Supreme Court No. 90509-6

Court of Appeals No. 70592-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,

Petitioner,
v.

NORTHWEST TRUSTEE SERVICES, INC.

Respondent,

and

WELLS FARGO BANK, N.A.

Defendant.

ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO AMICUS CURIAE MEMORANDUM OF NORTHWEST JUSTICE PROJECT

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I. INTRODUCTION

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby provides the following answer to the Amicus Curiae Memorandum ("Brief of Amicus NJP") submitted by the Northwest Justice Project ("NJP").

NJP's assertion that the Legislature has required a foreclosing beneficiary to also possess an ownership interest in the secured note subject to enforcement is mistaken. Rather, *Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), is consistent with the Court's decision in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), advising that it is a "holder" who can non-judicially enforce a deed of trust, and that we look to the Uniform Commercial Code ("UCC") for the definition of a "holder" consistent with the Deed of Trust Act ("DTA").

NJP's recommendation for a judicially-created DTA amendment to require enforcement based on note ownership cuts against the plain definition of "beneficiary" in RCW 61.24.005(2). There is no reason, based on R.A.P. 13.4(b), for the Court to even potentially cast doubt on the validity of *Trujillo*'s reasoned analysis.

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II. ARGUMENT AND AUTHORITY

A. NJP Conflates Ownership With Holder Status.

In *Bain*, the Court addressed the plain language of the DTA, stating:

> [s]ince 1998, the deed of trust act has defined a 'beneficiary' as 'the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation'.

175 Wn.2d at 98-99, *citing* RCW 61.24.005(2). The Court articulated that other portions of the DTA are consistent with the conclusion that a beneficiary must *hold* the note being enforced. *Id.* at 101-103.

To determine what constitutes a "holder," *Bain* relied on the UCC definitions in former RCW 62A.1-201(20)[1] and RCW 62A.3-301. *Id.* at 103-104. Indeed, it was the *homeowner* plaintiffs who argued the Court's "interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee." *Id.* at 104.

Although NJP and Ms. Trujillo suggest that a note holder must *also* be a note owner in order to foreclose pursuant to the DTA, the UCC could not be clearer: "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." RCW 62A.3-203, cmt. 1;

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[1] Now codified at RCW 62A.1-201(21).

see also In re Veal, 450 B.R. 897 (9th Cir. B.A.P. 2012).[2] NJP seeks to undermine the clear definition of "beneficiary" stated in the DTA, *i.e.*:

> *[t]he holder* of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

RCW 61.24.005(2) (emphasis added).

Trujillo does not "allow a non-beneficiary to foreclose under the DTA." Brief of Amicus NJP at 7. To the contrary, *Trujillo* directly follows *Bain*'s reasoning and UCC-based analysis, as well as earlier precedent in *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969).

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[2] *Veal* notes that one can be a holder and not be an owner, and that borrowers are economically indifferent to who owns their loan:

> This distinction further recognizes that the rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note. They are designed to provide for the maker a relatively simple way of determining to whom the obligation is owed and, thus, whom the maker must pay in order to avoid defaulting on the obligation. UCC § 3–602(a), (c). By contrast, the rules concerning transfer of ownership and other interests in a note identify who, among competing claimants, is entitled to the note's economic value (that is, the value of the maker's promise to pay). Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the Veals should not care who actually owns the Note – and it is thus irrelevant whether the Note has been fractionalized or securitized – so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the 'person entitled to enforce' the Note, the Veals should be content.

Id. at 912.

B. *Trujillo* Explains What Constitutes Sufficient Proof For Purposes of RCW 61.24.030(7).

Trujillo also resolves the mandate in RCW 61.24.030(7)(a) calling for a trustee to have proof of note ownership through evidence of holder status. Division One observed that:

> [t]his record reflects that Trujillo concedes in her pleadings that 'as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred *possession* of the Note to Wells [Fargo].' This concession is significant in that it is consistent with the beneficiary declaration before us. It is also consistent with *Bain*'s discussion of who constitutes a beneficiary for purposes of the Deeds of Trust Act.

Trujillo, 181 Wn.App. at 496 (emphasis in original).[3] Based on the fact of Wells Fargo's possession of the note as pled in Ms. Trujillo's complaint, and applying the holding in *Bain*, Division One found that Wells Fargo "provided proof that it is the 'beneficiary' of the deed of trust securing the delinquent note for purposes of this statute [RCW 61.24.030(7)]." *Id.*[4]

Contrary to NJP's position, *Trujillo* determined that:

> [w]e have no reason to conclude that the legislature intended to depart from either the common law, as articulated in *John Davis*,

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[3] *See also Trujillo* at 501-502 ("[t]he record reflects that Wells Fargo had possession of Trujillo's note from the beginning of the foreclosure proceeding. By definition, it is the 'holder' of that note.").

