46520-5-II
COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

VALERIE J. SLOTKE
Appellant

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE3
Respondent

RESPONDENT'S BRIEF

Appeal from Judgment of Pierce County Superior Court
Case No.: 13-2-11053-4
Honorable Kathryn J. Nelson

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I. INTRODUCTION

Borrower Valerie Slotke ("Slotke") appeals the summary judgment granting judicial foreclosure of 204 Island, Blvd., Fox Island, WA (the "Property"). Slotke challenges the routine foreclosure action, claiming it was an improper attempt to enforce the Note and Deed of Trust simultaneously, because there was no demonstration as to ownership of the note and deed of trust, that UCC 9-203 is the only method by which a person may obtain the right to enforce a deed of trust, and Slotke challenges the meaning of possession of the note. However, Slotke's arguments reflect a fundamental misunderstanding of foreclosures in the State of Washington.

In Washington, a note holder is entitled to enforce the note and foreclose on it when certain conditions are met. The evidence before the trial court on Deutsche Bank National Trust Company, as Trustee for Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE3's ("Deutsche Bank as Trustee") motion for summary judgment was comprehensive. Specifically, Deutsche Bank as Trustee submitted sworn evidence showing that Slotke entered into the loan and that the loan was secured by a recorded Deed of Trust against the Property on Fox Island. Deutsche Bank as Trustee submitted sworn evidence

reflecting Slotke's default on April 1, 2010 and her failure to cure that default. Deutsche Bank as Trustee submitted sworn evidence showing that it was the holder of the original Note, and even presented the original blue ink Note to the Court at the hearing on its Motion for Summary Judgment. The Note itself was specially indorsed to Deutsche Bank National Trust Company, as Trustee for Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE3. Deutsche Bank as Trustee further testified that no other suit or action had been instituted upon the note, or to foreclose the note. It was a prima facie case of judicial foreclosure.

Slotke's opposition failed to challenge the existence of the loan, the authenticity of the Note and Deed of Trust, or the existence of her default. Instead, Slotke challenged two agreements that are extraneous and not necessary for a judicial foreclosure action: the supplemental prospectus ("Supplemental Prospectus") and the pooling and servicing agreement (the "Pooling and Servicing Agreement"). The documents themselves related to the securitization of the loan and Slotke claimed that the parties to the agreements had failed to comply with the securitization documents. However, Slotke, who is a stranger to these contracts, lacked standing to challenge the agreements and lacks standing to challenge any alleged non-compliance therewith. More importantly, even if Slotke's

claims were true about the pooling and servicing agreement, it would not affect the outcome of litigation, because a decree of foreclosure is not contingent upon the existence of, or compliance with, a pooling and servicing agreement or supplemental prospectus. These allegations fail to establish the existence of a genuine issue of material fact. Slotke's response also seeks to redefine Washington law and terms of art, despite the weight of Washington case law, which directly contradicts her interpretations and application of the Uniform Commercial Code Section 9 to foreclosures.

Regardless of the distractors, this case is a straightforward judicial foreclosure action, where the beneficiary was entitled to foreclose, and did foreclose. Given the absence of any dispute of the dispositive facts for a foreclosure action, the trial court properly awarded summary judgment to Deutsche Bank as Trustee. Consequently, the trial court's grant of summary judgment of foreclosure should be affirmed on appeal.

II. RESPONSE TO APPELLANT'S STATEMENT OF ISSUES

Respondent Deutsche Bank as Trustee makes no assignments of error, inasmuch as the judgment below was correct. Therefore, Deutsche Bank as Trustee restates the issues pertaining to Appellants assignments of error as follows: The trial court correctly held that Deutsche Bank as

Trustee was the note holder and met its burden on summary judgment for judicial foreclosure of real property.[1]

III. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. Slotke Obtains a Loan and Grants Deed of Trust

On May 16, 2006, Valerie J. Slotke (hereinafter "Slotke"), for value received, executed and delivered a Promissory Note (the "Note") for a loan in the amount of $253,575.00 to First Financial Services, LLC, DBA The Lending Center. (CP 10, 14-19.) The Note also provides that the lender may transfer the Note and that anyone who takes the note by transfer. (CP 14.) The Note was later indorsed to Deutsche Bank as Trustee. In the Note, Slotke agreed to "pay principal and interest by making a payment every month" for 30 years. (CP 17.) The Note also specified that, if Slotke "do[es] not pay the full amount of each monthly payment on the date it is due, [she] will be in default," entitling the holder of the Note to collect the full amount of the principal, interest, late charges, and attorneys' fees. (CP 16.)

