Supreme Court No. 90509-6

(Court of Appeals No. 70592-0-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,
Plaintiff-Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,
Defendant-Respondent,

and

WELLS FARGO, N.A.,

Defendant.

AMICUS CURIAE MEMORANDUM OF NORTHWEST CONSUMER LAW CENTER IN SUPPORT OF PETITION TO REVIEW

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I. INTEREST OF *AMICUS CURIAE*

Northwest Consumer Law Center ("NWCLC") is a non-profit law firms that represents low and moderate-income homeowners. NWCLC has an interest in this Court's clarification of the meaning of the terms "owner" and "beneficiary" under RCW 61.24.030(7)(a) because it is essential for establishing the rules governing the ability of loan owners and non-judicial foreclosure trustees to institute and prosecute non-judicial foreclosure on our clients' homes and our clients' ability to effectively seek loss mitigation options to prevent or cure loan defaults.

II. ARGUMENT

The *Trujillo* decision directly conflicts with opinions of this Court, beginning with *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 88-89, 93, 102-03, 285 P.3d 34 (2012), where this Court found that "beneficiary" was defined by the legislature in the Deed of Trust Act ("DTA") to mean the "noteholder." This Court further found in *Bain* that the trustee in a non-judicial foreclosure "'shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust,'" *id.* at 93-94 (quoting RCW 61.24.030(7)(a); emphasis added), and that "[i]f the original lender [has] sold the loan, that purchaser would need to establish *ownership* of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions." *Id.* at 111 (emphasis added).

It is inconsistent with *Bain* for the *Trujillo* court to find that after the legislature amended the DTA to include an express proof of ownership

requirement for the noteholder in RCW 61.24.030(7)(a) and required that the owner be identified under RCW 61.24.030(8)(*l*), it intended there to be an even lower standard for use under the DTA which allows parties with a lesser relationship to the note – less than the "noteholder" and "owner" requirements recognized in *Bain* – to non-judicially foreclose.[1]

Numerous other DTA cases decided by this Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures.[2] The DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Bain* 175 Wn.2d. at 93. The *Trujillo* decision is also at odds with this Court's many prior decisions which require that "terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *See, e.g., State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014); *In re Detention of C.W.*, 147 Wn.2d 259, 272, 53 P.3d 979 (2002); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 762, 912 P.2d 472 (1996).

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[1] The legislature added this additional "proof of ownership" requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." *Id.* § 8 (8)(*l*).

[2] *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (same); *Albice v. Premier Mortg. Servs.es of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (same).

The *Trujillo* court's decision to allow a foreclosure trustee to initiate a non-judicial foreclosure at the direction of a person or entity who is not the owner or even the holder of a promissory note disregards RCW 61.24.030(7)(a)'s requirement that before a notice of trustee's sale is recorded, the "trustee shall have proof that the *beneficiary is the owner* of any promissory note or other obligation secured by the deed of trust." The *Trujillo* court justified this clear departure from the statutory language and defined canons of statutory interpretation by rewriting the statute, stating that: "the legislature could have eliminated any reference to 'owner' of the note [in the first sentence of RCW 61.24.030(7)(a)] because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." This admission of judicial legislation is unhinged from basic principles of separation of powers between the judicial and legislative branch and is clearly at odds with this Court's numerous decisions reciting the imperative that the DTA be construed in the homeowner's favor. *Id.*

An interpretation of the DTA requiring that a non-judicial foreclosure be initiated only at the direction of the promissory note owner is consistent with the language of the statute itself and the fact that the legislature added "owner" language to the statute in two places in 2009.[3] Such an interpretation resolves the language of the DTA in favor of homeowners because, as this Court noted in *Bain*, it is the promissory note owners, not the note holders or loan servicers, that are the true risk-

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[3] *See* Laws of 2009, ch. 292, § 8 (7)(a); Laws of 2009, ch. 292, § 8 (8)(*l*).

bearing entities and stakeholders, which have capacity and incentive to negotiate alternatives to foreclosure.[4] Indeed, one of the primary reasons this Court in *Bain* held that the Mortgage Electronic Recording System ("MERS") could not be considered a beneficiary under the DTA was because MERS does not have the ability to negotiate loss mitigation options or other foreclosure alternatives. *Bain*, 175 Wn.2d at 97-98.

