74264-7

74264-7

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

NO. 74264-7-I

ROBERT CUMMINGS and DORIS CUMMINGS, husband and wife,

Plaintiffs/Appellants,

vs.

NORTHWEST TRUSTEE SERVICES OF WASHINGTON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED SECURITIES SERIES 2006-FF8

Defendants/Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

APPELLANTS CUMMINGS' OPENING BRIEF

Correction: [INSERTED P. # ON TOC i – iv] and [INSERTED C.P. # ON P. 3 -5]

JAMES A. WEXLER, #7411
Attorney for Plaintiffs/Appellants
2025 – 201st Ave. SE
Sammamish, WA 98075
(206) 849-9455
wex@seanet.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUTES

RCW CHAPTER 19.86

RCW CHAPTER 61.24

RCW CHAPTER 62A.1

RCW CHAPTER 62A.9A

RCW CHAPTER 64.04

RCW CHAPTER 64.08

FEDERAL STATUTE

CASE LAW

I ASSIGNMENTS OF ERROR

1. The trial court erred by granting Defendants' Motions to Dismiss.

2. Trial court erred by failing to rule Defendant Trust was not entitled to foreclose.

3. Trial court erred by failing to rule MERS assignment of the deed of trust invalid.

4. Trial court erred by failing to rule Defendant NWTS was required to issue a new notice of default prior to commencing the foreclosure proceeding that is the subject of this litigation.

5. Trial court erred in awarding attorney fees pursuant to the subject deed of trust.

A. Issues Pertaining to Assignments of Error

1. Did Plaintiffs Waive Right to Contest Sale?

2. Does RCW 62A.9A-203 determine who is entitled to enforce the DOT?

3. Does the Waiver Doctrine Apply to this Case?

4. Can Plaintiffs prove their CPA under the facts of this case?

5. Do Plaintiffs have standing to Challenge legality of Defendants' actions?

II STATEMENT OF THE CASE

On April 12, 2006, First Franklin, a division of National City Bank of Indiana ("FF"), originated a mortgage loan on behalf of Plaintiff. The loan consisted of a note ("Note") and deed of trust ("DOT"), both

executed on or about April 12, 2006. CP 408.The Note and DOT named FF the lender, and the DOT named First American Title the trustee and Mortgage Electronic Registration Systems, Inc. ("MERS") the beneficiary. *Id.* FF recorded the DOT in the Snohomish County Auditor's Office under File no. 200604280683 on April 28, 2006. *Id.*

FF, the only entity that has ever acknowledged MERS as its *nominee*, went out of business in 2007. Accordingly, MERS could not have been acting as nominee for FF when MERS attempted to assign the Note and DOT to the Deutsche Bank National Trust Co., as Trustee for the Registered Certificate holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8 ("Trust") on October 6, 2011.

On July 26, 2009, several amendments to the Washington Deeds of Trust Act ("DTA") became law. One of those amendments (RCW 61.24.030(7)(a)): (1) required a *trustee* to have proof a *beneficiary* is the *owner* of the note secured by a DOT before recording, transmitting, or serving a notice of trustee's sale ("NOTS"); and (2) authorized a *trustee* to accept a declaration that contains language approved in .030(7)(a) from a *beneficiary* as proof of *ownership*.[1]

---

[1] RCW 61.24.030(7)(a) reads as follows: "That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection." The most important words in the second sentence of the quote are the six words at the end of the second sentence: "proof as required under this subsection." The noun "proof" and its prepositional modifier "as required under this subsection," considered together, are an unmistakable reference to the "*proof-of-ownership-of-the-note*" requirement in the first sentence of (7)(a). Consequently, the two sentences of (7)(a) are in harmony with one

On October 6, 2011, MERS *attempted* to assign Plaintiffs' DOT (not the Note) to the Trust. *CP 410.*

Approximately September 23, 2014, Select Portfolio Servicing, LLP ("SPS"), claiming to be the attorney-in-fact for the Trust, *attempted* to appoint NWTS the successor trustee.[2] *CP 418.* Neither SPS nor the NWTS ever provided the trial court with any proof SPS was in fact the Trust's authorized agent. Despite Plaintiffs' objection, the trial court never required NWTS to prove SPS had in fact been the Trust's agent when SPS attempted to appoint NWTS the successor trustee. There is no evidence in

---

another, not conflict. The focus of both sentences is on obtaining "proof" the beneficiary is the *owner* of the note. The only way one can arrive at the conclusion the second sentence is about obtaining proof the beneficiary is the *holder* of the note is by chopping off the prepositional phrase "*as required under this subsection*" at the end of the sentence. Ignoring the prepositional phrase at the end of the second sentence is the grammatical mistake made by every person who claims the second sentence of (7)(a) is about obtaining proof the beneficiary is the *holder* of the note. This mistake leads inexorably to the wrong conclusion about what proof the trustee must obtain before it is authorized to record a notice of trustee's sale.

