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 COALITION FOR CIVIL JUSTICE

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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 CCJ") submitted by the Coalition for Civil Justice ("CCJ").[1]

CCJ encourages the Court to completely overlook the critical second sentence of RCW 61.24.030(7)(a), and instead adopt a definition of "beneficiary" in the Deed of Trust Act ("DTA") which is contrary to the law of commercial paper and inapposite to the Court's holding in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

CCJ also seeks to introduce assertions that are found nowhere in the record, and the Court should not give credence to new theories that Ms. Trujillo did not raise below.

II. ARGUMENT AND AUTHORITY

A. Unlike the *Trujillo* Court, CCJ Fails to Consider the Plain Language of the DTA, and Particularly RCW 61.24.030(7).

While CCJ emphasizes the DTA provision calling for a trustee to have proof of a note's ownership prior to recording a notice of trustee's sale, the statute itself unambiguously articulates how this result can be accomplished:

> *[a] declaration* by the beneficiary made under the penalty of perjury *stating that the beneficiary is the actual holder of the*

[1] The CCJ appears to be an organization comprised of two debtors' attorneys.

> *promissory note* or other obligation secured by the deed of trust *shall be sufficient proof as required under this subsection.*

RCW 61.24.030(7)(a) (emphasis added).

Whether NWTS knew that Wells Fargo was not the Note owner is irrelevant for purposes of compliance with RCW 61.24.030(7)(a) as written. *Cf.* Brief of Amicus CCJ at 2. NWTS received a sworn declaration from Wells Fargo entitled "Beneficiary Declaration (Note Holder)." CP 36. Moreover, Ms. Trujillo admitted that Wells Fargo held the Note – making Wells Fargo the beneficiary – when foreclosure commenced. CP 87 (Compl., ¶ 26).[2]

Because "[t]he right to enforce an instrument and ownership of the instrument are two different concepts," and "[a] person may be... entitled to enforce the instrument even though the person is not the owner of the instrument...," CCJ is incorrect that a "holder must also be the owner of the obligation" in order to enforce it. *Compare* Brief of Amicus CCJ at 3; RCW 62A.3-203, RCW 62A.3-203 cmt. 1; *see also* 11 Am. Jur. 2d *Bills and Notes* § 210 (2009) (discussing differences between a "holder" of a note, and an "owner" of a note).

Furthermore, the DTA does not equate "beneficiary" with "owner" throughout its provisions, as CCJ would ask the Court to believe. For

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[2] The fatal flaw in a premise underlying CCJ's supposed logic is that "owner" does *not* equal "beneficiary." Brief of Amicus CCJ at 3; *but see* RCW 61.24.005(2).

example, no mention of ownership in a note is found anywhere in the process requirements of RCW 61.24.010(2) (trustee's appointment), RCW 61.24.031 (pre-foreclosure compliance), RCW 61.24.070 (issuance of a credit bid), and RCW 61.24.100 (prohibition on deficiency judgment).[3]

The sole mention of "owner" in RCW 61.24.040(2) occurs in a notice that can be issued in "substantially" the form listed. *Cf.* Brief of Amicus CCJ at 2. The sole mention of "owner" in RCW 61.24.163(5) occurs in the context of providing a beneficiary declaration as part of mediation. *Id.* Neither DTA section compels the conclusion that a beneficiary must be both a note holder *and* owner at the same time.[4]

In fact, as *Trujillo v. NWTS* observes, some State Senators recently considered amending the definition of "beneficiary" to include "owner" but the Washington Legislature did not adopt their request. 181 Wn. App. 484, 510, 326 P.3d 768 (2014); *see also* SB 5191, § 1(1).[5]

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[3] RCW 61.24.031 refers to "beneficiary" forty-eight times, and not once to "owner."

[4] CCJ also refers to RCW 61.24.030(8)(l), whereby a notice of default must identify the owner. Brief of Amicus CCJ at 5. But this section does not suggest this mere identification alters the right to a note's enforceability, which remains with the holder.

[5] SB 5191 would have changed the term "beneficiary" to mean:

> [o]wner of the instrument or document, including a promissory note, evidencing the obligations secured by the deed of trust, even if another party or parties are named as the holder, seller, mortgagor, nominee, or agent, excluding persons holding the same as security for a different obligation.

The same bill would also have required that "only the owner of the beneficial interest or the authorized agent of the owner of the beneficial interest may foreclose a deed of trust.... The foreclosure must be in the name of the owner of the beneficial interest." *Id.* at § 2(10).

Trujillo does not result in a "conflict" between RCW 61.24.030(7)(a) and the rest of the DTA; instead, it explains what Washington law has long stood for: "ownership of the note is not dispositive." *Compare* Brief of Amicus CCJ at 5; *Trujillo*, *supra.* at 498.

B. CCJ is Incorrect About the Facts of the *Trujillo* Case and Erroneously Contends Similar Circumstances Establish the Merits of Ms. Trujillo's Claims.

First, CCJ asserts that the record below demonstrates "mischief" that made Ms. Trujillo "unlikely to correct the irregularities that arise from the servicer's wrongful foreclosure efforts." Brief of Amicus CCJ at 5-6.[6] But Wells Fargo was not only Ms. Trujillo's loan servicer; Wells Fargo was also in possession of the Note at all times relevant to the uncompleted foreclosure. CP 88 (Compl., ¶ 26); *cf.* Brief of Amicus CCJ at 9 (theorizing the note was "held by yet another unidentified entity who acts as custodian as records"). Additionally, Ms. Trujillo took full advantage of her opportunities to modify the loan. *Id.* (Compl., ¶ 18; "several unsuccessful attempts to modify the loan" occurred).

