of America, N.A., as successor by merger to
20 BAC ("BofA"), and MERS jointly brought a motion to dismiss the
21 SAC pursuant to Civil Rule 12(b)(6) ("Second Dismissal Motion").
22 The movants argued that Appellants again failed to adequately
23 plead the identified claims and, in addition, that Appellants
24 should be collaterally estopped from contending that BofA could

26 ¹⁰ Notably, Appellants thus conceded in the SAC (filed in
27 January 2012) that they had notice in December 2010 and prior to
28 Debtor's initiation of the Adversary Proceeding in January 2011,
of FannieMae's ownership of the Debtor's loan and BAC's role as
servicer.

1 not initiate foreclosure proceedings, based on the order entered
2 by the bankruptcy court on the uncontested relief from stay
3 motion.

4 The bankruptcy court denied the Second Dismissal Motion in
5 part, and granted it in part.¹¹ By order entered April 6, 2012
6 (the "Second Dismissal Order"), the bankruptcy court dismissed
7 all claims in the SAC, with prejudice, except for the FDCPA
8 claims against BofA and ReconTrust. The bankruptcy court also
9 denied the Appellants' request for leave to further amend the
10 complaint.

11 **E. Summary Judgment Motion**

12 The Second Dismissal Order allowed the Appellants' FDCPA
13 claims to go forward against BofA and ReconTrust. After close of
14 discovery, BofA and ReconTrust ("SJ Movants") filed a joint
15 motion for summary judgment ("SJ Motion").¹² The SJ Movants
16 supported the SJ Motion with the declaration of Joe Peloso, a
17 Mortgage Resolution Specialist employed by BofA. Peloso's
18 Declaration authenticated: (a) a copy of the Note that included
19 an endorsement in blank from Countrywide; (b) a copy of a
20

21 ¹¹ On April 6, 2012, the bankruptcy court held a hearing
22 specifically to orally state its reasons for granting the Second
23 Dismissal Motion. The hearing transcript erroneously shows
24 March 9, 2012, as the date of the oral ruling, whereas, oral
argument occurred on March 9, 2012 and the oral ruling was issued
on April 6, 2012.

25 ¹² By order entered May 11, 2012, the bankruptcy court
26 required that all discovery be completed by August 17, 2012. The
27 SJ Movants filed the SJ Motion on the discovery cutoff date.
28 Nonetheless, Appellants argued for a continuance of the hearing
on the SJ Motion pursuant to Civil Rule 56(d) and lack of
discovery. The bankruptcy court denied the unsupported request.
Appellants do not appeal from the denial of their request for
continuance, and the issue, thus, is waived.

1 certified Certificate of Filing by BAC dated April 21, 2009,
2 changing the name of Countrywide Home Loans Servicing LP to BAC;
3 (c) a copy of Announcement 08-12 dated May 23, 2008 on FannieMae
4 letterhead, amending its Servicing Guidelines regarding "Note
5 Holder Status for Legal Proceedings Conducted in the Servicer's
6 Name"¹³; and (d) a copy of a letter dated June 24, 2011, from the
7 Comptroller of the Currency addressed to BofA and titled
8 "Conditional Approval #1003 July 2011," that documented the
9 merger of BAC into BofA.

10 Peloso's Declaration provided evidence that from loan
11 origination, ReconTrust, a wholly-owned subsidiary and agent of
12 BofA (and its predecessors in interest), maintained custody of
13 the endorsed-in-blank Note. Further, he testified that the
14 investor in the loan, FannieMae, authorized BAC, and subsequently
15 BofA, to enforce the Note on its behalf. Thus, the SJ Movants
16 argued that they are not "debt collectors" within the meaning of
17 the FDCPA, having obtained an interest in the loan long before it
18 went into default. They also argued that they did not make false
19 or misleading representations and employed no unfair practices
20 (as required to support an FDCPA claim), as they were entitled to
21 issue the Notice of Default based on Debtor's payment defaults,
22 the power of sale in the Trust Deed, and their authority as
23 servicer (and servicer's agent) and as holder of the Note.

24 In written response to the SJ Motion, Appellants objected
25 to Peloso's Declaration on the grounds that Mr. Peloso was not
26

27 ¹³ The SJ Movants also pointed out that the FannieMae
28 Guidelines are available at
"https://www.efanniemae.com/sf/guides/ssg/2008annlenlrt.jsp."

1 competent or qualified to testify and merely presented
2 inadmissible hearsay. Substantively, Appellants argued that
3 Appellants' claims were valid and all arose from the fact that
4 MERS was not a beneficiary under the Trust Deed. Appellants
5 cited the then recently issued opinion by the Washington State
6 Supreme Court, Bain v. Metro. Mortg. Grp., Inc.¹⁴ Appellants
7 further argued that all actions of which Appellants complained
8 proceeded from the invalid MERS Assignment and gave rise to
9 "collateral claims" such as those arising under the FDCPA and the
10 CPA. Finally, Appellants argued that the Bain opinion supported
11 Appellants' contention that the initiation of a non-judicial
12 foreclosure without the authority of the "true and lawful holder
13 and owner" of the Note and Trust Deed violated the FDCPA.
14 Adv. dkt. #72 at 12:19-21.

15 Appellants further argued that BofA was a debt collector
16 under the FDCPA because it purchased a debt in default, relying
17 on their contention that BofA acquired its interest on
18 October 14, 2010 via the MERS Assignment and shortly before the
19 Notice of Default issued. They argued that the SJ Movants failed
20 to present any evidence that FannieMae ever declared a default or
21 that FannieMae owned any interest in the Note, other than the
22 unreliable testimony in Peloso's Declaration.

23 The evidence presented by Appellants in response to the SJ
24 Motion consisted of the SAC and its attached documents, the
25 Declaration of Adam Greenhalgh that Appellants filed in support
26
27

28 ¹⁴ 175 Wn.2d 83 (2012).

1 of their opposition to the First Dismissal Motion;¹⁵ Appellants'
2 counsel's declaration regarding his review of documents at
3 Defendants' counsel's office described as the "collateral
4 wallet"; and Debtor's verification of the SAC.

5 After oral argument and additional briefing, the bankruptcy
6 court overruled the Appellants' objections to Peloso's
7 Declaration, granted the SJ Motion, and entered its order (the
8 "Final Judgment").