[2] There is no evidence in the record that SPS was Deutsche's agent when it attempted to appoint NWTS the successor trustee. In addition, even if SPS was Deutsche's agent when it attempted to appoint NWTS the successor trustee, RCW 61.24.010(2) does not grant authority for the agent of a ***lawful beneficiary*** to appoint a successor trustee; much less for the agent of a person who is not a ***lawful beneficiary*** to appoint a successor trustee. The statute – which must be strictly interpreted and interpreted strictly in favor of borrowers -- grants authority to a ***lawful beneficiary***, and ***no one else***, to appoint a successor trustee.

Also, the WDTA specifically states, in several sections, when an agent is authorized to performance on behalf of a principal. *See e.g., RCW 61.24.031.* Owing to this specificity in various sections of the WDTA, when a section does not specifically authorize an agent to act on behalf of a principal, the presumption *must be* that an agent is not authorized to act. If the legislature had intended to authorize agents to perform all of the acts principals are required and permitted to perform under the WDTA, it would have been useless for that body to specify, in various sections of the WDTA, specific acts an agent is permitted to perform on behalf of a principal. The courts are required to presume the legislature has not engaged in vain and useless acts. *Oak Harbor School District v. Oak Harbor Education Assoc., et al.,* 86 Wn.2d 497, 500 (1976); *Helleher v. Ephrata School Dist.* 165, 56 Wn.2d 866, 355 P.2d 989 (1960). As a result, not only is NWTS *not* a *lawfully-appointed successor trustee* because, in violation of *Walker* and RCW 61.24.010(2), the entity that attempted to appoint it – Deutsche -- was not a *lawful beneficiary*; NWTS is not a lawfully-appointed successor trustee because it was "*appointed*" by someone who *claims to be* an agent – a second violation of both *Walker* and RCW 61.24.010(2).

the trial court record NWTS was ever lawfully appointed the successor trustee. Obviously, this is a material fact that could determine the outcome of the case.

On August 27, 2014 and again on September 5, 2014, SPS delivered to NWTS documents SPS described as "beneficiary declarations." *CP 319, 321.* . Also on September 16, 2014, SPS attempted to appoint NWTS the successor trustee. The *appointment* was recorded on September 23, 2014.

On September 24, 2014, NWTS, acting as the purported successor trustee, issued a notice of default ("NOD") to Plaintiffs. *CP 325 – 327.* On November 11, 2014, NWTS recorded a Notice of Trustee's Sale ("NOTS") that set a sale date of March 13, 2015.*CP 329 – 332.*

Several days before the sale, Plaintiffs sent NWTS a letter. The letter explained that the sale was being conducted in violation of numerous provisions of the DTA and requested that NWTS conduct a cursory investigation to determine whether allegations in the letter were valid. Plaintiffs received no response to the letter, and Plaintiffs' home was sold on March 13, 2015. This lawsuit followed.

On or about March 27, 2015, NWTS filed a Motion to Dismiss ("Motion") Plaintiffs' lawsuit against NWTS. *CP 272 – 288.* That motion was heard by this Court on April 16, 2015. *CP 270 – 271.* At the conclusion of the hearing, the Court granted the motion to dismiss. *Id.*

Several months later the remaining Defendants jointly moved for dismissal. There motion was granted on October 27, 2015. *CP 9 – 10.*

This appeal followed.

III LEGAL STANDARDS ON REVIEW

A. Summary Dismissal of Actions

Summary dismissal of a cause of action is appropriate only if the party seeking a summary judgment demonstrates, by uncontroverted facts, that no genuine issue of material fact exists. Until this demonstration has been made, there is no necessity for the nonmoving party to present any evidence to prevent entry of the judgment. *Jacobsen v. State,* 89 Wn.2d 104, 569 P.2d 1152 (1977).

B. RCW CHAPTER 19.86

Under RCW 19.86.090, any person injured in his business or property by a violation of RCW 19.86.020 may bring a civil action to enjoin further violations and recover actual damages.

Pursuant to RCW 19.86.020, "unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful.

C. RCW CHAPTER 61.24

1. RCW 61.24.005(2) defines the *beneficiary* as the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

2. RCW 61.24.010(2) authorizes only the *beneficiary* to appoint a *successor trustee*.

3. Under RCW 61.24.010(4), the *successor trustee* has a duty of good faith to the borrower, beneficiary, and grantor.

C. RCW 62A.9A-203

1. RCW 62A.9A-203(a) determines that a *security (ownership [RCW 62A.1-201(b)(35)]) interest* in a note attaches to the note when the security interest becomes *enforceable* against the debtor (seller [RCW 62A.9A-102(a)(28)(B]) and third parties.

