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

No. 705920

ROCIO TRUJILLO, an unmarried woman,

Appellant,

vs.

NORTHWEST TRUSTEE SERVICES, INC;
Washington Corporation

Respondent

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

REPLY BRIEF OF APPELLANT

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WASHINGTON CASES

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No. 12-20559, slip op. at 3, 2013 WL 3213633
(5th Cir. June 26, 2013)

STATUTORY PROVISIONS

RCW Chapter 61.24

RCW 61.24.005(2)

RCW 61.24.010(4)

RCW 61.24.030(7)(a)

RCW 61.24.040(2)

RCW 61.24.070(2)

RCW 61.24.163(5)(c)

RCW Chapter 62A.

RCW 62A.9A.-313(h)

UCC § 3-201, Official Comment 1

UCC § 3-203, Official Comment 1

OTHER AUTHORITIES

Fannie Mae Form 2009

ARGUMENT

A. Northwest Trustee Services, Inc.'s entire defense is based on the legally indefensible position that Wells Fargo Bank, NA was the holder of the Note and Northwest was therefore entitled to record the Notice of Trustee's Sale after receiving Wells' holder declaration.

Respondent claims that Appellant's assertion that "'the beneficiary of the DOT is the owner of the promissory note or other obligation secured by the deed of trust,' overlooks that Washington defines beneficiary strictly in the context of holding a note, not just receiving the beneficial interest in a deed of trust, such as the Oregon or Idaho Trust Deed Acts require."[1] Respondent's claim demonstrates a profound lack of understanding of the Washington Deed of Trust Act (WDTA) and the Washington version of the Uniform Commercial Code (UCC).

There is no contradiction between my assertion that the beneficiary of the DOT is the *owner* of the debt secured by the DOT[2] and the RCW 61.24.005(2) definition of the term "beneficiary" as the *holder* of the note secured by the DOT. By suggesting there is a conflict between the two concepts, Respondent attempts to set up --- and then immediately tear down --- a false conflict.

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[1] *Respondent's Brief* at 5, *fn. 5.*

[2] It amazes me that Respondent apparently believes that the beneficiary of a deed of trust does not have to be, of necessity, the owner of the debt obligation evidenced by the note that the deed of trust secures. How could any person be the beneficiary of a deed of trust that secures repayment -- not *payment*, but *repayment*! – of a debt if that person owns no part of the debt the deed of trust secures? The Washington Legislature never intended the definition of "Beneficiary" in RCW 61.24.005(2) to elevate a debt collector (which is all Wells Fargo is in this case) to the status of *beneficiary of the DOT.*

In the real world, the *holder* and *owner* of the note and *beneficiary* of the DOT are almost always the same person.[3] That is the general rule. Certainly, *ownership* of the note does not exclude a person from being the *holder* of the Note. Again, in the real world, instances in which the *holder* and *owner* of the note are different persons is the exception to the general rule. Consequently, the Washington Legislature did not act in an aberrational way by requiring the Respondent, in the WDTA, to determine that Wells (i.e., the *beneficiary*) was both the *holder* (RCW 61.24.005(2)) and *owner* (RCW 61.24.030(7)(a)) of the note before Respondent was authorized to record the notice of trustee's sale. Instead, it would have been aberrational and bizarre for the Washington Legislature, in the WDTA, to bestow beneficiary-of-the-DOT status on a person who owns no part of the debt that the DOT secures. There is no evidence in the statute or in the legislative history surrounding passage of SB 5810 – the bill that made RCW 61.24.030(7)(a) law in Washington -- to suggest the Legislature intended such a consequence. Indeed, *all* of the statutory and legislative-history evidence establishes that the WDTA requires the *holder* and *owner* of the note and *beneficiary* of the DOT to be the same person.

B. The idea that the beneficiary, note holder and note owner are the same person permeates the WDTA.

[3] The UCC provides only a few examples of *note holders* who are not the *owners* of the notes they hold. The examples given are of thieves and persons who obtain notes by other illegal means. *See Official Comment 1 to § 3-201; and Official Comment 1 to §3-203*

The idea that the "beneficiary" of the DOT, and *owner* and *holder* of the debt obligation that the DOT secures are the same person permeates the WDTA. The idea is present:

(1) in RCW 61.24.030(7)(a): "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.* This language is found in sentence 1 of (7)(a). The use of this language in sentence 1 means that the reference to a "declaration by the beneficiary" in sentence 2 means a declaration by the owner of the note. Thus Respondent violated its duty of good faith because it accepted a declaration from someone it knew was not the owner of the Note;"

(2) in the statement to the borrower that is mandated by the RCW 61.24.040(2): "The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . , the *Beneficiary of your Deed of Trust and owner of the obligation secured thereby.*" (Respondent's statement that the phrase 'beneficiary of the DOT' has no statutory meaning in Washington[,]"[4] is obviously incorrect.);