9 **F. Civil Rule 60(b) motion for relief from Second Dismissal**
10 **Order**

11 On August 29, 2012, and after the SJ Motion was filed,
12 Appellants filed a Motion for Relief from Judgement/Order of
13 April 6, 2012 pursuant to Civil Rule 60(b) (the "Civil Rule 60(b)
14 Motion"). Appellants brought the Civil Rule 60(b) Motion solely
15 on the grounds that the Bain opinion rendered August 16, 2012
16 undercut the reasoning underlying the bankruptcy court's Second
17 Dismissal Order and repudiated the case law argued in support of
18 the Second Dismissal Motion. Appellants requested that the
19 bankruptcy court permit them to further amend their complaint "to
20 assert additional claims based upon the Bain decision." Adv.
21 dkt. #68 at 7:6-8.

22 The bankruptcy court heard oral argument on the Civil Rule
23 60(b) Motion and later stated its ruling orally on the record
24

25 ¹⁵ The bankruptcy court appropriately did not review the
26 Declaration of Adam Greenhalgh offered by Appellants in
27 connection with its consideration of the First Dismissal Motion.
28 See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
1542, 1555 (9th Cir. 1989) (generally a court may not consider
any material beyond the pleadings in its evaluation of a Civil
Rule 12(b)(6) motion).

1 when it also ruled on the SJ Motion. The bankruptcy court denied
2 the Civil Rule 60(b) Motion, as ordered in the Final Judgment.

3 Appellants filed their notice of appeal from the Final
4 Judgment on October 18, 2012 along with a motion seeking an
5 extension of the time for filing the notice of appeal. The
6 bankruptcy court granted the extension of the deadline to
7 October 18, 2012, by order entered December 31, 2012. Therefore,
8 the notice of appeal is timely.

9 III. JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b)(1) and (b)(2)(O).

12 We have jurisdiction under 28 U.S.C. § 158(a) and (b) to
13 hear appeals from final judgments, orders, and decrees; and with
14 leave of the Panel, from interlocutory orders and decrees of
15 bankruptcy judges. The burden of demonstrating jurisdiction lies
16 with the party asserting it. Kokkonen v. Guardian Life Ins. Co.
17 of Am., 511 U.S. 375, 379-80 (1994). Here, Appellants merely
18 state that we have appellate jurisdiction pursuant to 28 U.S.C.
19 § 158.

20 Appellants explicitly appeal from the Final Judgment. The
21 Final Judgment provides that "entry of this Order together with
22 the prior dismissal orders [Docket Nos. 42 and 58] result in all
23 causes of action in this adversary proceeding being resolved in
24 favor of the Defendants." Adv. dkt. #79 at 2.

25 Docket No. 42 is the First Dismissal Order, by which the
26 bankruptcy court dismissed Appellants' Wrongful Foreclosure Claim
27 with prejudice "to the extent that it seeks monetary damages or a
28 permanent injunction against the Defendants"; and dismissed all

1 remaining claims without prejudice. Adv. dkt. #42 at 2. As the
2 First Dismissal Order dismissed most of the FAC without
3 prejudice, the First Dismissal Order was an interlocutory order.
4 See WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.
5 1997). When the bankruptcy court entered the Final Judgment,
6 however, the First Dismissal Order became final and appealable.
7 See Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th Cir.
8 1981) ("an appeal from the final judgment draws in question all
9 earlier non-final orders and all rulings which produced the
10 judgment"). Arguably, two of Appellants' stated issues on
11 appeal¹⁶ implicate the First Dismissal Order, as does their
12 argument that the bankruptcy court should not have dismissed the
13 Quiet Title Action. "[T]he rule is well settled that a mistake
14 in designating the judgment appealed from should not result in
15 loss of the appeal as long as the intent to appeal from a
16 specific judgment can be fairly inferred from the notice and the
17 appellee is not misled by the mistake." Id. at 1363. Here, we
18 may infer Appellants' intent to appeal from the dismissal of the
19 Wrongful Foreclosure Claim and the Quiet Title Action in the
20 First Dismissal Order from their Statement of Issues and
21 arguments presented on appeal, and Appellees were not misled by

22
23 ¹⁶ Appellants' stated Issue No. 1 claims the bankruptcy
24 court erred by dismissing Appellants' claims for wrongful
25 foreclosure and "irregularities in the proceedings," although
26 Appellants inaccurately attribute the dismissal as accomplished
27 by the Second Dismissal Order and the Final Judgment, rather than
28 the First Dismissal Order. Their Issue No. 2 claims that the
bankruptcy court erred by dismissing Appellants' "claims for
injunctive relief" - again attributing the dismissal to the
Second Dismissal Order and Final Judgment, rather than the First
Dismissal Order. Both stated issues also confusingly refer to
the bankruptcy court's denial of the Civil Rule 60(b) Motion,
which was entered October 2, 2012.

1 the alleged mistake. The Appellees fully briefed the dismissal
2 of both claims.¹⁷ The propriety of the dismissal of these
3 claims, therefore, is properly before this Panel.

4 Docket No. 58, referred to in the Final Judgment, is the
5 Second Dismissal Order. The Second Dismissal Order pertained to
6 the Appellants' SAC and resulted in dismissal of two of the three
7 claims therein - the Abuse of Process and CPA claims - against
8 all Defendants and the FDCPA claims against MERS. The bankruptcy
9 court specifically did not dismiss the FDCPA claims alleged
10 against BofA and ReconTrust. Because the Second Dismissal Order
11 did not dispose of all claims among all the parties, it, too, was
12 an interlocutory order until entry of the Final Judgment, at
13 which time it became final and appealable. See Nascimento v.
14 Dummer, 508 F.3d 905, 908 (9th Cir. 2007); and Munoz, 644 F.2d at
15 1364. Appellants' stated Issue No. 5 implicates the Second
16 Dismissal Order as Appellants claim the bankruptcy court erred by
17 "dismissing Appellants' claims for violation of the Washington
18 Consumer Protection Act" which were dismissed in the Second
19 Dismissal Order.¹⁸ Appellants' Opening Brief at 1. Therefore,
20 we conclude that the propriety of the dismissal of the CPA claims
21
22

23
24 ¹⁷ Appellees initially argue that Appellants waived appeal
25 from the dismissal of the Wrongful Foreclosure Claim and the
26 Quiet Title Action by failing to include such claims in the SAC.
Appellees nonetheless addressed the merits of dismissal of both
claims on appeal.

27 ¹⁸ Appellants confusingly frame the issue, however, as
28 error made in connection with the bankruptcy court's Final
Judgment and ruling contained therein that denied relief from the
Second Dismissal Order.