2. RCW 62A.9A-203(b) lists the requirements that must be met for a Note to become *enforceable* against the seller of the note and third parties.

3. RCW 62A.9A-203(g) is the codification of the common law legal axiom, "the security follows the note."

D. RCW 64.04

1. RCW 64.04.010 requires the transfer of any interest in real property to be accomplished by deed.

2. RCW 64.04.020 requires a deed to be in writing, acknowledged by the party to be bound thereby, before a person authorized by statute to take acknowledgements.

E. RCW 64.08

RCW 64.08.010 authorizes certain persons, including notary publics, to take acknowledgements of deeds.

F. 26 U.S.C. § 860

1. Under 26 U.S.C. § 860(F)(a)(2)(B), any income received from an asset that is neither a "qualified mortgage" nor a "permitted investment" is *prohibited*. The word "prohibited" is not defined in 26 U.S.C. § 860. Thus, the word has its ordinary meaning.[3]

2. 26 U.S.C. §860(G)(a)(3) -- a "qualified mortgage" is *any obligation* which is *principally secured by an interest in real property* and which is transferred to the REMIC *on the startup day and in exchange for regular or residual interest in the REMIC; or*

3. pursuant to 26 U.S.C. §860(G)(a)(3)(ii), an obligation that is principally secured by an interest in real property *and* is purchased by the REMIC within the 3-month period beginning on the startup day, *if* the purchase is pursuant to a fixed-price contract in effect on the startup day.

4. 26 U.S.C. §860(G)(a)(5) -- The term "permitted investments" means any—

(A) cash flow investment,

(B) qualified reserve asset, or

(C) foreclosure property.

5. 26 U.S.C. §860(G)(a)(8) -- The term "foreclosure property" means property—

---

[3] *Black's Law Dictionary* defines "prohibit" as "To forbid by law; to prevent; -- not synonymous with 'regulate.'" *Merriam-Webster's Collegiate Dictionary, Tenth Edition* defines "prohibit" as "1: to forbid by authority : ENJOIN 2A: to prevent from doing something b: PRECLUDE *syn* see FORBID." Hence, a transaction that results in any income from an asset that is neither a "qualified mortgage" nor a "permitted investment" ***is forbidden by 26 U.S.C. §860(F)(a)(2)(B).***

(A) which would be foreclosure property under section 856(e) (without regard to paragraph (5) thereof) if acquired by a real estate investment trust, *and*

(B) which is acquired in connection with the default or imminent default of a *qualified mortgage held by the REMIC.*

26 U.S.C. § 856

5. 26 U.S.C. §856(e):

The term 'foreclosure property' means any real property (including interests in real property) . . . acquired by the real estate investment trust as the result of such trust having bid in such property at foreclosure, or having otherwise reduced such property to ownership or possession by agreement or process of law, after there was default (or default was imminent) on . . . an indebtedness which such property secured. *Such term does not include property acquired by the real estate investment trust as a result of indebtedness arising from the sale or other disposition of property of the trust described in section 1221(a)(1) which was not originally acquired as foreclosure property.* (Italics added)

IV ARGUMENT

A. Plaintiffs did not Waive Right to Contest Sale.

1. RCW 61.24.030 – Requisites to Trustee's Sale

In *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560 (2012) the Washington Supreme Court found that procedural irregularities, such as those that divest a trustee of authority to conduct a

sale, can invalidate a sale. *Albice*, 174 Wn.2d at 565. The Court cited *Udall v. T.D. Escrow Services*, Inc., 159 Wn.2d 903, 911 (2007) as direct support for this finding.

The *Udall* Court determined that a trustee may not withhold delivery of a trustee's deed "unless the sale itself was void due to a procedural irregularity that defeated the trustee's authority to sale the property." *Udall*, 159 Wn.2d at 911. The *Udall* Court cited *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P,2d 683 (1985) (suit brought by borrower prevented the trustee's initiation of foreclosure) as the example of a case in which procedural irregularities defeated a trustee's authority to sell a property. As the *Udall* Court pointed out, the sale in *Cox* was a violation of RCW 61.24.030(4), a subsection of RCW 61.24.030. *Id.*

RCW Section 61.24.030 is entitled "Requisites to a Trustee's Sale." Thus, *Albice*, by citing *Udall*, a case that rests on the holding in *Cox*, as authority for the proposition that a sale conducted in violation of RCW 61.24.040(6) exceeds the trustee's authority and must be invalidated, confirmed that the holding in *Albice* applies with equal force to sales conducted in violation of *any one of the subsections* of RCW 61.24.030. The specific subsection of RCW 61.24.030 that was violated in *Cox* was RCW 61.24.030(4).

a. *Schroeder v. Excelsior Management Grp., LLC*

In *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013) a different subsection of RCW 61.24.030 was

violated, but the result was the same. Moreover, in that case, the Supreme Court made it explicitly clear a violation of any one of the eight subsections of RCW 61.24.030 will result in invalidation of a sale.

