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NO. 71003-6-I

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

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DOUGLAS S. BRYSON and NETTI M. BRYSON,

Appellants-Plaintiffs,

v.

STEWART TITLE GUARANTY CO., a wholly owned subsidiary of  
Stewart Information Services Corp.; JPMORGAN CHASE BANK, N.A.;  
and NORTHWEST TRUSTEE SERVICES, INC.,

Respondents-Defendants.

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**BRIEF OF RESPONDENT STEWART TITLE GUARANTY CO.**

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## I. PROCEDURAL HISTORY

Douglas and Nettie Bryson (the “Brysons” or “Appellants”) filed a Complaint against Stewart Title Guaranty Company (“STGC”), Northwest Trustee Services, Inc. (“NWTS”) and JP Morgan Chase Bank, N.A. (“Chase”) in Skagit County Superior Court on July 15, 2013. CP 149-170. The Complaint sought to enjoin any foreclosure sale of the Brysons’ home as well as an accounting for a loan obtained by the Brysons from Chase. *Id.*

On August 15, 2013, STGC moved for dismissal under CR 12(b)(6) for failure to state a claim. CP 171-198. The trial court granted STGC’s motion on September 25, 2013. CP 201-202.

On October 10, 2013, the Brysons filed a notice for discretionary review. CP 119-142. On March 27, 2014, the Brysons served STGC’s counsel with their Brief of Appellants (“Appellants’ Brief”).

## II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

STGC makes no assignments of error. The Skagit County Superior Court’s order to dismiss STGC was correctly entered. STGC restates the issue pertaining to the Brysons’ assignment of error as follows:

Does STGC owe the Brysons a duty to produce a verified accounting?

### III. LEGAL ARGUMENT

#### A. Standard of Review

Whether the trial court properly dismissed for failure to state a claim is a question of law. The appellate court reviews *de novo*. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

Under CR 12(b)(6), a plaintiff states a claim if it is possible that facts consistent with the complaint could be established that would entitle the plaintiff to relief. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010). All facts alleged in the complaint are presumed to be true; however, the court is not required to accept a plaintiff's legal conclusions as true. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). “[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper.” *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977).

#### B. Brysons' Claims

The Brysons' Complaint attempts to make two claims: (1) “Emergency Temporary Restraining Order and Preliminary Injunctive Relief”; and (2) “An Accounting – Elements for An Accounting.” CP 153-158. Although the Complaint is difficult to understand, it appears that, at one point, the Brysons' property was in foreclosure. The Brysons' Complaint appears to seek an order (1) preventing foreclosure from

moving forward, and (2) requiring respondents to submit an accounting of a loan the Brysons obtained from Chase. CR 158.

Appellants' Brief, however, only seeks review of the second issue – whether STGC owes the Brysons a “duty to produce a verified accounting.” Appellants' Br., p. 1.

**C. Brysons Have Failed to State a Claim Against STGC Upon Which Relief May Be Granted**

**1. STGC Is Not the Trustee**

A trustee to a deed of trust is typically appointed by the beneficiary, who has complete discretion to substitute a new trustee at any time. *See* RCW 61.24.010(2) (trustee may be replaced by beneficiary; if no trustee is named in deed of trust or if trustee resigns or otherwise cannot serve, “the beneficiary shall appoint a trustee or successor trustee”); *see also Mutual Reserve Ass'n v. Zeran*, 152 Wash. 342, 350, 277 P. 984 (1929) (“The trustee is a mere nominal party, without interest in the subject-matter, who is named only as the instrument through which the rights of the real parties may be protected and enforced”).

The Brysons admit in their Complaint and in their appeal brief that NWTS was appointed as “successor trustee.” CP 150-153; Appellants' Br., pp. 3, 5, 12. STGC was not trustee at the time of any bankruptcy proceeding nor is it currently the trustee. STGC, therefore, has no interest or responsibility with regard to the subject property.

Specifically, STGC does not have the standing or ability to prevent any foreclosure on the subject property, nor does STGC have the ability or information necessary to provide the Brysons with any type of accounting. A defendant with no duty to act and who does not act has no liability to a plaintiff. *See, e.g., McCormick v. Milner Hotels, Inc.*, 53 Wn.2d 207, 339 P.2d 239 (1958); *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005).

**2. STGC Does Not Owe the Brysons Any Fiduciary Duty**

The Brysons allege that STGC owes them a fiduciary duty under RCW 11.97.010(3) and RCW 11.106.040. CP 155. This is incorrect as a matter of law. STGC is not the trustee and does not have any interest in the subject property. The Brysons repeatedly admit that NWTS is the successor trustee. CP 150-153; Appellants' Br., pp. 3, 5, 12. RCW 11.97.010 and RCW 11.106.040, therefore, do not apply to STGC.

Moreover, even if STGC were the trustee (which it is not), the Washington Deed of Trust Act clearly states that a "trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust." RCW 61.24.010(3).

**3. The Case Law Cited by the Brysons Is Inapposite**

None of the case law cited in Appellants' Brief holds that a former trustee, who has been replaced by a successor trustee, is required to provide the debtor with a verified accounting.

**IV. CONCLUSION**

The Brysons' claims against STGC were dismissed below because: (1) STGC has no ability or standing to either prevent foreclosure proceedings from moving forward on the subject property or to render an accounting; and (2) the trustee of a deed of trust (which STGC is not) does not owe the borrower a fiduciary duty. The Brysons, therefore, failed to state a claim against STGC upon which relief may be granted. STGC asks this Court to affirm the trial court's decision.

Respectfully submitted: April 22, 2014.

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**Certificate of Service**

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on April 22, 2014, a true copy of the foregoing BRIEF OF RESPONDENT STEWART TITLE GUARANTY CO. was served upon all parties/counsel of record as indicated below:

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Netti M. Bryson	<input type="checkbox"/>	By Legal Messenger
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DATED: April 22, 2014, at Seattle, Washington.



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