In *Bain*, this Court found that the capacity and incentive to engage in alternatives to foreclosure was a centrally important role of a DTA beneficiary given the passage of the Foreclosure Fairness Act of 2011 ("FFA"). *Id.* at 102-03. This Court held that because the FFA aimed to create a framework "for homeowners and beneficiaries to communicate with each other and reach a resolution and avoid foreclosure whenever possible," DTA beneficiaries must be able to "negotiate a deal in the face of changing conditions." *Id.* at 103; Laws of 2011, ch. 58, § 3(2).

When the legislature amended the statute in 2009, it did so because it recognized the gravity of the problems being caused by the lack of transparency regarding the ownership of promissory notes during the non-judicial foreclosure process and amended the DTA.[5] The legislature both added RCW 61.24.030(7)(a), requiring that a non-judicial foreclosure

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[4] *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L.REV. 755 (2011), cited with approval in *Bain*, 175 Wn.2d at 98 ("there is considerable reason to believe that servicers typically will not or are not in a position to negotiate loan modifications or respond to similar requests").

[5] *See* Laws of 2009, ch. 292, § 8 (7)(a); Laws of 2009, ch. 292, § 8 (8)(*l*).

trustee have evidence that the beneficiary is the *owner* of the promissory note, not just the holder, before initiating foreclosure proceedings, and added RCW 61.24.030(8)(l) to require that the Notice of Default identify the *owner* of the promissory note, not just the noteholder. *Id.* The 2009 amendments to the DTA are particularly significant because the case that the *Trujillo* court used to justify its holding that anyone with authority to enforce under RCW 62A.3-301, which includes a non-holder in possession and a transferee, as well as a holder, can initiate a non-judicial foreclosure, was decided on facts that predated by decades the 2009 legislative amendments to the DTA.[6] Therefore, *Trujillo* did not take into account the legislature's more recent decision to put in place requirements that the owner confirm its "actual holder" status to the foreclosure trustee and that the owner be disclosed to the homeowner in the Notice of Default, before a non-judicial foreclosure can be initiated. *See* n. 5, *supra.* However, in *Bain,* while this Court acknowledged that interpretation of the word "beneficiary" in the DTA required referring to Article 3 of the UCC to determine the definition of a "holder," it held that *only* a holder could act as a "beneficiary" under the DTA. *Bain,* 175 Wn.2d at 103-04.

In 2009, the legislature acted to put in place more stringent and restrictive language in the DTA regarding what entities can institute non-

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[6] *See Trujillo,* 326 P.3d at 775-76 (citing *John Davis & Co. v. Cedar Glen No. Four, Inc.,* 75 Wn.2d 214, 450 P.2d 166 (1969)). Moreover, the *Davis* case on which *Trujillo* relied was decided on facts that predated enactment of the Washington UCC in 1966. *See John Davis,* 75 Wn.2d at 215-18.

judicial foreclosures.[7] These additions were also consistent with the ownership language that had long existed in RCW 61.24.040(2), which supports the conclusion that the legislature had always intended that the "noteholder" or "beneficiary" was also the owner.[8] [9] Despite clear action by the legislature, the *Trujillo* court interpreted the DTA to have even less stringent requirements for beneficiary status than those imposed by *Bain* by allowing not only holders, but even non-holders that have "authority to enforce" pursuant to RCW 62A.3-301, to institute non-judicial foreclosure proceedings.[10] The *Trujillo* decision to allow holders, and even non-holders, to act as beneficiaries is clearly inconsistent with the holding in *Bain* (which limited its interpretation to "holders"), and fails to resolve the language of the DTA in favor of homeowners, thereby violating existing Supreme Court precedent. [11]

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[7] Laws of 2009, ch. 292, § 8 (7)(a); Laws of 2009, ch. 292, § 8 (8)(*l*).

[8] *See* RCW 61.24.040(2) (expressly equating the "beneficiary" with the "owner " of the note by requiring that borrowers be informed of "the Beneficiary of your Deed of Trust and *owner* of your obligation secured thereby" (emphasis added); *see also* Laws of 1985 ch. 193 § 4 (adding this DTA provision).