1 is also before this Panel in this appeal.¹⁹

2 **IV. ISSUES**

3 1. Whether the bankruptcy court erred when it granted
4 summary judgment in favor of BofA and ReconTrust on the FD CPA
5 claims.

6 2. Whether the bankruptcy court erred when it dismissed all
7 other claims against BofA and ReconTrust.

8 3. Whether the bankruptcy court erred when it dismissed all
9 claims against MERS.

10 4. Whether the bankruptcy court abused its discretion when
11 it denied the Civil Rule 60(b) Motion.

12 **V. STANDARDS OF REVIEW**

13 We review de novo the bankruptcy court's decision to grant
14 summary judgment. Boyajian v. New Falls Corp. (In re Boyajian),
15 564 F.3d 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv.
16 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP
17 2007). Viewing the evidence in the light most favorable to the
18 non-moving party (i.e., Appellants), we determine whether the
19 bankruptcy court correctly found that there are no genuine issues
20 of material fact and that the moving party is entitled to
21 judgment as a matter of law. Jesinger v. Nev. Fed. Credit Union,

22
23 ¹⁹ Appellants include another issue in their Statement of
24 Issues on Appeal, claiming that the bankruptcy court erred by
25 dismissing Appellants' claim for breach of contract. We note
26 that the caption page of the FAC included "Breach of Contract,"
27 however, Appellants failed to plead a claim for breach of
28 contract in the FAC. Nor do Appellants present any argument on
appeal with respect to breach of contract. Therefore, this issue
has been waived. City of Emeryville v. Robinson, 621 F.3d 1251,
1261 (9th Cir. 2010) (appellate courts in this Circuit "will not
review issues which are not argued specifically and distinctly in
a party's opening brief.").

1 24 F.3d 1127, 1130 (9th Cir. 1994); Gertsch v. Johnson & Johnson
2 Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP
3 1999).

4 We also review de novo the bankruptcy court's grant of a Civil
5 Rule 12(b)(6) motion to dismiss. Movsesian v. Victoria
6 Versicherung AG, 629 F.3d 901, 905 (9th Cir. 2010). When
7 reviewing a Civil Rule 12(b)(6) dismissal, we generally limit our
8 consideration to the complaint. Livid Holdings Ltd. v. Salomon
9 Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). We view
10 the complaint in the light most favorable to the plaintiff,
11 accepting all well-pled factual allegations as true, as well as
12 any reasonable inferences drawn from them. Johnson v. Riverside
13 Healthcare Sys., 534 F.3d 1116, 1122 (9th Cir. 2008). We may
14 affirm on any basis in the record. See Caviata Attached Homes,
15 LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes, LLC),
16 481 B.R. 34, 44 (9th Cir. BAP 2012).

17 We review the bankruptcy court's denial of the Civil
18 Rule 60(b) Motion for abuse of discretion. Arrow Elecs., Inc. v.
19 Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000);
20 Sewell v. MGF Funding, Inc. (In re Sewell), 345 B.R. 174, 178
21 (9th Cir. BAP 2006). We apply a two-part test to determine
22 objectively whether the bankruptcy court abused its discretion.
23 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
24 (en banc). First, we "determine de novo whether the bankruptcy
25 court identified the correct legal rule to apply to the relief
26 requested." Id. De novo means review is independent, with no
27 deference given to the trial court's decision. See First Ave. W.
28 Bldg., LLC v. James (In re Onecast Media, Inc.), 439 F.3d 558,

1 561 (9th Cir. 2006). Second, we examine the bankruptcy court's
2 factual findings under the clearly erroneous standard. Hinkson,
3 585 F.3d at 1262 & n.20. We must affirm the bankruptcy court's
4 factual findings unless those findings are "(1) 'illogical,'
5 (2) 'implausible,' or (3) without 'support in inferences that may
6 be drawn from the facts in the record.'" Id.

7 VI. DISCUSSION

8 A. Claims alleged against BofA²⁰ and ReconTrust

9 1. The FDCPA claims

10 The bankruptcy court dismissed Appellants' FDCPA claims
11 against BofA and ReconTrust when it determined that Appellants
12 failed to identify a genuine issue of disputed fact and the
13 SJ Movants were entitled to judgment as a matter of law on their
14 SJ Motion.²¹ Appellants argue the bankruptcy court erred. We
15 disagree.

16
17
18 ²⁰ For simplicity we refer to BofA in lieu of BAC
hereinafter.

19 ²¹ In the bankruptcy court, Appellants objected to Peloso's
20 Declaration based on hearsay and lack of qualification to testify
21 and objected to the documents submitted with Peloso's Declaration
22 based on lack of authentication. They also argued that they had
23 not been allowed to do discovery and sought a continuance to
24 allow them more time. The bankruptcy court determined that the
25 testimony and documents offered by Mr. Peloso "would be
26 admissible at trial." Hr'g Tr. (Sept. 28, 2013) at 7:21-22. The
27 bankruptcy court found that Mr. Peloso had personal knowledge
28 based on business records and also "would qualify as an expert to
testify about his review of BofA's documents and records under
FRE 702." Id. at 8:5-7. It further found that most of the
documents were self-authenticating, even if not business records.
Id. at 8:8-13. As to the request for more time for discovery,
the bankruptcy court denied the request. Appellants had from
April 22, 2012 to the August 17, 2012 discovery cutoff to conduct
discovery and failed to support a request for continuance. Id.
at 9:8-14. Appellants did not raise any issue on appeal with
respect to any of these rulings, and we consider them waived.

1 **a. Standards**

2 Federal Rule of Civil Procedure 56(c) (incorporated into the
3 Bankruptcy Rules under Bankruptcy Rule 7056) provides that a
4 party may move for summary judgment when there is no genuine
5 issue as to a material fact and the moving party is entitled to a
6 judgment as a matter of law. Any "genuine issue" is one where,
7 based on the evidence presented, a fair-minded jury could return
8 a verdict in favor of the nonmoving party on the issue in
9 question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249
10 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d
11 Cir. 1991). A "material fact" is one the resolution of which
12 could affect the outcome of the case. Anthes v. Transworld Sys.,
13 Inc., 765 F. Supp 162, 165 (D. Del. 1991).

