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No. 70706-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KELLY BOWMAN

Appellant,

vs.

SUNTRUST MORTGAGE, INC., FEDERAL NATIONAL MORTGAGE
ASSOCIATION; NORTHWEST TRUSTEE SERVICES, INC.;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and
DOE DEFENDANTS 1-10

Respondents

**SUPPLEMENTAL BRIEF OF RESPONDENT
NORTHWEST TRUSTEE SERVICES, INC.
PURSUANT TO COURT'S NOTATION RULING**

Submitted By:
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I. SUMMARY OF COURT'S QUESTION PRESENTED

1. What is the impact of the recent decision in *Trujillo v. Northwest Trustee Services*, 2014 WL 2453092, Slip Opin. No. 70592-0-I (Jun. 2, 2014) on this case?

II. RESPONSE TO QUESTION PRESENTED

1. The impact of *Trujillo* eliminates Bowman's arguments regarding ownership of the Note, and establishes that Northwest Trustee Services ("NWTS") was entitled to rely on a beneficiary declaration stating that SunTrust was the Note holder. *Trujillo* also supports NWTS' position on its compliance with statutory duties, such as acting in good faith and issuing certain foreclosure notices.

III. ARGUMENT

A. *Trujillo* Defeats Bowman's Primary Argument that "The Holder Must Also be the Owner of the Obligation."

Bowman maintains throughout his briefing that a foreclosing beneficiary *must be both* the note's holder and owner. Brief of Appellant at 15-17. However, *Trujillo* says otherwise.¹

This Court specifically notes that "the holder of a note *could also*

¹ Indeed, Bowman's Reply Brief mentions that the "issue" of whether SunTrust had authority to foreclose was squarely before this Court in *Trujillo*. Reply Brief of Appellant at 19, n. 6.

be its owner at the same time.” *Trujillo, supra.* at *7 (emphasis added), citing *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969). But Bowman’s suggested duality of being *both* the “true and lawful holder and owner of the note” is erroneous. Brief of Appellant at 21-22.² As this Court finds, “we must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note.” *Trujillo, supra.* at *8.

Thus, Fannie Mae’s ownership interest in the subject Note is, in the words of this Court, “irrelevant.” *Id.* at *10. Rather, Respondent SunTrust explains the basis for its authority in its Opening Brief: “[Fannie Mae] guidelines permit SunTrust to possess Bowman’s Note...;” as a result, “the servicer [i.e. SunTrust] becomes the holder of the Note....” Brief of SunTrust at 20, citing CP 656, 662-63, 658. Being the note holder “during the relevant period” is sufficient to establish one’s authority to foreclose. See *Mickelson v. Chase Home Finance LLC et al.*, 2014 WL 2750133 (9th Cir. June 18, 2014). Here, that proper party was SunTrust, *i.e.*, the original payee of the Note and the foreclosing beneficiary.

² Indeed, Bowman presciently stated that “no Washington court has gone this far.” Brief of Appellant at 17. That is because Bowman’s position on this issue is incorrect.

B. Under *Trujillo*, Bowman’s Claim that NWTS Was Not Properly Appointed Also Fails.

Bowman argues that “if SunTrust was not the duly authorized owner and holder of the subject obligation or otherwise failed to obtain such authority from the true and lawful owner and holder of the obligation, SunTrust’s appointment of NWTS as successor trustee was not valid or lawful.” Brief of Appellant at 22. Again, because ownership is “not dispositive,” SunTrust’s appointment of NWTS was fully appropriate because SunTrust is the beneficiary. *Trujillo, supra.* at *6; *see also Brodie v. Northwest Trustee Services*, 2014 WL 2750123 (9th Cir. June 18, 2014) (holding the note grants one the right to foreclose and appoint a successor trustee under the DTA); RCW 61.24.010(2) (“The trustee may resign at its own election or be replaced by the beneficiary.”).

The evidence in this case shows that SunTrust was entitled to appoint NWTS as the trustee for the purpose of carrying out non-judicial foreclosure due to Bowman’s unchallenged default. *See* Brief of Appellant at 34 (“Bowman owed over \$100,000 in payments”).

C. Trujillo Recognizes that a Trustee’s Duty is One of “Good Faith.”

Bowman repeatedly contends that NWTS “breached its fiduciary duty of good faith....” Brief of Appellant at 22 (emphasis desupplied).

But *Trujillo* clearly sets forth the applicable standard under RCW 61.24.010(4) (“a trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”). *Supra.* at *13. The addition of “fiduciary” is conspicuously absent from the statute.

Moreover, as this Court mentioned, while cases like *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), and *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), discuss a trustee’s duties, they do not substantiate a violation of them absent supporting facts. *Id.*

Based on this Court’s holding in *Trujillo*, Bowman is wrong that a trustee “must ensure that the beneficiary is the owner and holder of any promissory note....” Brief of Appellant at 23. Similarly, a trustee need not clarify, identify, or obtain authority from “the owner of the obligation” in order to proceed with foreclosure. *Id.* at 24. Consequently, Fannie Mae’s role as Note owner did not create a “dispute of material fact.” *Id.* at 25.

D. NWTS Could Rely on SunTrust’s Beneficiary Declaration.

Bowman challenges NWTS’ reliance on SunTrust’s beneficiary declaration based on the accusation that “the ‘owner’ of the obligation and entity in possession of the note and deed of trust are separate entities....”