[9] Given the long- standing equation of beneficiary with owner in the DTA, it appears that the 2009 legislative amendments were made to clarify that a beneficiary imbued with the power to initiate foreclosure proceedings must be both the holder and owner of a promissory note. In a recent unanimous decision, this Court held that the 2013 amendments to the Washington Collection Agency Act ("WCAA") served as an "interpretive clarification" of the definition of debt collector in the statute. *Gray v. Suttell & Assoc.*, Supreme Court No. 88414-5 (August 28, 2014), pp. 13-14. The *Gray* court found that the legislative amendments at issue were intended to clarify not change the definition of debt collector because the former statute was ambiguous. *Id.* Similarly, the 2009 legislative amendments to the DTA clarified the prior ambiguity in the statute regarding whether a non-owner holder could initiate foreclosure proceedings.

[10] *Trujillo*, 326 P.3d at 776-77.

[11] *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013); *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

Moreover, in reading the ownership language out of RCW 61.24.030(7)(a), the *Trujillo* court also ignored the fact that a presumed relationship between the beneficiary "note holder" and the loan owner has existed in the DTA since the Notice of Foreclosure form was added to the DTA in 1985.[12] RCW 61.24.040(2) requires that the defaulted borrower be advised in the Notice of Foreclosure form that the attached Notice of Trustee's Sale is the result of the default in payment to "the Beneficiary of the Deed of Trust and *owner* of the obligation secured thereby."[13] Thus, the legislature's addition of the proof of ownership requirement in RCW 61.24.030(7) is not surprising and in fact, it is consistent with the historical language and requirements of the DTA. It is also consistent with the added requirement, as regards residential real property, that the owner of the loan be identified separately from the loan servicer in the Notice of Default document as described in RCW 61.24.030(8)(*l*).[14]

The *Trujillo* decision not only reads the owner language out of RCW 61.24.030(7)(a) entirely, but eliminates the term "actual holder" from the statute as well. As discussed in the Petition for Review, the declaration executed by Wells Fargo and relied upon by Northwest Trustee Services in this case did not state that Wells Fargo was the "actual holder" of the note, but rather stated that Wells Fargo was either the "actual holder" of the note or, alternatively, "has requisite authority under

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[12] Laws of 1985, ch. 193 § 4
[13] RCW 61.24.040(2) (emphasis added).
[14] Laws of 2009, ch. 292, § 8 (7)(a)

RCW 62A.3-301 to enforce said obligation."[15] That alternative language included in the beneficiary declaration is not authorized by RCW 61.24.030(7)(a) or any other part of the DTA. This conflict is significant because entities that are authorized to enforce promissory notes pursuant to RCW 62A.3-301 are not always holders of promissory notes. Rather, entities authorized by RCW 62A.3-301 include: a "***nonholder*** in possession" and "a person ***not in possession*** . . ." or even a thief in possession of a note endorsed in blank. RCW 62A.3-301. In fact, RCW 62A.3-301 specifically contemplates that, "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument ***or is in wrongful possession of the instrument.***" RCW 62A.3-301 (emphasis added).

The *Trujillo* court's recognition of a "person entitled to enforce" as a DTA beneficiary when the language of the DTA describes beneficiaries as either owners and/or "actual holders" offends this Court's prior holdings requiring that the language of the DTA be interpreted in favor of homeowners. *Klem*, 176 Wn.2d at 789; *see also Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). By allowing a non-holder to initiate non-judicial foreclosure proceedings, the *Trujillo* decision allows entities with less stable, formalized, or even legal relationships to promissory notes to initiate non-judicial foreclosures.

As demonstrated above, the Court of Appeals' recognition of a

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[15] Rocio Trujillo, Petition for Review, Supreme Court No. 70592-0-I at 1-2

"person entitled to enforce" a promissory note pursuant to RCW 62A.3-301 as a DTA beneficiary flatly contradicts the holding of *Bain*. *Bain*, 175 Wn.2d at 104. Although the Court in *Bain* referenced RCW 62A.3-301, it did so merely as a tool to interpret particular terms in the DTA and the *Bain* court still concluded that the legislature ***only*** permits a "noteholder" to act as a beneficiary. *Id.* at 103-04. The mere reference to the language of RCW 62A.3-301 in *Bain* did not result in its decision meaning anything other than what it clearly held in response to Question 1:

> We answer the first certified question "No", based on the plain language of the statute. MERS is an ineligible "'beneficiary' within the terms of the Washington Deed of Trust Act," if it never held the promissory note or other debt instrument secured by the deed of trust.