14 All justifiable inferences must be drawn in favor of the
15 non-moving party. Anderson, 477 U.S. at 255. Likewise, all
16 evidence must be viewed in the light most favorable to the
17 non-moving party. Lake Nacimiento Ranch Co. v. Cnty. of San Luis
18 Obispo, 841 F.2d 872, 875 (9th Cir. 1987). A party responding to
19 a summary judgment motion may not rest upon mere allegations or
20 denials in its pleadings. Rather the party must present
21 admissible evidence showing that there is a genuine issue for
22 trial. Fed. R. Civ. P. 56(e). "Legal memoranda and oral
23 argument are not evidence, and they cannot by themselves create a
24 factual dispute sufficient to defeat a summary judgment motion."
25 British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir.
26 1978).

27 If the non-moving party bears the ultimate burden of proof
28 on an element at trial, as do the Appellants here, that party

1 must make a showing sufficient to create a genuine issue with
2 respect to that element in order to survive a motion for summary
3 judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

4 **b. Debt collectors**

5 The FDCPA provides that: "A debt collector may not use any
6 false, deceptive, or misleading representation or means in
7 connection with the collection of any debt." 15 U.S.C. § 1692e.
8 Here, the bankruptcy court found that on the record before it,
9 the admissible evidence was insufficient to create a genuine
10 issue that BAC was a debt collector under the FDCPA. Likewise,
11 the bankruptcy court was unable to conclude from the admissible
12 evidence that ReconTrust was a debt collector.

13 Several months after the bankruptcy court ruled on the
14 SJ Motion, the Ninth Circuit published its opinion in Schlegel v.
15 Wells Fargo Bank, N.A. (In re Schlegel), 720 F.3d 1204 (9th Cir.
16 2013). In In re Schlegel, the Ninth Circuit makes clear that a
17 "debt collector" under the FDCPA must have debt collection as the
18 principal purpose of its business. 720 F.3d at 1209. Neither
19 side here presented evidence regarding the defendants' principal
20 businesses. Appellees argued that they are not debt collectors
21 under the FDCPA and presented evidence that they merely acted as
22 a servicer and its agent under the authority of the FannieMae
23 Guidelines. The ultimate burden of proof on this critical
24 element, however, rested with the Appellants. As such, in
25 response to the SJ Motion, Appellants were required to come
26 forward with a showing sufficient to create a genuine issue of
27 fact as to that element in order to survive the SJ Motion. See
28 Celotex Corp., 477 U.S. at 322-23. They did not.

1 In effect, the bankruptcy court shifted the burden of proof
2 on this element to the Appellees. As the bankruptcy court
3 nonetheless granted summary judgment on other grounds, we
4 conclude that the error is harmless. See, e.g., Fed. R. Civ. P.
5 61 (incorporated into bankruptcy proceedings by Rule 9005).

6 **c. False or misleading representations/unfair**
7 **practices**

8 The bankruptcy court granted the SJ Motion on the admissible
9 evidence contained in Peloso's Declaration and self-
10 authenticating documents, establishing that:

11 [BofA], through its own agent, ReconTrust, had
12 possession of the [Note] and the authority of its
13 principal, [and] it was the holder of the [Note] and
14 was an authorized beneficiary under RCW 61.24.005(2).
15 Hr'g Tr. (Sept. 28, 2012) at 17:10-15.

16 Because [BofA] was an authorized beneficiary it could
17 properly appoint ReconTrust as successor trustee and
18 direct ReconTrust to issue [the Notice of Default]
19 pursuant to RCW 61.24.030. Id. at 17:16-19.

20 RCW 61.24.031 provides that an authorized agent may
21 issue a notice of default under RCW 61.24.010(8). Id.
22 at 17:20-22.

23 The bankruptcy court found that "because the issuance of the
24 appointment of successor trustee and the notice of default were
25 authorized and proper, there are no false or misleading
26 representations under [] 15 U.S.C. § 1692e or unfair practices
27 under 15 U.S.C. 1692f." Hr'g Tr. (Sept. 28, 2012) at 19:1-5.

28 Therefore, the bankruptcy court granted the SJ Motion. We find
no error in either the bankruptcy court's legal conclusions or
its determination that Appellants failed to show the existence of
disputed facts that would require trial.

Appellants failed below to present admissible evidence of a

1 genuine issue of material fact in dispute, and, on appeal, they
2 do not argue any specific error made by the bankruptcy court. In
3 defense of the SJ Motion, Appellants argued the plausibility of
4 their claims, rather than submitting evidence to support the
5 elements of the claims on which they bore the ultimate burden of
6 proof. Therefore, we conclude that the bankruptcy court did not
7 err when it granted the SJ Motion.

8 The undisputed facts determined in connection with the
9 SJ Motion and our conclusion that the bankruptcy court committed
10 no error necessarily inform our analysis of the Civil
11 Rule 12(b)(6) dismissals of the Appellants' other claims alleged
12 against BofA and ReconTrust.

13 **2. CPA claims**

14 The bankruptcy court dismissed the CPA claims alleged
15 against BofA and ReconTrust pursuant to the Second Dismissal
16 Order.

17 A motion to dismiss under Civil Rule 12(b)(6) challenges the
18 sufficiency of the allegations set forth in the complaint. The
19 court's review is limited to the allegations of material facts
20 set forth in the complaint, which must be read in the light most
21 favorable to the non-moving party, and together with all
22 reasonable inferences therefrom, must be taken to be true.
23 Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). Thus, a court
24 generally may not consider any material beyond the pleadings;
25 however, material that is properly submitted as part of the
26 complaint may be considered. Hal Roach Studios, 896 F.2d at
27 1555.

28 A complaint must contain either direct or inferential

1 allegations respecting all the material elements necessary to
2 sustain recovery under some viable legal theory. Bell Atl. Corp.
3 v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). The
4 plaintiff must provide grounds for her entitlement to relief,
5 which requires more than labels and conclusions; and the actions
6 must be based on legally cognizable claims. Twombly, 550 U.S. at
7 555. The court, thus, need not accept as true mere recitals of a
8 claim's elements, supported by conclusory statements; and the
9 plausibility of a claim is context-specific on review of which
10 the court may draw on its experience and common sense. See
11 Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 1950
12 (2009).

13 Under Washington law, private CPA claims require that the
14 plaintiff establish five elements:

15 (1) unfair or deceptive act or practice; (2) occurring
16 in trade or commerce; (3) affecting the public
17 interest; (4) injury to a person's business or
property; and (5) causation.

18 Panaq v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37 (2009)
19 (citing Hanqman Ridge Training Stables, Inc. v. Safeco Title Ins.
20 Co., 105 Wn.2d 778, 780 (1986)).

