Supreme Court No. 92143-1

Court of Appeals No. 71402-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VALMARI RENATA,

Appellant,

vs.

FLAGSTAR BANK, F.S.B. et al.,

Respondents,

ANSWER TO PETITION FOR REVIEW

Submitted By:
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I. Identity of Answering Party

Northwest Trustee Services, Inc. ("NWTS") is a respondent in the appeal and defendant in the trial court.

II. Counterstatement of the Case

NWTS incorporates the counterstatement of the case set forth in Flagstar and MERS's Answer. NWTS sets forth the following additional facts:

On July 22, 2010, before the Notice of Trustee's Sale was recorded, NWTS had in its possession a payment history, a copy of the Note with a special indorsement to Flagstar, a copy of the Deed of Trust, and a beneficiary declaration from Flagstar stating under the penalty of perjury that it was the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has the requisite authority under RCW 62A.3-301 to enforce said obligation.[1]

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[1] *See* Appellant's Petition for Review at 5-6 (Jeff Stenman letter dated July 22, 2010 and the attachments thereto.) CP 291-292.

After receiving the letter from NWTS in July of 2010, Renata did not communicate with NWTS in any way until filing this lawsuit.

III. Argument

NWTS incorporates the argument section of Flagstar and MERS's Answer. NWTS sets forth the following additional arguments:

A. Because every "person entitled to enforce" an instrument under RCW 62A.3-301 meets the plain meaning of the word "owner", NWTS literally complied with the first sentence of RCW 61.24.030(7)(a).

Lyons v. U.S. Bank National Ass'n, 181 Wn.2d 775 (2014) and *Trujillo v. NWTS*, 2015 WL 4943982 (2015) held that a beneficiary declaration with the language "or requisite authority under RCW 62A.3-301" is insufficient as a declaration provided for in the second sentence of RCW 61.24.030(7)(a).[2] The

[2] The second sentence of RCW 61.24.030(7)(a) provides one way that ownership can be proved: a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note ... shall be sufficient proof as required under this subsection. *Lyons*, *supra*, 181 Wash.2d 775, 789 (2014).

declaration does, however, unequivocally prove that Flagstar is the ***owner*** of the note.[3]

1. Plain meaning of "owner."

The "owner" of a promissory note is not defined in the Deed of Trust Act ("DTA") or Uniform Commercial Code ("UCC").[4] Statutory interpretation starts with the plain meaning of the language; the plain meaning controls if it is unambiguous. *Nissen v. Pierce County*, 2015 WL 5076297, *7 (2015). "We may use a dictionary to discern the plain meaning of an undefined statutory term." *Id.*

"Owned." To "own" a record means "to have or hold [it] as property." *Id.*

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[3] The first sentence of RCW 61.24.030(7)(a) requires that 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. Ownership can be proved in different ways. *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wash.2d 775, 789, 336 P.3d 1142 (2014).

[4] It is important to note that under the UCC, the concept of "person entitled to enforce" a note is not synonymous with "owner" of the note. *See* Official Comment 1 to UCC § 3-203. A person need not be the owner of a note to be the person entitled to enforce it, and ***not all owners will qualify as persons entitled to enforce***. Presumably, then, the DTA's definition of owner is more broad than the UCC's if the required proof is ownership.

"Ownership." "Ownership implies the right to possess a thing, ***regardless of any actual or constructive control***." Black's Law Dictionary (10th ed. 2014), ownership (emphasis added).

"Owner." An "owner" is defined as someone who has the right to possess, use, and convey something; a person in whom one or more interests are vested. An owner may have complete property in the thing or may have parted with some interests in it. Black's Law Dictionary (10th ed. 2014), owner.

These definitions make clear that an owner of a promissory note has a right to possess, use, and convey the note, but does not need actual or physical possession, and ownership is a distinct concept from control. *See Lynott v. National Union Fire Ins. Co. of Pittsburgh*, 123 Wash.2d 678, 693, 871 P.2d 146, 154 (1994) (***"Ownership is different from control"***).

2. A person entitled to enforce a note under RCW 62A.3-301 is either a holder or ***owner*** of the note, and nothing else.

The "requisite authority under RCW 62A.3-301" language in the declaration is not ambiguous as to Flagstar's status as an

owner because in all possible scenarios under RCW 62A.3-301, the requisite proof is established.

The first person entitled to enforce an instrument under RCW 62A.3-301 is the holder of the instrument, and that is the precise definition of a beneficiary under the DTA.[5] Whether a holder under the DTA is also an owner of the Note is irrelevant in this context, because any interpretation of the DTA that would find a trustee with proof that the beneficiary is the beneficiary (the holder of the note as that term is defined under the UCC) as failing to have the requisite proof under 61.24.030(7)(a) is absurd.

The second person entitled to enforce an instrument is (ii) a nonholder in possession of the instrument who has the rights of a holder. This is a person who is in possession of the note that is not properly endorsed, but either acquired the note by operation of law outside the UCC or was delivered the note with the purpose of

[5] This Court held that a beneficiary under the DTA is a holder as defined by the UCC. "The plaintiffs argue that our 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 by the payee ... We agree. This accords with the way the term 'holder' is used across the deed of trust act and the Washington UCC." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104.

transferring the right to enforce the instrument.[6] A nonholder in possession with rights of a holder is necessarily an "owner" of the note; it has the right to possession, the right to convey the note, and the right to enforce the note. Important to a nonholder in possession with rights of a holder is RCW 62A.3-203(b), which provides that "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." RCW 62A.3-203(b) (emphasis added). If Flagstar is a nonholder in possession of the instrument who has the rights of a holder under the UCC, Flagstar is necessarily an owner of the note.[7]

Finally, the third person entitled to enforce an instrument is (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309. If a person

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[6] *See*, Permanent Editorial Bd., for the UCC, Application of the UCC to Selected Issues Relating to Mortgage Notes (2011), *see also*, Official Comment to UCC § 3-203(b).