The primary question before the *Schroeder* Court was whether the parties to a deed of trust could waive the statutory requirement contained in RCW 61.24.030(2) that agricultural land must be foreclosed judicially. *Schroeder,* 297 P.3d at 679. Schroeder, like Plaintiffs herein, had signed a settlement agreement.

Both the settlement agreement and a separately signed contract, explicitly waived the right to claim the land was agricultural land in the event of a subsequent default. In addition, the deed of trust at issue in *Schroeder* specifically stated that the land had not been used, and would not be used, for agricultural purposes. *Id.,* at 680. Finally, Schroeder, unlike Defendants herein, actually received substantial compensation as part of the settlement agreement. Schroeder received $425,000 of new financing in return for the concession made in the settlement agreement.

Based on the plain language of RCW 61.24.030(2), the Court held that if the land was "agricultural," the trustee had no legal authority to foreclose non-judicially, and the parties could not waive the statute. *Id.,* at 686. The Court then reversed the lower court rulings, reinstated Schroeder's damage claims and ordered the trial court to vacate the foreclosure sale if the trial court determined the property was agricultural land.

B. RCW 62A.9A-203 determines who is Entitled to Enforce DOT.

RCW 62A.9A-203(a), (b), and (g), the codification of the *security follows the note* legal axiom, determines who is entitled to enforce a DOT.

Defendants herein have maintained that they have the right to foreclose because the Trust *holds* Plaintiffs' note ("Note"). They have also stated the Trust *owns* the Note, but offered no proof in the trial court in support of that claim; specifically, the Trust did not provide proof it gave "value" for the Note. In the absence of proof value was given for the Note, it is impossible to establish an *enforceable ownership interest in the Note*. RCW 62A.9A-203(b)(1). And, under RCW 62A.9A-203(g),[4] if an enforceable *ownership interest* in the note is *not established*, it is impossible to establish an *enforceable ownership interest in the DOT* that secures the note. In the absence of an enforceable ownership interest in the DOT that secures the note, there is no right to enforce the DOT by foreclosing non-judicially.

A non-judicial foreclosure is an attempt to *enforce a deed of trust*, *not* an attempt to *enforce the note* that the deed of trust secures. This point seems to be lost on most lawyers and, unfortunately, on not a few judges.

Defendants' assumption that they are entitled to enforce the deed of trust because the right to enforce the note allegedly has been transferred to the Trust is an assumption that is born of the widely-held misconception that a *transfer of the deed of trust* follows a *transfer of the right to enforce*

[4] RCW 62A.9A-203(g) is the codification of the security follows the note legal axiom.

the note. RCW 62A.9A-203(a), (b), and (g), the little-understood law in Washington for over 16 years, stands in direct opposition to this misconception. Often, however, this largely unknown fact does not matter because, unfortunately, most lawyers and not a few judges simply don't understand RCW 62A.9A-203(a), (b), and (g).

There has never been a subsequent assignment of the Note or DOT to the Trust. RCW 62A.9A.203(b)(2) requires that the security interest in the mortgage note, to be enforceable against the debtor, must be transferred by someone who has rights in the mortgage note or who has the power to transfer rights in the mortgage note to a purchaser of the mortgage note. MERS did not have rights in the mortgage note or the power to transfer rights in the mortgage note. Therefore MERS did not have the right to transfer Plaintiffs' Note and DOT to the Trust

In Washington, the "security follows the note" legal axiom is no longer a common law doctrine and has not been a common law doctrine for approximately 50 years. Approximately 50 years ago, the Washington State Legislature codified the axiom at RCW 62A.9A-203(a), (b), and (g). *See Official Comment 3 to UCC 9-203.* RCW Chapter 62A is Washington's version of the Uniform Commercial Code ("UCC").

The following is the correct interpretation of RCW 62A.9A-203(a), (b), and (g).

RCW 62A.9A-203(a) states a "**security interest**" (which includes the interest of a **buyer** of a promissory note in a transaction governed by

Article 9A (*See* RCW 62A.1-201(b)(35)) ***attaches*** to a promissory note when the security interest becomes ***enforceable*** against the debtor (the "debtor" concept includes a **seller** of a promissory note (*See* RCW 62A.9A-102(a)(28)). A "mortgage note" is just a variety of **secured** promissory note. Consequently, Article 9A, the **Secured** Transactions Article, not Article 3, provides the rules that govern transactions involving transfers of security for **secured** mortgage notes.