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[1] Slotke also identified the Court's dismissal of Slotke's claims with prejudice as an assignment of error, but Slotke's Answer, Response to Deutsche Bank as Trustee's Motion for Summary Judgment, and Opening Brief do not reflect that Slotke raised any affirmative claims against Deutsche Bank as Trustee.

In order to secure the payments required by the Note, on or about May 16, 2006, Slotke executed the Deed of Trust, which granted her lender a lien against the Property. (CP 10, 21-42.) The Deed of Trust repeated Slotke's duty to make monthly payments and stated that "if [a] default is not cured... Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law." (CP 33 §22.) The Deed of Trust also stated that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (CP 12 §20.) The Deed of Trust was recorded on May 24, 2006 under Pierce County recording File No. 200605240819 (CP 21.) Both the Note and Deed of Trust provided that they could be transferred.

B. The Loan Was Securitized and Assigned to Deutsche Bank as Trustee

The ownership interest in Slotke's loan was assigned to a securitized mortgage loan trust named Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE3. (CP 3, 9.) The Trustee of the trust is Deutsche Bank National Trust Company. (*Id.*) An Assignment of Deed of Trust was recorded on August 5, 2011, under

Pierce County recording number 201108050538, reflecting that Mortgage Electronic Registration Systems, Inc., as nominee for First Financial Services, LLC, DBA The Lending Center, assigned its interests in the Deed of Trust to Deutsche Bank as Trustee. (CP 44.) Deutsche Bank as Trustee is the holder of the Note and the beneficiary of the Deed of Trust under Washington law. (CP 10.)

C. Slotke Defaults on the Loan and Deutsche Bank as Trustee Initiates Foreclosure

Slotke failed to make the monthly mortgage payment due on April 1, 2010 and failed to make payments thereafter. (CP 11.) On or about June 25, 2012, a letter was sent to Slotke, advising her of the default. (CP 11.) The notice stated the amount of default ($50,654.65) and that the defaulted needed to be paid by July 25, 2012 in order to cure the default. The notice further stated that if the default was not cured, the loan would be accelerated. (CP 46.) It is undisputed that Slotke failed to cure the default and the loan was accelerated. (CP 12.)

On May 14, 2013, Deutsche Bank as Trustee filed a judicial foreclosure in Pierce County Superior Court and was assigned Case No. 13-2-09169-6.

D. Deutsche Bank as Trustee's Summary Judgment Motion is Granted

1. Deutsche Bank as Trustee's Summary Judgment Motion and Supporting Evidence

On January 16, 2014, Deutsche Bank as Trustee filed a Motion for Summary Judgment that was supported by several sworn affidavits. The Motion argued that there was no genuine issue of material fact that (1) Slotke was in default, (2) Deutsche Bank as Trustee provided notice of the default to Slotke, (3) Deutsche Bank as Trustee was the holder of the note and beneficiary, and (4) all of the preconditions to enforcement of the Note and Deed of Trust had been met. In support of its Motion, Deutsche Bank as Trustee filed an affidavit based upon business records, made at or near the time of the activity and kept in the course of business. (CP 9-46, 60-97.) The Affidavit further stated that the Slotke was due for the April 1, 2010 payments, that no payments were made thereafter, and that on or about June 25, 2012, the loan servicer advised the borrower of the default, and that the loan would be accelerated if the default was not cured. (CP 12.) The affidavit attested that Deutsche Bank as Trustee was the holder of the Note and the current beneficiary and mortgagee of record under the Deed of Trust. (CP 10.) The affidavit stated that the note was physically in the possession of Deutsche Bank as Trustee or Deutsche Bank as

Trustee's agent as custodian or bailee. (CP 10.) The affidavit also provided true and correct copies of the Note, Deed of Trust, and the Assignment to Deutsche Bank as Trustee, which was recorded in the official records of Pierce County. (CP 14-44.)