21 In the SAC, Appellants alleged that actions taken by BAC
22 and ReconTrust violated the Trust Deed Act and that such
23 violations constituted per se violations of the CPA. As the
24 bankruptcy court noted, the Trust Deed Act "contains a list of
25 per se violations of the CPA at RCW 61.24.135,²² which does not
26

27 ²² Revised Code of Washington § 61.24.135 provides that:

28 (continued...)

1 include any of the alleged acts in this case." Hr'g Tr.
2 (April 6, 2012) at 11:8-11. Appellants made the same per se
3 argument in connection with alleged violations of the FDCPA,
4 however, they do not cite any applicable statutory provision, and
5 we know of none.

6 The first two elements of a private CPA claim "may be
7 established by a showing that (1) an act or practice which has a
8 capacity to deceive a substantial portion of the public (2) has
9 occurred in the conduct of any trade or commerce." Hangman Ridge
10 Training Stables, Inc., 105 Wn.2d at 785-86. Appellants alleged
11 that BAC and ReconTrust issued documents without the requisite
12 authority in connection with Debtor's loan and the initiation of
13

14 ²²(...continued)

15 (1) It is an unfair or deceptive act or practice under
16 the consumer protection act, chapter 19.86 RCW, for any
17 person, acting alone or in concert with others, to
18 offer, or offer to accept or accept from another, any
19 consideration of any type not to bid, or to reduce a
20 bid, at a sale of property conducted pursuant to a
21 power of sale in a deed of trust. The trustee may
22 decline to complete a sale or deliver the trustee's
23 deed and refund the purchase price, if it appears that
24 the bidding has been collusive or defective, or that
25 the sale might have been void. However, it is not an
26 unfair or deceptive act or practice for any person,
27 including a trustee, to state that a property subject
28 to a recorded notice of trustee's sale or subject to a
sale conducted pursuant to this chapter is being sold
in an "as-is" condition, or for the beneficiary to
arrange to provide financing for a particular bidder or
to reach any good faith agreement with the borrower,
grantor, any guarantor, or any junior lienholder.

(2) It is an unfair or deceptive act in trade or
commerce and an unfair method of competition in
violation of the consumer protection act, chapter 19.86
RCW, for any person or entity to: (a) violate the duty
of good faith under RCW 61.24.163; (b) fail to comply
with the requirements of RCW 61.24.174 [deposits into
foreclosure fairness account]; or (c) fail to initiate
contact with a borrower and exercise due diligence as
required under RCW 61.24.031.

1 foreclosure. Appellants supported this assertion by alleging
2 that FannieMae represented itself to be the holder, owner, or
3 assignee of the loan, which could be determined to contradict the
4 authority required of BAC and ReconTrust.

5 The bankruptcy court dismissed the CPA claims because it
6 determined that even though Appellants adequately pled the first
7 elements, they did not and could not allege the causation
8 elements. In light of the undisputed facts subsequently
9 established in connection with the SJ Motion on the FDCPA claims,
10 we need not review the adequacy of the Appellants' causation
11 allegations because they cannot plausibly plead deceptive acts by
12 BofA and ReconTrust. As discussed earlier, the undisputed
13 evidence established that BofA, as holder of the Note, was an
14 authorized beneficiary under the Deed of Trust Act; BofA could
15 properly appoint ReconTrust as successor trustee; and the Notice
16 of Default was issued by the duly appointed and authorized agent
17 of BofA. Because the Appointment of Successor Trustee and Notice
18 of Default were authorized and proper, the bankruptcy court found
19 at summary judgment that there were no false or misleading
20 representations or practices.²³ Therefore, the record in

22 ²³ In oral argument, and indirectly in the appellate brief,
23 counsel for Appellants argued that the representation in the
24 Notice of Default that BofA was both owner and servicer
25 constitutes a misleading statement actionable by Appellants.
26 Appellants did not so allege in their various forms of the
27 complaint; the bankruptcy court appropriately found no material
28 issues of disputed fact as to the validity of the Notice of
Default; and we conclude that the discrepancy is not material nor
could Appellants plausibly plead otherwise. See *Donohue v. Quick
Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010) (“[I]mmaterial
statements, by definition, do not affect a consumer’s ability to
make intelligent decisions.”). We recognize Donohue discussed

(continued...)

1 connection with the bankruptcy court's findings for BofA and
2 ReconTrust on the FDCPA claims, equally supports dismissal of the
3 CPA claims. Thus, even if we were to conclude that the
4 bankruptcy court erred in its causation analysis, such error
5 would be harmless. See Shanks v. Dressel, 540 F.3d 1082, 1086
6 (9th Cir. 2008) (appellate court may affirm on any basis
7 supported by the record).

8 **3. Wrongful Foreclosure Claim**²⁴

9 In the FAC, Appellants asserted that based on the invalidity
10 of the MERS Assignment, the documents signed and actions taken by
11 BofA and ReconTrust were not authorized and, thus, violated the
12 Trust Deed Act. Notably, however, they did not plead that a
13 trustee sale was noticed or a foreclosure sale completed; nor do
14 they plead any facts to indicate that the Notice of Default,
15 which was the only enforcement action allegedly taken under the

16 ²³(...continued)
17 materiality in the context of the FDCPA, but conclude that the
18 reasoning is appropriate to our analysis here. Washington law
19 makes clear that the distinction between an owner of the Note and
20 a beneficiary who is a holder of the relevant note is not
21 significant. See Wash. Rev. Code § 61.24.030(7) (requiring,
22 prior to foreclosure of residential real estate, that the trustee
23 have proof that the beneficiary owns the note, but also providing
24 that a statement that the beneficiary is a note holder suffices).
25 Indeed, at least for purposes of RCW 61.24.030, BofA was the
26 owner.

27 ²⁴ Appellants subsequently did not include a wrongful
28 foreclosure claim in the SAC. Appellees on appeal argue that
Appellants thus abandoned the claim, citing Forsyth v. Humana,
Inc., 114 F.3d 1467, 1474 (9th Cir. 1997) ("It is the law of this
circuit that a plaintiff waives all claims alleged in a dismissed
complaint which are not realleged in an amended complaint.").
This "Forsyth rule" was overruled, in part, by the Ninth Circuit
in Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012),
specifically as to claims dismissed with prejudice and without
leave to amend. Here, the bankruptcy court dismissed the
Wrongful Foreclosure Claim with prejudice to the extent
Appellants sought damages or permanent injunction.