[4] It is important to note that Ms. Trujillo's contention that NWTS could not rely on Wells Fargo's beneficiary declaration did not, by itself, give rise to any cause of action in the underlying complaint. *See* CP 82-94. Ms. Trujillo asserted that Wells Fargo lacked the lawful authority to foreclose, and consequently, NWTS was liable for Criminal Profiteering, Consumer Protection Act violations, and the Intentional Infliction of Emotional Distress. *Id.* Yet, Ms. Trujillo conceded that NWTS "was legally appointed the successor trustee." CP 90 (Compl., ¶ 30).

> or the UCC, as articulated in RCW 62A.3-301, in enacting RCW 61.24.030(7)(a) regarding proof of who is entitled to enforce a note that is secured by a deed of trust.

Id. at 500; *cf.* Brief of Amicus NJP at 6 ("the legislature imposed more stringent requirements... by requiring that the beneficiary be the *owner* of the note.").

Trujillo reconciles RCW 61.24.030(7) through a *plain reading* of "the second sentence of the statute, specifying that the beneficiary must be the holder of the note for purposes of proof...." *Id.* at 501. Thus, once a trustee obtains a declaration of holder status, the trustee has "sufficient proof" to achieve compliance with RCW 61.24.030(7)(a). The beneficiary, *i.e.* the note holder, "need not show that it is the owner of the note." *Id. Trujillo* is the logical descendant of *John Davis & Co.* and *Bain*, and its holding should stand without further review.

C. The Court Should Not Expand the Definition of "Beneficiary" in Order to Force Investors Into Mediation.

NJP recognizes that the Foreclosure Fairness Act ("FFA") directs the production of a beneficiary declaration as part of pre-mediation disclosures. Brief of Amicus NJP at 7, *citing* RCW 61.24.163(5) ("Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a)."). But this statute does not suggest expanding the definition of "beneficiary" so that note owners must participate in a

mediation session.

The FFA does not compel those with an ownership interest in a loan, *e.g.* investors such as Fannie Mae or Freddie Mac, to engage in mediation because the *only* parties necessary for that process are the beneficiary, borrower, borrower's representative, and mediator. RCW 61.24.163(7).[5]

Moreover, state and federal legislation has addressed some of the concerns voiced in *Bain* with respect to identifying all entities who can potentially discuss loan-related issues, and knowing the proper parties for borrowers to communicate with. TILA now requires that any note sale (TILA) be disclosed to a borrower. *See* 15 U.S.C. §1641(g). RESPA requires that any servicing transfer be disclosed to a borrower in advance. 12 U.S.C. §2605(b). And the DTA mandates disclosure of "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust." RCW 61.24.030(8)(l).

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[5] The plaintiff's counsel in *Bain* argued in briefing that homeowners are protected in mediation from a servicer, participating on a beneficiary's behalf, who might claim that it is bound by an owner's prohibition on modifying the loan. *Bain, supra.*, Response to Washington Bankers Associations Amicus Brief at 17 ("Washington law expressly provides that if a servicer participating in mediation claims that it cannot modify a loan because of an investor restriction, the servicer must provide proof of that restriction.").

NJP's argument to change the definition of "beneficiary" in order to eliminate small servicers' exemptions from mediation, and instead sweep those with an ownership interest in the loan into the process, is best left to legislative efforts, not the Court in this case. Brief of Amicus NJP at 8; *cf. Salts v. Estes*, 133 Wn.2d 160, 171, 943 P.2d 275 (1997) (Court will not "transform" statutory language through judicial construction); *Anderson v. City of Seattle*, 78 Wn.2d 201, 471 P.2d 87 (1970) ("[i]t is not the prerogative of the courts to amend the acts of the legislature.").

D. The Widespread Acceptance of *Trujillo* By Judges Across Washington State Does Not Mean an Issue of Substantial Public Interest Exists.

NJP argues that further review of *Trujillo* is appropriate because "NWTS's counsel have repeatedly cited *Trujillo*... and numerous other cases have already cited *Trujillo* with approval since its recent publication." Brief of Amicus NJP at 3.

However, the adoption of *Trujillo* as either controlling or persuasive authority does not equate to an issue of substantial public interest simply because the case involves a mortgage loan. *See* R.A.P. 13.4(b)(4). The Supreme Court has previously denied review of several appellate decisions relating to the enforceability of secured notes or compliance with the DTA.

For example, *Collings v. City First Mortgage Servs., LLC* addressed the bona fide purchaser doctrine in a case involving a securitized loan with multiple transfers. 177 Wn. App. 908, 317 P.3d 1047 (2013), *review denied*, 179 Wn.2d 1028, 320 P.3d 718 (2014).[6] A petition for review of Division One's decision was denied.