2. Slotke's Opposition and Evidence

Slotke filed a Reply, arguing that because Deutsche Bank as Trustee had not submitted proof that it acquired the Note and Deed of Trust by December 28, 2006, Deutsche Bank as Trustee was not entitled to foreclose on the property. The basis for this argument was 26 U.S.C. 860, which relates to the tax implications for certain investments.[2] (CP 114.) Slotke also argued that Deutsche Bank as Trustee's possession of the note was insufficient, under RCW 62A.9A.3-313, that Deutsche Bank as Trustee was required to demonstrate ownership of the note, and that Deutsche Bank as Trustee's physical possession of the note on behalf of the certificateholders did not entitle it to foreclose on the property. (CP 110-111.) According to Slotke, Deutsche Bank as Trustee must also prove that it gained an enforceable security interest in the Deed of Trust under RCW 62A.9A.3-313 to foreclose on the property. Slotke also challenged

[2] Neither the plain language of the Washington Deed of Trust Act, or UCC Article 3 requiring compliance with 26 U.S.C. 860, or that it be a "Qualified Mortgage" under 26 U.S.C. 860, in order to foreclose a Deed of Trust or Mortgage in the State of Washington. Similarly, there is no requirement that a Note Holder be a Real Estate Mortgage Investment Conduit. These arguments were not raised or briefed in Slotke's Opening Brief and therefore is waived.

the delivery of the Note to the Trust under the terms of the Pooling and Servicing Agreement. However, there are no such requirements under Washington law to foreclose and Slotke's response admitted that she was not a party to either contract; and, she did not allege and has not alleged that she was a third party beneficiary of the contract. (CP 107.) In sum, therefore, Slotke relied on creative legal arguments to avoid foreclosure, while failing to submit evidence on point to rebut Deutsche Bank as Trustee's prima facie case of foreclosure and failing to identify the existence of a genuine issue of a material fact as to whether foreclosure was appropriate. Slotke did not challenge Deutsche Bank as Trustee's declaration or the admissibility of the evidence contained therein.

3. Deutsche Bank's Reply

In Reply, Deutsche Bank as Trustee argued that RCW 62.A9A (UCC Article 9) did not apply to secured interests in real property, and that Slotke lacked standing to enforce the terms of the Pooling and Servicing Agreement and Supplemental Prospectus to which she was not a party. (CP 119-121.) Furthermore, Deutsche Bank as Trustee argued that the transfer of the note would not affect Slotke's obligations thereunder and that, even if there was an impropriety in the transfer of a promissory note, that impropriety would only affect the parties to the transfer, and not the borrower. (CP 120.) Deutsche Bank as Trustee further argued that

Deutsche Bank as Trustee further argued that the transfer of the Note carried with it the Security under Washington law and that, as the holder of the note, Deutsche Bank as Trustee was entitled to enforce the security interest.[3] (CP 121.) Finally, Deutsche Bank as Trustee argued that because there were no material disputes of fact as to Deutsche Bank as Trustee's right to judicially foreclose under the loan documents, Deutsche Bank as Trustee had proven that it was entitled to judgment as a matter of law. (CP 123.)

IV. ARGUMENT

A. Summary Judgment Awards are Reviewed *De Novo*

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Meyer v. Univ. of Wash.,* 105 Wn.2d 847, 852, 719 P.2d 98 (1986). To establish the existence of a genuine issue of material fact, the nonmoving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Seven*

[3] The Washington Supreme court affirmed that "the security instrument will follow the note, not the other way around." *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 104 (2012).

Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). When determining whether an issue of material fact exists, the court construes all facts and inferences in favor of the non-moving party. *See Reid v. Pierce County,* 136 Wn.2d 195, 201, 961 P.2d 333 (1998). On review of a summary judgment, this court must decide whether the affidavits, facts, and record have created an issue of fact and, if so, whether such issue of fact is material to the cause of action. *Lamon v. McDonnell Douglas Corp.,* 91 Wash.2d 345, 352, 588 P.2d 1346 (1979). A genuine issue of material fact exists only where reasonable minds could reach different conclusions. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In reviewing mortgage loans, the "clear" and "express" terms of a promissory note, guarantee, and security agreement must be enforced as written. *Seattle-First Nat'l Bank v. Westwood Lumber, Inc.,* 65 Wash. App. 811, 817, 820 (Div. 1, 1992).