1 Trust Deed, was improperly issued.²⁵

2 Appellants sought a permanent injunction against all of the
3 defendants and generally prayed for a judgment for damages,
4 alleging simply that Debtor lost time while pursuing her actions.
5 The bankruptcy court held that the Trust Deed Act provided no
6 support for either a permanent injunction or damages, and
7 dismissed the Wrongful Foreclosure Claim with prejudice
8 accordingly. On appeal, Appellants argue that the Bain opinion
9 establishes that they adequately pled the Wrongful Foreclosure
10 Claim in all respects, and that the bankruptcy court erred by
11 relying on case law that is "no longer good authority" after
12 Bain.

13 **a. Permanent injunctive relief**

14 Initially we note that none of the questions addressed in
15 Bain²⁶ pertained to injunctive relief under the Trust Deed Act,
16 although the court extensively discussed the Trust Deed Act
17 generally.²⁷ The Trust Deed Act allows restraint of a

18
19 ²⁵ Appellants did not allege that BAC was not the holder of
20 the Note at the time the Notice of Default was issued. See Wash.
21 Rev. Code 61.24.031; and Reinke v. Northwest Trustee Services,
Inc., 2011 Bankr. LEXIS 4142 at *32 (Bankr. W.D. Wash. 2011).
Nor did Appellants allege that Debtor was not in default.

22 ²⁶ We also note that Bain solely addressed questions
23 regarding MERS and its participation in a foreclosure context.
We address Appellants' alleged claims against MERS separately
24 below.

25 ²⁷ The two cases that generated the certified questions to
26 the Washington Supreme Court in Bain both involved requests for
27 injunctions to stop foreclosures initiated by MERS and damages
28 under the CPA, among other things. Bain, 175 Wn.2d at 90.
Nonetheless, the merits of the underlying cases were not before
the Washington Supreme Court, and the opinion contains no
discussion or analysis pertaining to the injunctive relief

(continued...)

1 foreclosure sale on any "proper legal or equitable ground."
2 Wash. Rev. Code § 61.24.130. Appellants did not allege that a
3 sale was noticed and they did not merely seek to restrain a sale,
4 if one were noticed. Instead, Appellants sought a permanent
5 injunction.²⁸ Bain provides no support for such relief,
6 Appellants cited no other legal authority for such relief, and we
7 located none. The bankruptcy court did not err when it dismissed
8 the Wrongful Foreclosure Claim to the extent Appellants sought a
9 permanent injunction.

10 **b. Monetary damages for wrongful initiation of**
11 **foreclosure**

12 In January 2011, when the bankruptcy court dismissed the
13 Wrongful Foreclosure Claim to the extent Appellants sought
14 damages, it did so based on well-established legal authority,
15 both federal and state. The bankruptcy court referred to and
16 specifically agreed with the then-recent decision by Judge
17 Overstreet in Reinke v. Northwest Trustee Services, and the cases
18 cited therein, which held that the Trust Deed Act does not
19 authorize a civil action for damages for wrongful initiation of
20 foreclosure. See, e.g. Vawter v. Quality Loan Serv. Corp.,
21 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010); and Brown v.
22 Household Realty Corp., 146 Wn. App. 157, 189 P.3d 233, 240

24 ²⁷(...continued)
25 requested therein.

26 ²⁸ In its oral ruling, after determining that a permanent
27 injunction would not be appropriate, the bankruptcy court
28 analyzed whether the FAC supported a request for any restraint of
the foreclosure sale. The bankruptcy court found the FAC
deficient as it contained no allegations that would indicate the
Notice of Default was issued incorrectly.

1 (2008).

2 On appeal Appellants argue, primarily based on Bain, that
3 the case law relied upon by the bankruptcy court is no longer
4 good law on the efficacy of a wrongful initiation of foreclosure
5 damages claim. Bain, however, does not speak to the issue at
6 all. We reviewed the posture of the Washington federal and state
7 courts on this issue and concluded that currently the courts are
8 not of one mind.²⁹ In point of fact, at least one district court
9 recently abstained from ruling on the question of whether "a
10 plaintiff can recover damages under the [Trust Deed Act] for an
11 initiated but uncompleted trustee sale." See Zhong v. Quality
12 Loan Service Corp., 2013 U.S. Dist. LEXIS 145916 *11 (W.D. Wash.
13 Oct. 7, 2013). In Zhong, the district court acknowledged that
14 the issue was submitted by an Order Certifying Question to the
15 Washington Supreme Court in Frias v. Asset Foreclosure Servs.,
16 Inc., No. 13-cv-0760 (W.D. Wash. Sept. 25, 2013).³⁰

17 We need not decide this issue here because even if we were
18 to determine that the bankruptcy court erred at the Civil
19 Rule 12(b)(6) level, such error would be harmless in light of the
20 record and determinations made by the bankruptcy court later in

21
22 ²⁹ By way of example: In Stafford v. Sunset Mortg., Inc.,
23 2013 WL 1855743 at *2 (W.D. Wash. Apr. 29, 2013), the district
24 court noted that "[a]s this Court has repeatedly ruled,
25 Washington law does not recognize a claim for wrongful initiation
26 of a non-judicial foreclosure when no sale occurs." Whereas, in
27 Walker v. Quality Loan Service Corp., 176 Wn. App. 294, 308 P.3d
716, 724 (2013), the state court disagreed with Vawter and held
that "a borrower has an actionable claim against a trustee who,
by acting without lawful authority or in material violation of
the DTA, injures the borrower, even if no foreclosure sale
occurred."

28 ³⁰ The matter was assigned Supreme Court No. 89343-8 on
September 30, 2013, and the briefing schedule set.

1 connection with the SJ Motion on the FDCPA claims. See Shanks v.
2 Dressel, 540 F.3d at 1086 (appellate court may affirm on any
3 basis supported by the record). Appellants based their FDCPA
4 claims on the same allegedly false and misleading acts and
5 documents on which they based their Wrongful Foreclosure Claim.

6 As discussed earlier, the undisputed facts established that
7 the Notice of Default was issued by the duly appointed and
8 authorized agent of BofA: ReconTrust. See Wash. Rev. Code
9 61.24.031 (an authorized agent may issue a notice of default
10 under RCW 61.24.010(8)). And, FannieMae's servicer, BofA, was an
11 authorized beneficiary under the Deed of Trust Act as holder of
12 the endorsed-in-blank Note (in the custody of BofA's agent
13 ReconTrust). Therefore, the record in connection with the
14 bankruptcy court's findings for BofA and ReconTrust on the FDCPA
15 claims, equally supports a decision for them on the Wrongful
16 Foreclosure Claim.

