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 CONSUMER LAW CENTER

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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 NWCLC") submitted by the Northwest Consumer Law Center ("NWCLC").

NWCLC posits that *Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), conflicts with the Court's decision in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), because *Trujillo* broadens the scope of who can be a proper "beneficiary" under the Deed of Trust Act ("DTA"). Yet, NWCLC asserts that a "beneficiary" must *simultaneously* be a note holder *and* owner, an expansive position that finds no support in either the DTA's plain language or in *Bain*.

Contrary to the arguments of NWCLC, the outcome of *Trujillo* was correct, *i.e.*, Wells Fargo held the note at all relevant times, which made Wells Fargo the beneficiary, and NWTS was consequently entitled to rely on a declaration of Wells Fargo's holder status.[1]

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[1] Ms. Trujillo selectively appealed only NWTS' dismissal, and not the grant of summary judgment in Wells Fargo's favor. Case No. 13-2-06928-8, Dkt. 36 (King Co. Sup. Ct.). Wells Fargo produced substantial evidence of its authority as the foreclosing beneficiary before the trial court. *Id.*, Dkt. 27 (Dep. of Trujillo) at 21 (admitting modification from Wells Fargo and her default); Dkt. 28 (Dec. of Weatherly) at ¶ 6 (Wells Fargo possessed Note indorsed in blank since 2006).

II. ARGUMENT AND AUTHORITY

A. *Trujillo* is Consistent With *Bain.*

Washington's adoption of the UCC specifically adheres to the principle that "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." RCW 62A.3-203, cmt. 1. Ironically, co-counsel for NWCLC urged the *Bain* Court to embrace an "interpretation of the deed of trust act" based on "UCC definitions." 175 Wn.2d at 104. The Court agreed, interpreting "beneficiary" as encompassing not just a holder as defined by former RCW 62A.1-201(20)[2], but also pursuant to RCW 62A.3-301. *Id.*

Notably, the Court cited that portion of the UCC providing that "[a] person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument.*" *Id.*, *quoting* RCW 62A.3-301 (emphasis added); *see also John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 22-23, 450 P.2d 166 (1969).

After a note's negotiation, the holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment. *See Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 724-25, 565 P.2d 812 (1977); RCW 62A.9A-102(55). Thus, if a borrower like Ms. Trujillo defaults on the debt owed (*i.e.* the Note), the DTA grants a

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

beneficiary the power to non-judicially foreclose on the collateral named in the Deed of Trust in satisfaction thereof.[3]

Ms. Trujillo's Complaint even observed that, according to the subject Note, "anyone who took the Note by transfer and was entitled to receive payments under the Note would become the Note Holder." CP 92 (Compl., ¶ 11; emphasis omitted). This language concurs with Washington's codification of the UCC, stating: "negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent." RCW 62A.3-201, cmt. 1.

Washington's UCC-based provisions also identify that:

> [o]wnership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203. Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.

Id. The term "owner" is broader than "holder," because deeds of trust secure interests other than negotiable instruments, so being a holder alone cannot account for the right to enforce in every instance. In *Cox v. Helenius*, the debt was evidenced by an installment contract that cannot be "held" in the UCC sense. 103 Wn.2d 383, 693 P.2d 683 (1985); *see also*

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[3] This is precisely why there is "no authority... for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title." *Bain*, 175 Wn.2d at 112.

Rodgers v. Seattle-First Nat. Bank, 40 Wn. App. 127, 697 P.2d 1009 (1985) (involving a non-negotiable instrument). This principle is also reflected with *Bain*, which states:

> [i]f the original lender had sold the loan, that purchaser would need to establish ownership of that loan, *either* by demonstrating that it actually held the promissory note *or* by documenting the chain of transactions.

175 Wn.2d at 111 (emphasis added).

"Documenting the chain of transactions" to show ownership is entirely consistent with the idea that one method of being the entity that possesses the right to foreclose is to show holder status, and another method is to show some other contractual right to enforce the underlying agreement secured by a deed of trust. This reading allows for the use of term "owner" in the DTA without changing the definition of "beneficiary."

In sum, there is a clear separation between a note holder and owner in the enforceability of promissory notes; both *Bain* and *Trujillo* uphold that difference.

B. Defining "Beneficiary" as the Note Holder Does Not Construe the DTA Against Borrowers.

NWCLC contends that melding holder status and ownership into the definition of "beneficiary" would result in construing the DTA "in the

homeowner's favor." Brief of Amicus NWCLC at 3. But such definition would not satisfy any of the DTA's core goals, *i.e.*:

> (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

Frizzell v. Murray, 179 Wn.2d 301, 309, 313 P.3d 1171, 1175 (2013), *citing Plein v. Lackey,* 149 Wn.2d 214, 229, 67 P.3d 1061 (2003). Rather, NWCLC's argument vitiates the laws on commercial paper, as stated above, and calls into question the stability of land titles post-foreclosure where only a note holder enforced its mortgage lien.