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *See Beaupre v. Pierce Cnty.,* 161 Wn.2d 568,571, 166 P.3d 712 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.,* 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). However, the Court may *affirm* the ruling below *on any ground supported by the record,* "even if the trial court did not consider the argument." *King Cnty.*

v. Seawest Inv. Assocs., LLC, 141 Wn. App. 304, 310, 170 P.3d 53 (2007) (citing *LaMon v. Butler,* 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

Here, the Note and Deed of Trust are unambiguous in describing what constitutes a breach and the remedies for such a breach. The trial court correctly applied the standards in granting summary judgment of judicial foreclosure to Deutsche Bank as Trustee. This Court should affirm that decision, for the reasons set forth below.

B. The Trial Court Property Granted Deutsche Bank as Trustee's Motion for Summary Judgment

1. Deeds of Trust and Beneficiary Status under Washington Law

A deed of trust is a three-party transaction, in which land is conveyed by a borrower, the grantor, to a trustee, who holds title in trust for a lender, the beneficiary, as security for credit or a loan the lender has given the borrower. *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012) (citing 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE TRANSACTIONS § 17.3, at 260 (2d. ed.2004)).

Traditionally, the beneficiary of a deed of trust was the lender who loaned money to the homeowner. *Bain,* 175 Wash.2d at 88, 285 P.3d 34. The deed of trust protects the lender by giving it the power to nominate a trustee, who then has the power to sell the home if the homeowner

defaults. *Id.* Lenders, however, are free to sell the secured debt, typically by selling the promissory note signed by the homeowner. *Id.* The Washington Deed of Trust Act recognizes that the beneficiary of a deed of trust at any one time might not be the original lender. *Id.* The act therefore gives subsequent holders of the debt the benefit of the act by defining "beneficiary" broadly. *Id.*; RCW 61.24.005(2).

2. The Holder of the Note is Entitled to Foreclose, Even if the Holder is Not the Owner of the Note

The Uniform Commercial Code Article 3 of the Revised Code of Washington ("RCW") is the substantive state law governing negotiable instruments. A Note is a negotiable instrument. Among the persons or entities entitled to enforce a negotiable instrument under the RCW is the "holder." *See* RCW § 62A.3-301. A person or entity in possession of an instrument qualifies as the "holder" of the instrument is payable to that person or entity, or payable to the bearer. RCW 62A.1–201(b)(21) states that, "'Holder' with respect to a negotiable instrument, means ... [t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

In order for a note to be enforceable by a party *other than* the one to whom the note was originally payable, the note must either be negotiated or transferred. A "'negotiation' means a transfer of possession,

whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." RCW § 62A.3-201. "[I]f an instrument is payable to an identified person, negotiation requires transfer of *possession* of the instrument *and* its indorsement by the holder." RCW § 62A.3-201(b) (emphasis added). An "indorsement" is a signature that is "made on an instrument for the purpose of negotiating the instrument." RCW § 62A.3-204.

Neither RCW 62A.3 RCW nor relevant case law define "possession." But Black's Law Dictionary defines "possession" as:

> "1. The fact of having or holding property in one's power; the exercise of dominion over property.
>
> 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object."

BLACK'S LAW DICTIONARY 1281 (9th ed.2009).

When a note is transferred from one lender to another, the successor lender receives not only the note but also, inherently, an interest in the relevant trust deed. *Am. Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 61 (1911) *on reh'g,* 67 Wash. 572 (1912) ("There is no doubt that a mortgage, or any other security given for the payment of a bill or note, passes by a transfer of the bill or note to the transferee."). The successor lender therefore has the right to judicially foreclose on the note

and trust deed based on its possession of the note. Because plaintiff has possession of the note in this case, it is entitled to summary judgment. *See, e.g., Workman v. Bryce*, 50 Wash. 2d 185, 190 (1957) (decree of foreclosure was properly entered where mortgage was established as valid, the past due debt was unpaid, and the borrower had defaulted).