17 **4. Quiet Title Action**

18 The bankruptcy court dismissed the Quiet Title Action
19 without prejudice. Appellants did not re-plead a claim for quiet
20 title in the SAC. Appellants, therefore, waived any claim for
21 quiet title. See Lacey, 693 F.3d at 928 (a plaintiff waives
22 claims alleged in a dismissed complaint by not re-pleading such
23 claims in an amended complaint when dismissal is without
24 prejudice).

25 And if the merits are considered, we also determine that the
26 bankruptcy court did not err. On appeal, Appellants do not
27 allege that they were barred from re-pleading a quiet title
28

1 action. Rather, they merely repeat the arguments made to the
2 bankruptcy court. They argue that MERS could assign neither the
3 Trust Deed nor the Note - but they also argue inconsistently that
4 by assigning the Trust Deed without assigning the Note, MERS
5 caused the irreparable severance of the Note from the Trust Deed.
6 Appellants' argument is internally inconsistent and incorrect as
7 a matter of law, because the security follows the obligation
8 secured. See In re Jacobson, 402 B.R. 359, 367 (Bankr. W.D.
9 Wash. 2009). "This principle is neither new nor unique to
10 Washington: '[T]ransfer of the note carries with it the
11 security, without any formal assignment or delivery, or even
12 mention of the latter.'" Id. (quoting Carpenter v. Longan, 83
13 U.S. 271, 275 (1872)).

14 A quiet title action is equitable and designed to resolve
15 competing claims of ownership. Kobza v. Tripp, 105 Wn. App. 90,
16 95 (2001). Where such an action is against a purported lender or
17 otherwise involves a deed of trust, a plaintiff must also allege
18 facts demonstrating they satisfied their obligations under the
19 deed of trust. Elene-Arp v. Federal Home Finance Agency, 2013 WL
20 1898218 at *4 (W.D. Wash. 2013). Here, the Quiet Title Action
21 did not involve either title to or ownership of property.
22 Instead, Appellants sought to extinguish the lien of the Trust
23 Deed, but failed to allege any facts regarding the status of
24 their obligations under the Trust Deed or Note. Therefore,
25 Appellants failed to allege sufficient facts in the FAC to
26 plausibly allege a claim for quiet title and, thus, the
27 bankruptcy court did not err when it dismissed the Quiet Title
28

1 Action.

2 **5. Abuse of Process**

3 The bankruptcy court also dismissed the Abuse of Process
4 Claim pursuant to the Second Dismissal Motion. Appellants based
5 their Abuse of Process claim in the SAC on virtually the same,
6 although re-phrased, allegations on which they based their
7 Wrongful Foreclosure Claim in the FAC. To the "abuse of the
8 foreclosure process" and "improper initiation of foreclosure
9 proceedings" allegations, Appellants added allegations that
10 ReconTrust breached the duty of good faith it owed, as successor
11 trustee, to Debtor and that ReconTrust and BofA violated the
12 statutory prohibition against the same entity serving as trustee
13 and beneficiary under the same deed of trust, based on their
14 common corporate direction and control. None of such
15 allegations, taken as true for purposes of the Civil Rule
16 12(b)(6) evaluation, meet the pleading requirements for an abuse
17 of process claim.

18 In evaluating an abuse of process claim, "the crucial
19 inquiry is whether the judicial system's process, made available
20 to insure the presence of the defendant or his property in court,
21 has been misused to achieve another, inappropriate end." Sea-Pac
22 Co. v. United Food and Comm'l Workers Local Union 44, 103 Wn.2d
23 800, 805 (1985) (citation omitted). The elements of an abuse of
24 process claim, are,

- 25 (1) existence of an ulterior purpose - to
26 accomplish an object not within the proper
27 scope of the process, - and (2) an act in the
28 use of legal process not proper in the
regular prosecution of the proceedings.

1 Id. (citation omitted). And of particular import here, the
2 defendant must have employed some process in the technical sense,
3 meaning process issued by the Washington courts. Id. at 806-07.

4 Appellants did not allege any ulterior purpose - they
5 alleged that the actions violated the Trust Deed Act. And,
6 critically, they do not allege any use of the judicial process in
7 the allegedly improper initiation of non-judicial foreclosure.
8 Therefore, the Abuse of Process Claim fails as a matter of law
9 and was properly dismissed. The bankruptcy court did not commit
10 error.

11 **B. Dismissal of claims against MERS**

12 **1. Dismissal of the FDCPA claims against MERS**

13 The bankruptcy court dismissed the FDCPA claims against MERS
14 in response to the Second Dismissal Motion because Appellants
15 failed to allege any action by MERS that could potentially give
16 rise to liability under the FDCPA. Appellants alleged only that
17 MERS executed the MERS Assignment. The MERS Assignment solely
18 purported to transfer MERS's interest in the Trust Deed and the
19 Note to BofA. As such, it was not an attempt to collect a debt
20 and, therefore, could not violate any provision under the FDCPA,
21 as a matter of law.³¹ We find no error in the bankruptcy court's
22 decision on this point.

23 **2. Dismissal of the CPA claims against MERS**

24 The bankruptcy court also dismissed the CPA claims against
25

26 ³¹ Appellants did not identify the bankruptcy court's
27 denial of leave to amend as an issue in this appeal, nor did they
28 include any legal argument regarding leave to amend. We
therefore consider the Appellants to have waived review on this
point.

1 MERS in the Second Dismissal Order. On appeal, Appellants rely
2 heavily on Bain as authority to establish that MERS may be held
3 liable for violations of the CPA - but Appellants seek to prove
4 too much through Bain.

5 In Bain, the court held that the mere listing of MERS on a
6 deed of trust is not itself an actionable injury under the CPA.
7 175 Wn.2d at 120. While the Bain court was unwilling to find
8 that characterizing MERS as a beneficiary was per se deceptive,
9 it held that MERS's purported action as a beneficiary
10 presumptively meets the first element of a CPA violation³²;
11 however, ultimately a homeowner must produce evidence on each
12 element required to prove a CPA claim. Id.

13 Whether a practice is unfair or deceptive is a question of
14 law for the court to decide - if the parties do not dispute their
15 conduct. Indoor Billboard/Washington, Inc. v. Integra Telecom of
16 Wash., Inc., 162 Wn.2d 59, 74, (2007). In the SAC, Appellants
17 lump together their allegations of "unfair and deceptive acts"
18 taken by BofA, ReconTrust, and MERS, as a group. Review of these
19 allegations, in light of the subsequently determined undisputed
20 facts, results in our conclusion that Appellants failed to
21 adequately plead an unfair or deceptive act by MERS.