NWCLC's viewpoint would lead to an *inefficient, expensive* process whereby investors with an ownership interest in a note must seek to also possess a note before non-judicially foreclosing. Such state of affairs: 1) discourages investment in mortgage loans by adding transaction costs for investors, which are ultimately passed on to borrowers, and 2) will likely generate a sharp rise in judicial actions – including the prospect of deficiency judgments – that can be advanced solely by a note holder against defaulting borrowers. These outcomes, caused by NWCLC's recommended alteration to the definition of "beneficiary" in RCW 61.24.005(2), certainly do not benefit homeowners.

C. The Application of RCW 62A.3-301 Was Not Raised in This Case, and Review Should Not be Accepted to Address Collateral Matters.

NWCLC encourages the Court to accept review and consider the presence of language in the beneficiary declaration that references RCW 62A.3-301. Brief of Amicus NWCLC at 8-10. But Ms. Trujillo did not plead any claim associated with RCW 62A.3-301 in her complaint; she simply alleged that NWTS could not rely on Wells Fargo's beneficiary declaration because "RCW 61.24.030(7)(a) requires that the 'holder' of the note and the 'owner' of the note be the same person." CP 89 (Compl., ¶ 29(c)).

In fact, Ms. Trujillo did not assign error on appeal to the CR 12(b)(6) dismissal of any specific cause of action, *i.e.*, Criminal Profiteering, violation of the Consumer Protection Act, or Intentional Infliction of Emotional Distress. The only issues raised in her briefing to Division One were:

> 1) The trial court erred in finding that [NWTS] was not the real party in interest.
>
> 2) The trial court erred in ruling that NWTS was authorized by RCW 61.24.030(7)(a) to record a notice of trustee's sale after receiving a declaration from Wells Fargo Bank, NA... stating that Wells was the actual holder of the promissory note.

Brief of Appellant at 5. RCW 62A.3-301 is not mentioned *even once* in either Ms. Trujillo's Opening or Reply Briefs.

It is axiomatic that issues presented for the first time on appeal – by an Appellant, let alone Amicus Curiae – are not subject to consideration by the appellate court. *See, e.g., Hall v. Feigenbaum*, 178 Wn. App. 811, 818, 319 P.3d 61, *review denied*, 180 Wn.2d 1018, 327 P.3d 54 (2014) (issues not raised below or properly briefed on appeal are waived). NWCLC's argument concerning RCW 62A.3-301, also raised by its co-counsel in *Lyons v. US Bank N.A. et al.*, Case No. 89132-0, should not form the basis for Supreme Court review.[4]

III. CONCLUSION

The facts of Ms. Trujillo's complaint, accepted as true for purposes of CR 12(b)(6) are straightforward: 1) Ms. Trujillo admitted to defaulting on the terms of the secured Note when she failed to make any payments after November 1, 2011[5]; 2) Wells Fargo took possession of the secured Note when the foreclosure process began[6]; 3) Wells Fargo provided NWTS with a beneficiary declaration even before the Notice of Default

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[4] Nonetheless, even on the merits, NWCLC is incorrect that mentioning RCW 62A.3-301 in a beneficiary declaration, which the borrower never receives, renders that document invalid. Wells Fargo's declaration in this case is specifically limited to "requisite" authority under RCW 62A.3-301. *See* CP 36. As *Bain* explains, only a note *holder* has the *requisite* authority to act as beneficiary under the DTA. 175 Wn.2d at 89 ("Simply put, if MERS [or another foreclosing entity] does not hold the note, it is not a lawful beneficiary."). The record before the trial court shows Wells Fargo was the note holder and therefore possessed that very type of authority which RCW 62A.3-301 delineates.

[5] *See* Brief of Appellant at 5-6, *see also* CP 86 (Compl., ¶ 17).

[6] *See* CP 87 (Compl., ¶ 26).

was issued[7]; and 4) Wells Fargo appointed NWTS as the successor trustee of the Deed of Trust.[8]

These facts do not lead to the legal conclusion espoused by NWCLC that Wells Fargo was unable to enforce the secured Note as its holder. The *Trujillo* decision does not "fail to resolve the language of the DTA in favor of homeowners." Brief of Amicus NWCLC at 6. Rather, it interprets the DTA in a manner consistent with the UCC, *Bain*, and decades of related case law in Washington. The Court should decline NWCLC's request for review of *Trujillo* to be accepted.

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.

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[7] *See* CP 36-39.
[8] *See* CP 40.

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 Consumer Law Center** 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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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
Filed by: Joshua Schaer
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Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Amicus Curiae Memorandum of Northwest Consumer Law Center.**

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

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