Where an entity is the note holder, it is not necessary for the note holder to also be the note owner; rather, "proof of [the status of holder] is what entitles a beneficiary to enforce a note secured by a deed of trust. Ownership of the note is irrelevant." *Trujillo v. Nw. Tr. Servs., Inc.,* 181 Wash.App. 484, 506, 326 P.3d 768 (2014). Furthermore, it is well-established that one party may hold and enforce a note on behalf of a second party, and courts have consistently upheld the practice of doing so. *See, e.g. Corales v. Flagstar Bank, FSB,* 822 F. Supp. 2d 1102, 1107 (W.D. Wash, 2011)(finding that although Freddie Mac owned the loan at issue, "Flagstar is the holder of the note with the right to enforce it and the corresponding deed of Trust"). In *Bain*, the Washington Supreme Court affirmed that the security interest follows the note, and thereby recognized the long held precept of Washington law that the holder of the note is entitled to the enforce the security interest given to insure performance under the note. *Bain*, 175 Wn.2d 83, 104 (2012).

3. Here, Deutsche Bank as Trustee is the Holder of the Note, which was Specially Indorsed to Deutsche Bank as Trustee

In this case, Deutsche Bank as Trustee filed a judicial foreclosure complaint. In support of its Motion for Summary Judgment, Deutsche Bank as Trustee submitted affidavits attesting that it was the holder of the Note. (CP 9-47.) Deutsche Bank as Trustee then produced the original blue ink note to the Court and Slotke for inspection at the hearing on the Motion for Summary Judgment. (CP 117.) These acts clearly demonstrate Deutsche Bank as Trustee's possession and control of the note, as well as Deutsche Bank's status as the note holder.

In addition, the Note was properly indorsed to Deutsche Bank as Trustee. (*See supra;* CP 17.) The Note was originally made payable to First Financial Services, LLC DBA The Lending Center a Deed of Trust. The Note was then negotiated and made payable to Deutsche Bank National Trust Company, as Trustee for Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE3 through the special indorsement and by transfer of possession to Deutsche Bank National Trust Company, as Trustee for Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE3. Since Deutsche Bank as Trustee is currently in possession of the Note in it

capacity as the trustee of an express trust, it qualifies as the Note Holder and is entitled to foreclose under Washington law. *See* RCW §§ 62A.3-301 and 62A.1-201(20). *Huebner v. Sales Promotion, Inc.*, 38 Wn.App. 66, 73, 684 P.2d 752 (1984). It follows that Deutsche Bank National Trust Company, as Trustee has standing to prosecute the judicial foreclosure action.

Slotke inaccurately argues that the Deed of Trust does not secure repayment of the underlying mortgage debt obligation to the holder of the note, unless the note holder is the note owner. (App. Br. 12) In support of this claim, Slotke cites RCW 62.A.3-310(b), which stands for the proposition that, when a note is issued and dishonored, a creditor may sue on either the dishonored check or contract. (App. Br. 12.) She also relies on RCW 62A.9A-203. (App. Br. 12). Neither 62A.3-310 nor RCW 62A9A-203 support Slotke's broad statement that "only the owner of the note and underlying debt obligation is entitled to utilize the DOT to foreclose judicially or non-judicially." (App. Br. 13). Further, Slotke's argument is directly contradicted by RCW 62A.3-301, which states that the "person entitled to enforce the instrument" means the holder of the instrument, a non-holder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under RCW 62A.3-309 or 62A.3-418(d)

and specifically states "a person may be entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." Finally, the official comment to RCW 62A.3-301 states that the rights to transfer, negotiate, enforce, or discharge a negotiable instrument are located in Article 3. As discussed in more detail below, the Article 9 does not apply. Slotke has not identified any Washington case law supporting her position that Deutsche Bank as Trustee is unable to judicially foreclose on a property. However, Deutsche Bank as Trustee has identified a number of cases that are on point that directly contradict Slotke's argument. Washington law is clear that it is the *holder* of the note who is entitled to foreclose, and that there is no requirement that the holder of the note must also be owner.