[7] *See* definition of owner, *supra*: An "owner" is defined as someone who has the right to possess, use, and convey something; a person in whom one or more interests are vested.

is not in possession of the instrument, RCW 62A.3-309 explains when lost, destroyed, or stolen instruments may be enforced:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.[8]

A person that meets the requirements of RCW 62A.3-309(a) is also an owner of the note; it has the ***right to*** possess the note, it has the right to convey the note[9], and it has the right to enforce the note. If Flagstar did not possess the Note but satisfied each requirement under RCW 62A.3-309(a), it would still be an

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[8] RCW 62A.3-309(a).
[9] *See, JPMorgan Chase Bank, N.A. v. Stehrenberger*, 180 Wash. App 1047, 337 P.3d 325 (2014).

owner because control and actual possession are irrelevant to ownership.[10]

Because the declaration unequivocally establishes that Flagstar was the ***owner*** or holder of the Note, NWTS literally complied with RCW 61.24.030(7)(a).

B. NWTS had in its possession other documentation prior to recording the first Notice of Trustee's Sale that proved Flagstar was the owner of the note.

Even if the declaration alone was not sufficient to comply with RCW 61.24.030(7)(a), unlike *Lyons* and *Trujillo*, the record here shows that NWTS also had in its possession a copy of the Note specially indorsed to Flagstar, a copy of the Deed of Trust, and a payment history, all of which were provided to Renata by NWTS before recording the Notice of Trustee's Sale.[11] These documents alone, particularly a note with a special indorsement to Flagstar, are sufficient proof under RCW 61.24.030(7)(a).

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[10] *See* definition of "Ownership" *supra*: "Ownership implies the right to possess a thing, ***regardless of any actual or constructive control.***" Black's Law Dictionary (10th ed. 2014), ownership (emphasis added).

[11] *See* Appellant's Petition for Review at 5, ¶ 2 (Jeff Stenman letter dated July 22, 2010 and the attachments thereto. CP 291-292.

C. The beneficiary declaration cannot be the proximate cause of any injury under the CPA because Renata did not see the beneficiary declaration and Flagstar was in fact the holder of the note when it provided NWTS the beneficiary declaration.

Even assuming NWTS failed to comply with RCW 61.24.030(7)(a), Renata still must meet every element of a CPA claim, including injury and causation. Renata must have raised a genuine issue of material fact that NWTS's alleged unfair and deceptive conduct was the proximate cause ("cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened). *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash.2d 59, 83, 170 P.3d 10 (2007).

Renata never saw the beneficiary declaration. Unlike *Trujillo*, where this Court found that investigation expenses and other costs associated with "dispelling the uncertainty about who owns the note that NWTS's allegedly deceptive conduct created", the beneficiary declaration here was never actually seen by Renata, she never requested to see the beneficiary declaration, she did not

investigate the beneficiary declaration, and, even if it was seen, the declaration could not have created any deception because its contents were entirely true.

There is nothing in RCW 61.24.030(7)(a) that requires the trustee to show a borrower the beneficiary declaration, and any claim that this beneficiary declaration somehow caused investigative expenses lacks merit because it would be improper for a borrower to rely on a beneficiary declaration for any reason.

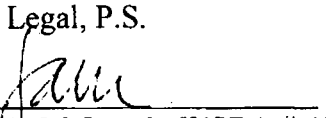
Finally, also unlike *Trujillo* and *Lyons*, Flagstar has proven on this record that it actually held the note when it made the declaration at issue.[12]

IV. Conclusion

NWTS requests the Court deny review.

Dated this 23rd day of September, 2015

RCO Legal, P.S.



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[12] *See*, *Trujillo*, supra, at N. 4 ("Wells Fargo would constitute a "holder," and therefore a valid beneficiary under the DTA, if it actually held the note when it made the declaration at issue.").

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. On September 24, 2015 I caused a copy of the **Answer to Petition for Review** to be served to the following in the manner noted below:

Richard Llewelyn Jones Kovac & Jones, PLLC 1750 112th Ave. NE, Suite D-151 Bellevue, WA 98004 Attorneys for Plaintiff / Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
Fred B. Burnside Davis Wright Tremaine, LLP 1201 Third Ave., Suite 2200 Seattle, WA 98101-3045 Attorneys for Defendants / Respondents Flagstar Bank, FSB and MERS	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 24th day of September, 2015.

Kristine Stephan, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Kristi Stephan
Cc: John McIntosh
Subject: RE: Valmari Renata v. Flagstar Bank, F.S.B., et al. (Petition for Review) / Supreme Court No. 92143-1 / Court of Appeals No. 71402-3-I

Received on 09-24-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kristi Stephan [mailto:kstephan@rcolegal.com]
Sent: Thursday, September 24, 2015 12:59 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: John McIntosh <jmcintosh@rcolegal.com>
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Valmari Renata (Appellant) v. Flagstar Bank, F.S.B., et al. (Respondents)
Supreme Court No. 92143-1
Court of Appeals No. 71402-3-I
Filed by: John A. McIntosh
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Please file the attached **Answer to Petition for Review.**

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

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