Brief of Appellant at 23. Bowman should not be permitted to attack this declaration, as he was neither a party or third-party beneficiary of its contents, and it was not provided to him as part of notices in the non-judicial foreclosure. *Accord Brodie, supra.* (no standing to challenge assignment of loan documents); *Massey v. BAC Home Loans Servicing LP*, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013) (same).

But even if Bowman could legally contest NWTS obtaining and relying on SunTrust's sworn statement, a declaration under penalty of perjury stating that SunTrust is the Note holder is *sufficient proof* for the purposes of RCW 61.24.030(7)(a). *Trujillo, supra.* at *5. Contrary to Bowman's position, NWTS need not have taken further "action to verify SunTrust's authority." Reply Brief of Appellant at 19.

This Court's reference to documentation in *Trujillo* applies equally here, namely that: "[t]here is no evidence in this record that contests either the validity or truthfulness of this beneficiary declaration, signed... under penalty of perjury and delivered to NWTS for the purpose of complying with this statute." *Id.* Therefore, the same conclusion should also be

reached in this case, *i.e.*: “[a]bsent conflicting evidence, the declaration should be taken as true.” *Id.*³

All of Bowman’s claims – DTA, CPA, and Criminal Profiteering – are predicated on the notion that NWTS lacked authority to foreclose and could not utilize SunTrust’s declaration as evidence of its beneficiary status. Bowman’s argument that NWTS could not rely on the beneficiary declaration “upon being provided information suggesting Fannie Mae was the owner of obligation” simply fails in light of the *Trujillo* decision. Brief of Appellant at 24.

E. *Trujillo* Also Resolves Bowman’s Argument Concerning the Notice of Foreclosure.

Bowman asserts that NWTS omitted “any declaration that SunTrust was the beneficiary and owner of the obligation as required under RCW 61.24.040(2)” from the Notice of Foreclosure. Brief of Appellant at 26. This is essentially the same position that *Trujillo* took, and this Court rejected, stating:

This form is nothing more than that [*i.e.* an attachment to a notice]. It does not state the law. Our discussion earlier in this opinion

³ Bowman’s supposedly “conflicting evidence regarding the ownership of the loan,” *i.e.*, Fannie Mae’s *ownership* interest, is not enough to undermine the declaration’s contents concerning SunTrust’s authority as the Note *holder*. See Brief of Appellant at 23, 25.

extensively discusses the controlling law. In any event, the statute states that the form need only be ‘substantially’ followed.

Trujillo, supra. at *12.

This Court observed in *Trujillo* that “the record reflects that Wells Fargo had possession of Trujillo’s note from the beginning of the foreclosure proceeding. By definition, it is the ‘holder’ of that note.” *Supra.* at *8. That conclusion is likewise true when applied to Bowman’s appeal because SunTrust held the Note throughout the subject foreclosure process.

SunTrust originated the \$417,000 loan to Bowman, and he acknowledged this fact when he signed the Note. CP 258-60. Bowman also knew from the Notice of Default that Fannie Mae owned the loan at that time, and he knew that SunTrust was servicing the loan. CP 221-23. SunTrust’s name appears in both the Notice of Foreclosure and Notice of Trustee’s Sale. CP 225-28, 497. Bowman’s desire to have known that Fannie Mae owned his loan, in order to “pursued Fannie Mae sponsored programs that *might* have provided him a modification of his loan” does

not give rise to either DTA or CPA liability against NWTS. Brief of Appellant at 33 (emphasis added).⁴


IV. CONCLUSION

Trujillo is dispositive on virtually every point in this appeal. However, even concerning issues not directly addressed in that decision, *Trujillo* points the way toward upholding the trial court's ruling. Bowman's theories cannot overcome the facts demonstrating that SunTrust is the Note holder, *i.e.* beneficiary, or that NWTS materially complied with the non-judicial foreclosure process that began strictly because of *Bowman's own default*.

On the record presented herein, this Court should reaffirm *Trujillo* and find in NWTS' favor.

DATED this 27th day of June, 2014.

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By: 
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Of Attorneys for Respondent
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⁴ Or Criminal Profiteering liability, for that matter. *Cf.* Brief of Appellant at 38.

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 June 30, 2014, I caused a copy of the **Supplemental Brief of Respondent Northwest Trustee Services, Inc. Pursuant to Court’s Notation Ruling** to be served to the following in the manner noted below:

Richard Llewelyn Jones Kovac & Jones, PLLC 2050 112 th Ave. NE, Suite 230 Bellevue, WA 98004 Attorneys for Appellant	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
Richard Llewelyn Jones Kovac & Jones, PLLC 1750 112 th Ave. NE, Suite D-151 Bellevue, WA 98004 Attorneys for Appellant	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile

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<p>John S. Devlin, III Andrew G. Yates Abraham K. Lorber Lane Powell, PC 1420 Fifth Ave., Suite 4200 Seattle, WA 98101-2338</p> <p>Attorneys for Respondents SunTrust Mortgage, Inc., Federal National Mortgage Association and Mortgage Electronic Registration Systems, Inc.</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail</p>
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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.

Sign this 30th day of June, 2014.



 Kristine Stephan, Paralegal