RCW 62A.9A-203(b) states that a security interest (i.e., ownership interest (*See* RCW 62A.1-201(b)(35)) in collateral (i.e., a mortgage note (RCW 62A.9A-102(a)(12)(B)) becomes ***enforceable*** against the world when three conditions are met: (1) value has been given for the note (RCW 62A.9A-203(b)(1)); (2) the seller has rights in the note or the power to transfer rights in the note to a purchaser (RCW 62A.9A-203(b)(2)); *and* (3) either (a) the debtor (i.e., the seller of the note (RCW 62A.9A-102(a)(28)(B)) has signed a security agreement that provides a description of the note (RCW 62A.9A-203(b)(3)(A)), *or* (b) the note is not a certificated security and, pursuant to the terms of the seller's security agreement, is being held by someone other than the secured party (i.e., the purchaser of the note (RCW 62A.9A-102(a)(73)(D)) solely for the purchaser's benefit. *See RCW 62A.9A-203(b)(3)(A) and (B) and RCW 62A.9A-313.*

Under RCW 62A.9A-203(b), the instant the three conditions listed in the preceding paragraph have been met, the purchaser's ownership

interest in the note becomes enforceable against the world and attaches to the note. At that same instant, pursuant to RCW 62A.9A-203(g), the note purchaser's enforceable ownership interest in *the security for the note* (i.e., the DOT) becomes enforceable against the world and attaches to the security (i.e., the DOT). In other words, the security (i.e., the DOT) follows the note. *See Official Comment 3 to UCC 9-203.*

However, this automatic transfer of the DOT occurs upon the transfer of an enforceable "*ownership interest*" in the note, ***not***, as NWTS has repeatedly claimed, upon transfer of the "right to enforce the note." The fact the "security follows the note" doctrine is codified in Article 9A, the Article that contains the rules governing transfers of "*ownership interests*" in secured promissory notes; and not Article 3, the Article that governs the *negotiation, transfer* and *enforcement* of promissory notes, is proof the doctrine has always referred to the transfer of "*ownership* of secured promissory notes.

Until counsel for Plaintiff began raising the issue of the importance of RCW 62A.9A-203(a), (b), and (g) to the foreclosure process three years ago, the provision was *never* mentioned in foreclosure litigation in this state. Initially, bank lawyers claimed and court's found RCW 62A.9A-203 applied only to personal property transactions. In *Trujillo v. Northwest Trustee Services, Inc., 326 P.3d 768 (2014)* this court made such a finding. *Trujillo*, 326 P.3d at 778. Fortunately, the Supreme Court dispelled the erroneous notion that RCW 62A.9A-203 applies only to personal property

transactions in *Brown v. Washington Department of Commerce,* No. 90652-1 (2015). In an otherwise brilliant analysis of 9A-203(a), (b), and (g), an analysis Plaintiffs' counsel originated more than 2 years before the Supreme Court's decision in *Brown,* the Court failed to recognize the importance of 9A-203(g)'s connection with, and dependence on, 9A-203(a) and (b). Because the Court failed to recognize that connection, it predictably arrived at the wrong conclusion.

A deed of trust does not follow the transfer of the *right to enforce a note*. As demonstrated below, a deed of trust follows the *transfer of the right of ownership of a note*. RCW 62A.9A-203(a), (b), and (g). Since Defendants have provided *no proof* that the Trust *owns* the note (though they have casually claimed ownership *without providing proof*), granting summary judgment would be a violation of RCW 61.24.030(7)(a).

The *Cox* Court declared the sale unlawful because of a violation of the requisites to a lawful trustee's sale contained in RCW 61.24.030(4); and the *Schroeder* Court declared the sale unlawful because of a violation of the requisites to a lawful trustee's sale contained in RCW 61.24.030(2);

In other words, in *Cox,* and *Schroeder,* the Washington Supreme Court has already ruled that a violation of the requisites to a lawful trustee's sale contained in either one of two of the eight subsections of RCW 61.24.030 -- .030(2), and .030(4)– invalidates a sale. Among other alleged violations, Plaintiffs have alleged and provided proof that

Defendants have violated RCW 61.24.030(7) in numerous ways while prosecuting this non-judicial foreclosure.

C. Waiver

The Washington Supreme Court has already determined that violations of RCW 61.24.030 cannot be waived because the requirements of RCW 61.24.030 are not "rights" or "privileges" of a grantor; they are "limitations on the authority of the trustee to foreclose." *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); and *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013). Plaintiffs, out of lack of knowledge, may not have initially moved as quickly as an experienced foreclosure lawyer would have moved, but, after learning about the illegalities here involved, Plaintiffs moved with lightning speed to protect their rights. There is no waiver.

D. Consumer Protection Act Claim

To prevail on a claim for violation of the Consumer Protection Act ("CPA"), Plaintiff must prove: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) a public interest impact; (4) injury to Plaintiff in his business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986).