4. RCW 62A.9A. (UCC Article 9) Does Not Affect Deutsche Bank's Status as Note Holder and Authority to Foreclose

As a preliminary matter, Slotke's application of RCW 62A.9A to foreclosures confuses the UCC provisions addressing the creation of a secured interest in Real Property with the creation of a secured interest in a pre-existing mortgage note by the owner of note. The Court of Appeals has already considered *and rejected* the argument that RCW 62A.9A applies to the determination of whether the deed of trust beneficiary (as note holder), has authority to enforce foreclose. *Trujillo v. Nw. Tr. Servs.,*

Inc., 181 Wash. App. 484, 502, 326 P.3d 768, 778 (2014), as modified (Nov. 3, 2014). Specifically, in *Trujillo*, the Court of Appeals considered the borrowers argument that the transfer of physical possession of the note was not "legal possession of the promissory note as required to be the 'holder'" as required by Washington law. The Court distinguished RCW 62A.9A, which addresses the criteria for the owner of a mortgage note to create a security interest *in that note,* from a foreclosure proceeding, because "the foreclosure proceeding is not based on the creation of a personal property security interest in the note." *Id.* at 777. Instead, "the security interest underlying the foreclosure proceeding is the lien created by the deed of trust in the real property securing the note that is in the possession of Wells Fargo. Thus, UCC §9-313, which is concerned with security interest in notes, has no bearing on this case." *Id.* 777. Trujillo specifically stated that "there is no authority supporting the proposition that Article 9 of the UCC applies" and specifically rejected counsel's attempt to use RCW 62A.9A-313 "for a purpose for which it was not intended." *Id.* at 778. The Court found that "[RCW 62A.]3-301 is dispositive on the question of who is entitled to enforce the note." *Id.* at 778. The comments to RCW 62A.9A–313 also explicitly state: "This section does not define 'possession,'" and that determining whether a

particular person has possession, the principals of agency apply." RCW 62A.9A–313 cmt. 3.

Here, the undisputed evidence establishes that Deutsche Bank as Trustee is the holder of the promissory note. Deutsche Bank as Trustee had actual physical possession of the promissory note as reflected by the affidavits submitted in support of its Motion for Summary Judgment, and by the possession of the blue ink Note, which Deutsche Bank as Trustee produced at the hearing on summary judgment. The note was specifically indorsed to Deutsche Bank as Trustee.

5. Deutsche Bank as Trustee's Enforcement of the Loan is Not a Simultaneous Action Prohibited by RCW 61.12.120

A mortgagee can elect to sue either on the mortgage or on the promissory note. *Seattle Savings & Loan Ass'n v. Gardner J. Gwinn, Inc.*, 171 Wash. 695, 698, 19 P.2d 111 (1933). The mortgagee may sue and obtain a judgment on the note and enforce it by levy upon any property of the debtor. If the judgment is not satisfied in this manner, the mortgagee still can foreclose on the mortgaged property to collect the balance. Alternatively, the mortgagee may foreclose on the mortgaged property and obtain a deficiency judgment. *American Federal Sav. & Loan Ass'n of Tacoma v. McCaffrey,* 107 Wash.2d 181, 189, 728 P.2d 155 (1986). Concurrent actions to execute a judgment and foreclose on the mortgaged

property are, however, prohibited. RCW 61.12.120; *American Federal,* 107 Wash.2d at 190, 728 P.2d 155.

Slotke claims that the judicial foreclosure complaint, which identifies the Note, is prohibited as "concurrent actions to execute a judgment and foreclose." Slotke misunderstands Washington statutes regarding foreclosure. Under RCW 61.12.120, a plaintiff cannot foreclose "while he is prosecuting *any other action* for the same debt or matter which is secured by the mortgage ...". *Farm Credit Bank of Spokane v. Tucker*, 62 Wash. App. 196, 201, 813 P.2d 619, 622 (1991) citing RCW 61.12.120. However, the code does not prevent a plaintiff from pleading the terms of a note in a foreclosure action; it simply prohibits a plaintiff from maintaining two separate causes of action for the same debt at the same time. *Hinchman v. Anderson,* 32 Wash. 198, 206, 72 P. 1018 (1903). Indeed, pleading the terms of the note is generally how parties explain why they are entitled to foreclose. A foreclosing plaintiff simply agrees to pursue recovery of the judgment from the sale of the foreclosed property *before* levying on any other property of the debtor to satisfy a deficiency. *See* RCW 61.12.070.

In this case, it is clear that there is only one lawsuit on the debt and that it seeks judicial foreclosure. Slotke has failed to identify any other.

Accordingly, Slotke's claim that the single judicial foreclosure action was somehow a concurrent action fails.