Glepco, LLC v. Reinstra involved a deed of trust and notice of sale – from NWTS – which omitted a second lot on the foreclosed property. 175 Wn. App. 545, 307 P.3d 744, *review denied*, 179 Wn. 2d 1006, 315 P.3d 530 (2013). Division One affirmed reformation and quiet title claims, and further review was not accepted. *Id.*

BECU v. Burns concerned the plain language of a DTA provision. 167 Wn. App. 265, 272 P.3d 908, *review denied*, 175 Wn.2d 1008, 285 P.3d 885 (2012), *citing* RCW 61.24.100. Division One's opinion was permitted to stand without additional appellate review.

CHD, Inc. v. Boyles involved application of the waiver doctrine after a non-judicial foreclosure, and Division Three discussed the DTA's objectives in detail. 138 Wn. App. 131, 157 P.3d 415 (2007). The Supreme Court did not accept a petition for review.

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[6] "According to the testimony, the note was created in December 2006 when Loveless refinanced his loan with City First. City First endorsed the note specially to Greenpoint Mortgage Funding Inc. Greenpoint endorsed the note in blank. The note was acquired by Lehman Brothers.... Lehman conveyed it through a depositor, the Structured Assets Securities Corporation, to U.S. Bank for the benefit of certificate holders." *Id.* at 933.

Lastly, *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, extensively analyzed foreclosure trustees' duties (as then existing) and obvious procedural and substantive defects with a non-judicial process. 80 Wn. App. 655, 910 P.2d 1308 (1996), *review denied*, 130 Wn.2d 1015, 928 P.2d 416 (1996), *citing* RCW 61.24.040. *Meyers Way* has been cited numerous times in each division of the Court of Appeals since publication. Review of Division One's decision in *Meyers Way* was denied.

NJP cites to *Lyons v. US Bank N.A. et al.* to support its position that review is warranted because *Lyons* does not reach the DTA's meaning of "beneficiary." Brief of Amicus NJP at 9, *citing* Case No. 89132-0. But the *Lyons* complaint expressly recognizes that "beneficiary" means "note holder" in the DTA context; Ms. Lyons claimed that NWTS recorded a sale notice "without obtaining the proper executed document from the *holder of the note* because Wells Fargo did not have any beneficial interest in [her] loan." Case No. 89132-0, CP 22 (Compl., ¶ 15.4; emphasis added).[7] The fact that the outcome of *Lyons* is pending should not cause *Trujillo* to be called into question.

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[7] In *Lyons*, not even the borrower knew that the loan was sold just one day before the Notice of Trustee's Sale was recorded as to her commercial property. *Id.*, Brief of Appellant Lyons at 8-9. Nor did the borrower know when NWTS possessed a beneficiary declaration or the contents thereof, as that document is solely given to a trustee "before" recording a sale notice. RCW 61.24.030(7)(a).

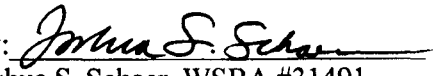
III. CONCLUSION

As Ms. Trujillo noted in her briefing on appeal, "the trial court was required to assume that the legislature meant exactly what it said." Brief of Appellant at 17, *citing Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991). In the DTA, the Legislature plainly allows trustees to rely on a declaration of holder status as "sufficient proof" to comply with RCW 61.24.030(7)(a).

Not only did NWTS possess a sworn declaration from Wells Fargo entitled "Beneficiary Declaration (Note Holder)," but Ms. Trujillo admitted that Wells Fargo held the Note when foreclosure commenced. CP 87 (Compl., ¶ 26). As Note *holder*, Wells Fargo was the "beneficiary," as defined by the DTA and consistent with the UCC. *See* RCW 61.24.005(2); *see also Bain*, *supra*. Therefore, this case should not be accepted for Supreme Court review.

DATED this 10th day of October, 2014.

RCO LEGAL, P.S.

By: 
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action; and I am competent to be a witness herein.

2. That on October 10, 2014, I caused a copy of the **Answer of Respondent Northwest Trustee Services, Inc. to Amicus Curiae Memorandum of Northwest Justice Project** to be served in the following in the manner noted below:

Matthew Geyman Columbia Legal Services 101 Yesler Way, Suite 300 Seattle, WA 98104 Attorneys for Appellant Trujillo	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 10th day of October, 2014.

Kristine Stephan, Paralegal

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Rocio Trujillo (Appellant) v. Northwest Trustee Services, Inc. (Respondent), et al.
Supreme Court No. 90509-6
Court of Appeals No. 70592-0-I
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Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Amicus Curiae Memorandum of Northwest Justice Project.**

If there are any questions, please contact us. Thank you.

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