1. Deceptive acts and practices.

As stated in the First Amended Complaint and documented in the exhibits attached to said Complaint, Defendants engaged in a pattern of deceptive and unfair acts and practices in foreclosing the Property non-

judicially. These acts include: (1) allowing MERS to assign interests in the Note and DOT to the Trust even though MERS never "owned" or "held" the Note or DOT; (2) MERS failure to assign Plaintiffs' Note and DOT to the Trust within the time period required by federal law (26 U.S.C. §860(G)), thereby preventing Plaintiffs' loan from becoming a "*qualified mortgage*;" (3) allowing the Trust to commence and conclude this non-judicial foreclosure even though the non-judicial foreclosure sale would result in the receipt of income by the Trust from an asset that is neither a "qualified mortgage" nor a "permitted investment, in violation of the *prohibition* contained in 26 U.S.C. §860(F)(a)(2)(B); " and (4) NWTS acting on the successor-trustee authority allegedly obtained when SPS appointed NWTS the successor trustee on September 23, 2014, even though all of the Defendants, including specifically NWTS, were aware that SPS did not hold any interest in the Note or DOT at any point in time.

a. MERS assigned the Note and DOT.

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), the Washington Supreme Court ruled that MERS could not be a lawful beneficiary. MERS, the Court reasoned, had never "held" or "owned" the note, and therefore had never had any interest in the note. Since the DOT follows the note (*See RCW 62A.9A.-203(a),(b) and (g)*), MERS also never obtained any interest in the DOT. Accordingly, MERS had no right to assign the beneficial interest in the DOT. One may assign

only an interest that one possesses. MERS' assignment of the Note and DOT is inherently deceptive. *Bain* 175 Wn.2d at ¶ 50.

Additionally, RCW 62A.9A-203(a) states a *security interest* (including the interest of a *buyer* of a promissory note in a transaction governed by Article 9A (RCW 62A.1-201[b][35]) attaches to a promissory note when the security interest becomes enforceable against the *debtor* (including a *seller* of a promissory note (RCW 62A.9A-102[a][28]).[5]

RCW 62A.9A-203(b) states that a *security (ownership) interest* becomes enforceable when three conditions are met. One of the three conditions is that the person who claims the security interest must have given *value* for the note. MERS never gives value for any borrower's note and did not give value for Plaintiffs' Note in this case. As a result, MERS did not have an enforceable ownership interest in the Note to transfer. The transfer of the ownership interest in the Note therefore was void ab initio.

RCW 62A.9A-203(g) is the codification of the common law security follows the note legal axiom. *See Official Comment 9 to UCC §9-203.* Under 9A-203(g), Plaintiffs' DOT was automatically transferred if, and only if, Plaintiffs' Note was transferred pursuant to 9A-203(a) and (b). The only transfers that occur pursuant to RCW 62A.9A-203(a) and (b) are *sales* of promissory notes. Consequently, the version of the security follows the note legal axiom codified at 9A-203(a), (b), and (g) is

[5] A "mortgage note" is just a variety of **secured** promissory note. Article 9A (the ***Secured Transactions*** Article), not Article 3 (the ***Negotiable Instruments*** Article), applies to transactions involving ***secured*** mortgage notes.

diametrically opposed to the version of the security follows the note doctrine set forth in *Brown v. Washington Department of Commerce,* No. 90652-1 (2015).

Brown is controlling authority in Washington. RCW 62A.9A-203(g), however, is also controlling legal authority in Washington. It is untenable for two diametrically opposed versions of the security follows the note legal axiom to be controlling legal authority in Washington at the same time. Moreover, one of the versions, of necessity, is wrong. Since RCW 62A.9A-203 is perfectly aligned with the historical meaning of the security follows the note doctrine, 9A-203 is not the version that is wrong.

MERS' assignment of the Note and DOT, when it did not own any interest in the Note or DOT, was certainly unfair and deceptive; and the participation of each of the other Defendants in MERS' assignment of the Note and DOT was equally unfair and deceptive.

b. Plaintiffs' DOT has never been lawfully assigned to the Trust.

RCW 64.04.010 requires that all interests in real property be transferred by deed.[6] RCW 64.04.020 directs that, to be lawful, a deed

[6] Defendants claim MERS' assignment is irrelevant because the Trust automatically obtained the right to enforce the deed of trust when the Trust became the "holder" of the Note. As shown above, RCW 62A.9A-203 stands in direct opposition to this popular misconception. In addition, however, RCW 64.04.010 also stands in opposition to this erroneous notion.