6. Slotke Lacks Standing to Challenge the Supplemental Prospectus and the Pooling and Servicing Agreement and Deutsche Bank as Trustee's Compliance Therewith

Many Courts have considered the securitization of mortgage loans. *In re Nordeen*, 495 B.R. 468, 478 (B.A.P. 9th Cir. 2013)(gathering cases). As Bain pointed out, many loans have been pooled into securitization trusts where they, hopefully, produce income for investors. *Bain v. Metro. Mortgage Grp., Inc.,* 175 Wash. 2d 83, 96, 285 P.3d 34, 40 (2012), citing, *Pub. Emps' Ret. Sys. of Miss. v. Merrill Lynch & Co.,* 277 F.R.D. 97, 102–03 (S.D.N.Y.2011) (discussing process of pooling mortgages into asset backed securities). On appeal, Slotke argued that Deutsche Bank as Trustee was not entitled to foreclose on the Property, based on the Pooling and Servicing Agreement, because Deutsche Bank as Trustee was in possession of the Note for the benefit of the certificate holder of the trust. This is incorrect because securitization merely creates a separate contract which Slotke lacks standing to challenge.

a. Securitization Merely Creates a Separate Contract and does Not Change the Relationship Between the Parties to the Loan

Securitization has no bearing on whether a party may foreclose and does not provide a basis to relieve a borrower or his loan obligations.

"[S]ince the securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way, plaintiffs' claims arising out of securitization fail." *Lamb v. Mortg. Elec. Registration Sys., Inc.*, 2011 WL 5827813, (W.D. Wash. 2011). *See also, Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229, (W.D. Wash. 2011); *In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("[Plaintiffs] 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."). *Thepvongsa v. Reg'l Tr. Servs. Corp.,* C10-104RSL, 2013 WL 5366065 (W.D. Wash. Sept. 25, 2013).

b. Slotke, who is not a Party to the Contracts or Intended Third Party Beneficiary, Lacks Standing to Challenge the Agreements, or Compliance Therewith

Here, Slotke challenges Deutsche Bank as Trustee's compliance with the terms of the Pooling and Servicing Agreement. However, Slotke admits that she was not a party to the Pooling and Servicing Agreement, and she did not allege or submit evidence reflecting that she is an intended third party beneficiary of that agreement. Courts in Washington considering such allegations have rejected them. *See, e.g., Frazer,* 2012 WL 1821386 at * 2 (W.D. Wash. May 18, 2012) aff'd, 585 F. App'x 539 (9th Cir. 2014) and aff'd, 585 F. App'x 541 (9th Cir. 2014)("Plaintiffs are

not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it."); *Bank of New York Mellon v. Sakala,* 2012 WL 1424665 at *5 (W.D. Wash., April 24, 2012) (unpublished) (dismissing borrower's FDCPA claims based upon violations of a PSA where borrowers were neither parties to nor intended beneficiaries of the PSA); *Paatalo v. JPMorgan Chase Bank, N.A.,* 2012 WL 2505732 at *7 (W.D. Wash., June 28, 2012) (unpublished) ("[A] borrower does not have standing to challenge assignments and agreements to which it is not a party."). *See Mikhay v. Bank of Am.,* 2:20–cv–01464RAJ, 2011 WL 167064, at *2 (W.D.Wash. Jan.12, 2011) ("Plaintiffs do not cite any obligation on [defendant] to inform Plaintiffs of its compliance with [the trust agreement] or explain why the burden ... should be on [the defendant] to prove the propriety of its conduct."); *Brodie v. Nw. Tr. Servs., Inc.,* No. 12-CV-0469-TOR, 2012 WL 4468491, at *1 (E.D. Wash. Sept. 27, 2012), appeal dismissed (Nov. 28, 2012)(collecting cases); *In re Nordeen,* 495 B.R. 468, 478 (B.A.P. 9th Cir. 2013).