Second, CCJ claims that "NWTS relies on standard forms, such as the Beneficiary Declaration utilized in this matter," and "other major corporate trustees... conduct their business in essentially the same way."

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[6] CCJ fails to recognize that Ms. Trujillo did not plead the existence of a "wrongful foreclosure" or the type of DTA-based claim the Court recently addressed in *Frias v. Asset Foreclosure Services, Inc. et al.*, Slip Opin. No. 89343-8 (Sept. 18, 2014).

Brief of Amicus CCJ at 7-8; *see also Id.* at 10 (alleging "cut-and-paste template based notices of default). However, no evidence supporting these statements exists in the *Trujillo* record. The impugning of trustees' business practices has no relevance to the consideration of review.

Third, CCJ cites to several cases where allegations were brought against NWTS based on information contained in notices of default. Brief of Amicus CCJ at 8. The lawsuits in *Williams v. NWTS*, Case No. 14-2-11106-7 (Pierce Co. Sup. Ct.) and *Lucero v. Bayview Loan Serv. LLC et al.*, 13-00602-RSL (W.D. Wash.) consist of nothing more than bare allegations raised during pending actions. *Id.*[7] The appeals in *Bowman v. SunTrust Mortg. et al.*, 70706-0-I (Wash. Ct. App.) and *Hobbs v. NWTS*, 71143-1-I (Wash. Ct. App.) both properly resulted in the trial court's grant of summary judgment in NWTS' favor.[8]

CCJ's reference to *In re Butler* also does not support Ms. Trujillo's position either. Brief of Amicus CCJ at 8.[9] *Butler* holds that "Northwest Trustee was entitled to rely on... [the] Beneficiary Declaration, and had no duty to undertake an independent investigation." 512 B.R. 643, 657

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[7] One co-counsel for CCJ also represents the plaintiffs in both *Williams* and *Lucero*.
[8] One co-counsel for CCJ also represents the plaintiff in the *Bowman* appeal, which is pending before Division One. Moreover, the plaintiffs in *Hobbs* featured an opposition declaration from Ms. Trujillo herself. *See* Case No. 13-2-22970-6 (King Co. Sup. Ct.).
[9] One co-counsel for CCJ also represented the plaintiff in *Butler*. Case No. 12-01209-MLB (Bankr. W.D. Wash.).

(Bankr. W.D. Wash. 2014). *Butler* does *not* show a substantial public interest exists with respect to the criteria for Supreme Court review. R.A.P. 13.4(b).

Fourth, CCJ conveniently ignores holdings that cut against its position. *See, e.g., Brodie v. NWTS*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) (US Bank held the note and could act through its agent to foreclose under the DTA); *Stafford v. SunTrust Mortgage Inc.*, 2014 WL 3767479 (W.D. Wash. Jul. 31, 2014) (regardless of Fannie Mae's ownership interest, SunTrust held the note and NWTS could rely on beneficiary declaration); *Rouse v. Wells Fargo Bank, N.A.*, 2013 WL 5488817 (W.D. Wash. Oct. 2, 2013), *appeal dismissed* ("courts have uniformly rejected claims that only the 'owner' of the note may enforce it."); *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W.D. Wash. May 13, 2013) (authority to foreclose based on possession of a note indorsed in blank, *not* because of Fannie Mae's ownership interest); *Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246 (W.D. Wash. Jul. 29, 2012) (enforceability of note and deed of trust based on holder status, not ownership). Judges faced with claims related to the DTA routinely agree that "beneficiary" and "owner" are not synonymous.

In sum, the presence of numerous baseless allegations brought in other cases is neither a "pervasive" fact pattern nor recurring issue. *Cf.*

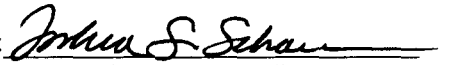
Brief of Amicus CCJ at 9. The published result in *Trujillo* should be left to stand.

III. CONCLUSION

Trujillo states a reasonable, accurate, and legally-sound interpretation of RCW 61.24.030(7)(a). *Trujillo* is in accord with the UCC as adopted in Washington, and the *Bain* decision. *Trujillo* should therefore be considered a legitimate analysis of the DTA. Based on the facts presented to the trial court, Division One reached the correct result, and CCJ's support for Ms. Trujillo's Petition for Review should be rejected.

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 Coalition for Civil Justice** 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
Ronald E. Beard Abraham K. Lorber Lane Powell, PC 1420 Fifth Ave., Suite 4200 Seattle, WA 98101-2338 Attorneys for Respondent Wells Fargo Bank, N.A.	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile
Audrey Udashen Sheila M. O'Sullivan Northwest Consumer Law Center 520 E. Denny Way Seattle, WA 98122	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile

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Ha Thu Dao Grand Central Law, PLLC 787 Maynard Ave. S. Seattle, WA 98104	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile

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

OFFICE RECEPTIONIST, CLERK

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Cc: Joshua Schaer
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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
Filed by: Joshua Schaer
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Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Amicus Curiae Memorandum of Coalition for Civil Justice.**

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

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