Plaintiffs anticipates that Defendants will claim the transfer of a deed of trust need not be by deed because the deed of trust follows the note automatically. Further, Defendants will probably cite *Howard v. Shaw*, 10 Wn. 151, 38 P. 746 (1894) and RCW 62A.9A-203 as authority for their position. Respecting *Howard,* the claim will be that after the holding in *Howard,* the transfer of an interest in a deed of trust is no longer considered a "*conveyance.*" Consequently, the real property "*conveyance*" statutes no longer apply. In reality, however, *Howard* does not stand for the proposition that after *Howard* the

must be in writing, signed by the party to be bound thereby, and acknowledged by the party to be bound thereby before a person authorized by statute to take acknowledgements. Clearly, to be bound by the transfer of an interest in real property the transferor must have rights in the property prior to the transfer.

MERS lacked any interest in the lien on the Property represented by the DOT when MERS assigned the DOT to the Trust. Hence, independent of the RCW 62A.9A-203 analysis, the MERS assignment transferred to the Trust only that which MERS possessed – nothing! The failure to transfer the lien interest represented by the DOT, independent of the numerous other bases for invalidating the sale, invalidates the foreclosure proceeding and, as a result, the March 13, 2015 sale.

Defendants' collective decision to act on the basis of this invalid MERS' assignment was an unfair and deceptive act by each of the Defendants.

c. NWTS had no lawful authority to commence this foreclosure.

---

transfer of a deed of trust is no longer a conveyance. *Howard* stands for the proposition that after *Howard* the transfer of a deed of trust is no longer the transfer of a "fee title interest in the property;" it is the transfer of a "lien interest in the property." Defendants have simply misread *Howard*.

Nor does RCW 62A.9A-203 support Defendants' position. According to the Permanent Editorial Board of the UCC, the official interpreters of the meaning of the UCC, RCW 62A.9A-203 is ***subordinate to state property laws***. *See Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (American Law Institute and National Conference of Commissioners on Uniform State Laws, November 14, 2011), at fn. 43. That is, in a contest between RCW 62A.9A-203 and RCW 64.04.010 concerning the rules for transferring real property in Washington, RCW 64.04.010 controls. *Id.*

The Trust derived its authority to act from MERS' assignment of the Note and DOT to the Trust – an assignment that, for several reasons,[7] was legally ineffective. NWTS was appointed the successor trustee by the Trust – an appointment that, because of the ineffectiveness of the MERS assignment, was also legally ineffective. Accordingly, NWTS had no authority to proceed with a non-judicial foreclosure and violated the WDTA by starting one and by actually selling the Property on March 13, 2015.

In the absence of lawful authority, NWTS's commencement of this foreclosure was unfair and deceptive.

d. The foreclosure is forbidden by 26 U.S.C. §860(F)(a)(2)(B).

26 U.S.C. §860(F)(a)(2)(B) forbids any transaction that produces income from an asset that is neither a "qualified mortgage" nor a "permitted investment.

1. Plaintiff's loan is not a "qualified mortgage."

When MERS assigned Plaintiffs' loan (Note and DOT) into the Trust on October 6, 2011, the loan did not become a "qualified mortgage" for three reasons.

a. MERS assigned the DOT in violation of RCW 64.04.010.

[7] The assignment was legally ineffective because: (1) MERS had no interest to assign; (2) even if MERS had had an interest to assign, (a) the loan was assigned more than 5 years ***after*** the Trust closed and (b) MERS did not receive a regular or residual interest in exchange for the loan.

The assignment was legally invalid because it was made by MERS, an entity that did not own any interest in the Note or DOT. As a result, the assignment violated the requirement in RCW 64.04.020 that an interest in real property be transferred by the person to whom the interest transferred is owed. There has never been any other attempt to assign the DOT to the Trust. Accordingly, pursuant to the requirements of RCW Chapter 64.04, the lien interest in the Property represented by the DOT has never been lawfully transferred into the Trust.

b. Loan assigned to Trust more than five years after Trust's Startup Date and therefore was not a "qualified mortgage."

The loan was not assigned to the Trust until more than five years after the Trust closed. According to the Trust Agreement, *the Trust closed on June 29, 2006*. The Assignment occurred on *October 6, 2011*, more than five years after the Trust closed.

Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i) and (ii), to be a "qualified mortgage" a loan must be assigned into the Trust, at the very latest, *no later than 90 days after the Trust's closing date.* Transfer of a loan into a REMIC trust after the 90th day is *prohibited* by federal law. *See 26 U.S.C. §860(F) and (G).* Since the loan was not assigned into the Trust until more than *five (5) years* after the Trust's closing date, if it has ever been assigned to the Trust, the loan is not legally part of the Trust.

c. MERS did not receive "regular" or "residual" interest in exchange for the loan and therefore the loan was not a "qualified mortgage."

When MERS assigned the loan into the Trust, MERS did not receive a regular or residual interest in the Trust in exchange for the loan. The Trust records will bear out this allegation. Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i), to be a "qualified mortgage," a loan must be transferred into a Trust in exchange for regular or residual interests in the Trust. Consequently, the loan would not have become a "qualified mortgage" even if it had been lawfully transferred into the Trust.