Below, Slotke challenged the Pooling and Servicing Agreement and the Supplemental Prospectus, arguing that the failure to strictly comply with those documents render's Deutsche Bank as Trustee without any authority to foreclose as the trustee for the certificateholders of the trust. However, Deutsche Bank as Trustee has demonstrated its

possession of the Note and Slotke admits she was not a party to the Pooling and Servicing Agreement or Prospectus, and she never argued that she was an intended third party beneficiary thereof. Accordingly, Slotke has no standing to sue based on those contracts. Furthermore, Slotke has cited no case law to challenge the propriety of Deutsche Bank as Trustee's dealings with respect to unrelated parties, pursuant to a third party contract, where that contract has no bearing on or otherwise affect Slotke's loan obligation. Furthermore, as the trustee of an express trust in possession of the Note at issue, Deutsche Bank as Trustee is the proper party to initiate a foreclosure action. *LaSalle Bank Nat. Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F.Supp.2d 618, 633 (D.Md.2002). Accordingly, Slotke's challenges based upon the securitization of the loan fail.[4]

7. Entitlement to Attorneys' Fees

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[4] In the underlying action, Slotke also challenged the foreclosure, based on alleged noncompliance with Real Estate Mortgage Investment Conduits ("REMIC"). These claims were not directly advanced in the appeal, and fails for the same reason as the securitization claims. First, there is no foreclosure requirement that the Note Holder be a REMIC. Second, when faced with similar allegations, *Zhong* rejected such allegations of ownership and timely endorsement into the trust, stating that conclusions allegations lacked authority to challenge them, and that "it is beyond dispute that [borrower] does not have standing to challenge the tax status of a third party." *Zhong v. Quality Loan Serv. Corp. of Washington*, No. C13-0814JLR, 2013 WL 5530583, at *4 (W.D. Wash. Oct. 7, 2013)

Deutsche Bank as Trustee respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. Deutsche Bank as Trustee also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the Deed of Trust and Note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. (CP 28.) Deutsche Bank as Trustee's prosecution of the foreclosure and response to Slotke's appeal have been necessary to protect Deutsche Bank as Trustee's right to foreclose under the deed of trust. Attorney fees are therefore appropriately awarded to Defendants pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wash. App. 1, 288 P.3d 409 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wash. App. 624, 638-39, 174 P.3d 95 (Wash. App. Div. 1, 2007) ("[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.")

V. CONCLUSION

After the moving party submits adequate affidavits, the nonmoving party must set forth sufficient fact to rebut the moving party's contentions and disclose the existence of a genuine issue of material fact. Here, Deutsche Bank as Trustee carried its burden on summary judgment with

uncontroverted, competent, admissible evidence. Slotke did not dispute the validity of the terms of the Note or Deed of Trust, and did not dispute her default. Washington law does not require the existence of, or compliance with a pooling and servicing agreement to foreclose and does not require ownership of the note. Slotke's claims do not entitle her to vacate a rightfully granted and supported order of judicial foreclosure. This Court should:

1. Affirm entry of the trial court's Order Granting Deutsche Bank's Motion for Summary Judgment, dated June 27, 2014;
2. Dismiss this appeal; and
3. Award Deutsche Bank as Trustee its costs on appeal, pursuant to a Cost Bill to be presented after entry of this Court's order, based on the provision for attorneys' fees in the Deed of Trust.

RESPECTFULLY SUMITTED THIS 29TH DAY OF DECEMBER, 2014.

HOUSER & ALLISON
A Professional Corporation

By: _____
Robert W. Norman, Jr. (SBN 37094)
Cara C. Christensen (SBN 43198)
Attorneys for Attorneys for
Respondent, Deutsche Bank National
Trust Company, as Trustee for Ixis
Real Estate Capital Trust 2006-HE3
Mortgage Pass Through Certificates,
Series 2006-HE3

CERTIFICATE OF SERVICE
(BY OVERNIGHT MAIL)

STATE OF WASHINGTON, COUNTY OF SEATTLE:

I, the undersigned say: I am a person over the age of eighteen years and not a party to this action. My business address is 1601 Fifth Avenue, Suite 850, Seattle, WA 98101.

On December 29, 2014, I served true copies of the attached

RESPONDENTS' BRIEF

[X] **VIA OVERNIGHT E-MAIL/MAIL/COURIER:** By placing a true copy thereof enclosed in a sealed envelope, addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would in the ordinary course of business, be delivered to an authorized courier or delivery authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day for delivery on the following business day.

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

Dated: December 29, 2014

Shawn Williams

HOUSER & ALLISON APC

December 29, 2014 - 3:56 PM

Transmittal Letter

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Case Name: Slotke v. Deutsche Bank National Trust Co., as Trustee

Court of Appeals Case Number: 46520-5

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