22 Appellants alleged: (a) misrepresentation as to the true
23 holder of the obligations; (b) unlawful and unauthorized

25 ³² In Bain, MERS, acting as beneficiary, purported to
26 appoint successor trustees who initiated foreclosure proceedings.
27 Bain, 175 Wn.2d at 89. Here, the only foreclosure action taken
28 consisted of the Notice of Default issued by ReconTrust, which
was duly appointed by BofA, not MERS; and BofA was the duly
authorized servicer for the holder of the Note.

1 declaration of default; (c) unlawful assignment of the Note from
2 MERS to BofA; (d) use of "robo-signers"³³; (e) unlawful
3 appointment of unqualified successor trustee; (f) unlawful
4 initiation of non-judicial foreclosure proceedings; and (g)
5 "other misrepresentations." Among these alleged actions,
6 conceivably only (c) is plausibly applicable to MERS - as MERS
7 executed the MERS Assignment;³⁴ and under Bain, MERS is not a
8 lawful beneficiary under the Trust Deed Act. Appellants fail,
9 however, to plausibly allege any injury proximately resulting
10 from the MERS Assignment. The alleged injury, consisting of
11 Debtor's loss of time for business and personal matters while she
12 consulted legal counsel to address legal threats and loss of her
13 home, is not plausibly related to the MERS Assignment. The legal
14 threat and the possibility of losing her home could only relate
15 to the Notice of Default, not the MERS Assignment. Appellants
16 pled no direct causal link between the MERS Assignment and the
17 alleged injuries. Therefore, Appellants fail to adequately plead
18 a claim against MERS under the CPA, and dismissal was not error.

19 **3. Wrongful Foreclosure Claim, Quiet Title Action, and**
20 **Abuse of Process Claim**

21 Appellants included the Wrongful Foreclosure Claim and the
22 Quiet Title Action in their FAC, and the bankruptcy court

23
24 ³³ Appellants cite no legal authority that such signatures
25 render the documents void; courts reject "robo-signing" as a
26 cognizable legal theory; and there is nothing deceptive about
using an agent to execute a document. See Bain v. Metro Mortg.
Grp., Inc., 2010 U.S. Dist. LEXIS 22690, 2010 WL 891585, at *6
(W.D. Wash. 2010).

27 ³⁴ Execution of the MERS Assignment is the only action
28 taken by MERS specifically alleged anywhere in the SAC.

1 dismissed both pursuant to the First Dismissal Order. The FAC
2 lacks any allegation that MERS took any action that impacted
3 Debtor's right to the Property, and contains only conclusory
4 allegations that MERS caused Debtor injury. And, by failing to
5 plead the Quiet Title Action in the SAC, Appellants waived the
6 claim.

7 As to the Abuse of Process Claim, contained in the SAC and
8 dismissed by the Second Dismissal Order, we apply the same
9 reasoning discussed above as to BofA and ReconTrust. The
10 bankruptcy court committed no error by dismissing the Abuse of
11 Process Claim as Appellants failed to adequately plead such a
12 claim as to any defendant.

13 **C. Denial of Civil Rule 60(b) Motion**

14 Appellants stated the issue challenging the bankruptcy
15 court's denial of their Civil Rule 60(b) Motion as follows:

16 Did the trial court err in denying Appellants' Motion
17 for Relief from the trial court's Orders of April 6,
18 2012 and October 2, 2012, dismissing Appellant's claims
for wrongful foreclosure procedures set forth in RCW
61.24, et seq.?

19 Appellants' Opening Brief at 1.

20 In addition to factual problems with the issue statement
21 itself,³⁵ Appellants fail to present any argument as to how the
22 bankruptcy court abused its discretion in denying Civil Rule
23

24 ³⁵ The issue statement misstates the effect of the orders
25 to which it refers. The April 6, 2012 order (relating to the
26 SAC) did not dismiss the Wrongful Foreclosure Claim. The
27 Wrongful Foreclosure Claim was dismissed by the January 10, 2012
28 order (relating to the FAC). The October 2, 2012 disposition is
the Final Judgment that is on appeal. Appellants did not seek
relief from the Final Judgment, other than by filing the Notice
of Appeal.

1 60(b) relief. Therefore, this issue has been waived. See City
2 of Emeryville v. Robinson, 621 F.3d at 1261.³⁶

3 **VII. CONCLUSION**

4 Based on the foregoing, we AFFIRM.

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12 ³⁶ Even if the Panel were to review the bankruptcy court's
13 denial of the requested relief under Civil Rule 60(b), which was
14 brought on the alleged grounds that the intervening opinion by
15 the Washington Supreme Court in Bain "vitiating" the case
16 authority and reasoning on which the bankruptcy court based its
17 denial, we would affirm. The bankruptcy court correctly
18 identified the applicable legal standard, citing Phelps v.
19 Alameida, 569 F.3d 1120 (9th Cir. 2009); and the record supports
20 the logical and reasonable conclusion that the bankruptcy court
21 "did not rely on any cases that would have been partially
22 overruled by Bain, and [] did not make any determinations that
23 would be changed following Bain." Hr'g Tr. (Sept. 28, 2012)
24 5:22-25, 6:1. In Bain, the Washington Supreme Court answered
25 three certified questions. First, it concluded that "if MERS
26 does not hold the note, it is not a lawful beneficiary."
27 175 Wn.2d at 89. It was unable to determine the "'legal effect'
28 of MERS not being a lawful beneficiary" on "the record and
argument before" it. Id. And finally, it concluded that a
homeowner "may" have a CPA claim "based upon MERS representing
that it is a beneficiary," but such a determination would "turn
on the specific facts of each case." Id. Here, on the First
Dismissal Motion, the bankruptcy court "dismissed the abuse of
process claim because the plaintiffs did not allege the existence
of an ulterior purpose or an act that uses the judicial process"
[Hr'g Tr. (Sept. 28, 2012) at 6:10-13]; "dismissed the FDCPA
claim against MERS because the plaintiffs did not allege an
action by MERS that could give rise to liability under the FDCPA"
(Id. at 6:14-16); and "dismissed the Consumer Protection Act
claim because the plaintiffs had not pled any act of the
defendants which was causally linked to the injury of the
plaintiffs" (Id. at 6:17-20). Thus, even on the merits, we
conclude that the bankruptcy court did not abuse its discretion
by denying the Civil Rule 60(b) Motion.