Selling the Property therefore was a deceptive and unfair act that is the result of Defendants' concerted actions.

2. Acts Capable of Repetition.

These illegal acts have been repeated in hundreds, if not thousands, of foreclosures throughout the State of Washington. Defendants have continued the practice of foreclosing on properties for which the foreclosing entity obtained its lien interest in the property through an assignment from MERS in defiance of the Washington Supreme Court's decision in *Bain*. Because these actions are so often repeated, the practices described herein above have a widespread adverse impact on some of Washington's most vulnerable and exposed citizens.

If the court permits this sale to stand, despite the fact Defendants' actions have been declared illegal by both the Washington Supreme Court, Plaintiff will lose the Property without having had the opportunity to establish the illegality of the foreclosure proceeding in a court of law.

3. Defendants are the sole cause of Plaintiffs' loss.

Finally, the loss of the Property is due entirely to Defendants' unlawful conduct. Defendants will undoubtedly argue that Plaintiffs' failure to make payments is the cause of Plaintiffs' loss, and that Plaintiffs cannot fulfill the "but for" causation or damages elements. However, in this instance it doesn't matter that Plaintiffs have failed to make mortgage payments because the foreclosing entity has no more legal right to foreclose than Plaintiffs' next door neighbor. Plaintiffs could miss 100 consecutive payments and Defendants would have no greater right to foreclose than they have at this moment. Thus, the loss of Plaintiffs' home, if it occurs is due entirely to Defendants' unlawful actions.

Additionally, Plaintiffs incurred substantial investigation costs prior to instituting this lawsuit. Plaintiffs have been severely injured in their property as a result of the wrongful foreclosure and the need to investigate Defendants' actions prior to instituting this lawsuit.

E. Plaintiff has standing to challenge legality of assignments.

Respondents will almost certainly claim Plaintiffs lack standing to challenge the three MERS assignments.

Plaintiffs are parties to the DOT and Note. The Lender, or its successor or assign has the right to transfer the Note and DOT only because Plaintiffs granted the Lender that right in both the Note and DOT. However, Plaintiffs granted the Lender the right to make *legal* transfers only. The transfer to the Trust was not a lawful transfer. It violated a

federal statute. As parties to both the Note and DOT, Plaintiffs had an absolute right to challenge the transfer.

More importantly, in Washington, the transfer of an ownership of the note does not mean the transferee is automatically entitled to enforce the DOT. Under the Washington version of the UCC, Since Washington property laws require all interests in real property to be transferred by deed, under the Washington version of the UCC, the right to enforce the DOT does not exist until a deed that complies with state law has been executed and transferred to the purchaser.[8]

Because the attempted assignment of the DOT by MERS was legally ineffective, there has been no transfer of the DOT in this case. Consequently, Deutsche has never had the right to enforce the DOT and is not a *lawfully beneficiary* under the WDTA; and NWTS is not a *lawfully-appointed trustee*.

The Court should rescind its order granting dismissal to NWTS and should reinstate NWTS as a Defendant in this case.

---

[8]Under the rule in UCC § 9-203(g), if the holder of the note in question demonstrated that it had an attached security interest (including the interest of a buyer) in the note, the holder of the note in question would also have a security interest in the mortgage securing the note even in the absence of a separate assignment of the mortgage. (This Report does not address whether, under the facts of the *Ibanez* case, the holder of the note had an attached security interest in the note and, thus, qualified for the application of UCC § 9-203(g). ***Moreover, even if the holder had an attached security interest in the note and, thus, had a security interest in the mortgage, this would NOT, of itself, mean that the holder could enforce the mortgage without a recordable assignment of the mortgage to the holder. Whatever steps are required in order to enforce a mortgage in the absence of a recordable assignment are the province of real property law.***
Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, at 12, n.43. (italics, bolding, underscoring and capitalization added).

V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

Respectfully submitted,

JAMES A. WEXLER

James A. Wexler, Attorney for
Plaintiffs/Appellants

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused Plaintiff's Amended Opening Brief to be served on the following representative for Defendants at the below stated address by E-maill as previously agreed between the parties to this litigation:

Joshua S. Schaer
RCO Legal, P.S.
13555 S.E. 36th St., Suite 300
Bellevue, WA. 98006
jschaer@rcolegal.com

John Eugene Glowney, WSBA#12652
Vanessa Soriano Power
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA.98101-4109
john.glowney@stoel.com
vanessa.power@stoel.co,

Clerk, Court of Appeals
Of the State of Washington Division I
One Union Square
600 University Street
Seattle, WA. 98101
206.464.7750

DONE this 12th day of February, 2016 at Tacoma, WA.

JAMES A. WEXLER

James A. Wexler

James A. Wexler, #7411
Attorney for Plaintiffs