Bain, 175 Wn.2d at 110. While it answered the question in specific reference to MERS, the reasoning in *Bain* holds true for any other person or entity seeking to be defined as a "beneficiary." *Id.* *Bain* shows that the DTA must be interpreted with the understanding that the legislature has added requirements in the DTA that are more exacting than the provisions of the UCC. *Id.*

The reasoning in *Bain* further shows that the DTA was never intended to include a definition of beneficiary that encompassed the many non-holders that come under the umbrella of a "person entitled to enforce" under RCW 62A.3-301. In *Bain*, this Court referenced other sections of the DTA that "bolster the conclusion that the legislature meant to define 'beneficiary' to mean the *actual holder* of the promissory note or other debt instrument." *Id.* at 101. One of the sections referenced by the *Bain*

Court is RCW 61.24.070(2), which provides that subsequent to the trustee's sale, "the trustee shall, at the request of the beneficiary, credit towards the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust." *Id.* at 102. The *Bain* Court explained that "this provision makes little sense if the beneficiary does not hold the note" because such a reading would "authorize the non-holding beneficiary to credit to its bid funds to which it had no right." *Id.* Analogously, the legislature could not have intended for a thief of a promissory note—who would be considered a "person entitled to enforce" under RCW 62A.3-301—to be able to credit the debt owing on the promissory note towards his bid at a trustee's sale.

III. CONCLUSION

NWCLC respectfully requests that this Court clarify that a "beneficiary" under RCW 61.24.030(7)(a) must be the owner as well as the holder of the note—no more and no less—and that a trustee does not have authority to proceed with foreclosure in reliance on a beneficiary declaration that does not fully comply with the DTA or when the trustee has reason to know that the purported beneficiary does not own the note.

DATED this 29th day of August, 2014

NORTHWEST CONSUMER LAW CENTER

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NWCLC Board Member and Vice Chair

DECLARATION OF SERVICE

I, Audrey Udashen, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing *Amicus Curiae* Memorandum of Northwest Consumer Law Center in Support of Petition for Review to be served by first-class mail, postage prepaid, upon the following counsel of record:

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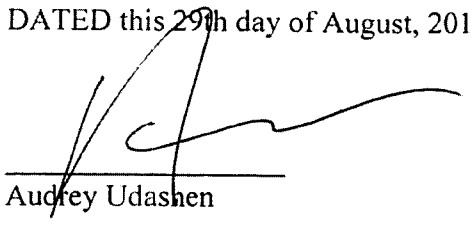
DATED this 29th day of August, 2014.



Audrey Udashen

OFFICE RECEPTIONIST, CLERK

To: Audrey Udashen-NWCLC
Subject: RE: Trujillo v. Northwest Trustee Services Inc., et al, Case No. 90509-6

Rec'd 8/29/14

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: Audrey Udashen-NWCLC [mailto:Audrey@nwclc.org]
Sent: Friday, August 29, 2014 2:45 PM
To: 'Supreme@courts.wa.gov'
Subject: Trujillo v. Northwest Trustee Services Inc., et al, Case No. 90509-6

Dear Clerk,

Attached are the following documents for filing with the Court:

- Motion of the Northwest Consumer Law Center for Leave to File *Amicus Curiae* Memorandum In Support of Petition to Review; and
- *Amicus Curiae* Memorandum of Northwest Consumer Law Center in Support of Petition to Review.

This has been served today on all counsel of record by legal messenger.

The case name, case number, and name, phone number, bar number and email address of the attorney filing the document are:

Trujillo v. Northwest Trustee Services Inc., et al, Case No. 90509-6, filed by Audrey Udashen, WSBA #42868, (206)805-0989, audrey@nwclc.org.

Thank you,

NW CONSUMER LAW CENTER

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