(3) in the WDTA provision, RCW 61.24.070(2), that spells out who may bid at the trustee's sale and the unique way the beneficiary is permitted to bid

[4] *Respondent's Brief at 5, fn. 5.*

at the sale: "The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust[.]" (This type of bid would not be possible if the "beneficiary" of the DOT was not the "owner" of the debt obligation secured by the DOT. Otherwise, RCW 61.24.070(2) would permit one person to bid the amount of a debt he does not own while requiring all other non-owners of the debt to pay cash, or its equivalent, to acquire the property. Respondent has offered the court no reason, and there is no legitimate reason, why the Legislature would take such a position. The Legislature has not taken such a position. The beneficiary contemplated by RCW 61.24.070(2), as numerous other provisions of the WDTA confirm, is the owner of the note secured by the DOT.);

(4) in RCW 61.24.163, subparts (5) and (5)(c), which detail the timelines and procedures for the Foreclosure Mediation Program mandated by the Foreclosure Fairness Act of 2011: "Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include, "Proof that the entity claiming to be the *beneficiary is the owner of any promissory note or obligation secured by the deed of trust*[.] (Why would the Legislature require proof that the beneficiary is the *owner* of the note if the beneficiary does not have to be the *owner* of the note? Also, this provision proves

yet again – and why this fact is not self-evident to Respondent is a mystery to me -- that the "beneficiary" defined in RCW 61.24.005(2) is the same "beneficiary" that is defined in the DOT itself (i.e., the Lender (the owner of the debt.)));"

(5) in the definition of the term "Trust Deed" (i.e., DOT): "a deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another *to the beneficiary.* RCW 61.24.020. (Appellant's obligation was not to Wells; it was to the owner of the debt obligation, Fannie Mae. Therefore the definition of "Trust Deed" establishes that Wells was not the beneficiary of the DOT because there was no obligation owed to Wells. The benefit that the DOT confers is the *repayment* of the debt. The only person entitled to receive *repayment* of a debt is the person who created the debt by lending the money in the first place.); and

(6) in the definition of "Grantor": "a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations[.]" RCW 61.24.005(7). (Remember, pursuant to the definition of "Trust Deed," the borrower's obligation is owed to the person who "benefits" from the security that the DOT provides (i.e., the beneficiary): the owner of the debt).

C. The beneficiary was defined in terms of holding the note in RCW 61.24.005(2) because in 2009 note owners were foreclosing even though they did not hold the notes on which

they were foreclosing. It had always been understood that the beneficiary of the DOT had to be the owner of the debt that the DOT secured. The requirement that the beneficiary be the holder of the note was merely an additional requirement to further protect borrowers.

RCW 61.24.030(7)(a) became law in Washington in 2009 as part of Engrossed Senate Bill (SB) 5810. In 2009, homeowners all over the country were attacking foreclosing lenders by claiming that the Lenders did not hold the notes, even though they were the owners of the notes. Courts all over the country were routinely disallowing this defense. *Welk v. GMAC Mortgage, LLC, Merscorp, LLP*, No. 12–3141 (8th Cir. July 15, 2013); *Martins v. BAC Home Loans Servicing, L.P.*, No. 12-20559, slip op. at 3, 2013 WL 3213633 (5th Cir. June 26, 2013). The Washington Legislature decided to afford Washington homeowners a greater measure of protection than homeowners in other parts of the country enjoyed. As RCW 61.24.030(7)(a) proves, by defining the beneficiary as the *holder* of the note, the Legislature was not making a choice between defining the beneficiary as the *owner* of the note and defining the beneficiary as the *holder* of the note; it was requiring the beneficiary, who is the *owner* of the note, to also be the *holder* of the note. The videoed hearings leading to passage of the 2009 amendments to the Washington Deed of Trust Act (WDTA) --- which included RCW 61.24.030(7)(a) --- prove the point.

The hearings took place on February 18, 2009, February 24, 2009, March 23, 2009 and March 26, 2009. At the February 18, 2009 hearing, State Senator

Claudia Kauffman, SB 5810's sponsor, testified that SB 5810 was a Governor-requested bill,[5] and that it would require Lenders (i.e., the owners of the debts) to contact borrowers and try to work out modifications.[6] Nick Federicci, an executive with the Washington Low Income Housing Alliance, testified that before being allowed to foreclose, the entity that actually *owns* the loan should be required to prove that it actually has the authority to foreclose by showing its lottery ticket (i.e., proving it has the right to foreclose by showing that it actually holds the note.)[7]

It is clear that both Senator Kauffman and Mr. Federicci were of the opinion that the beneficiary of the DOT also had to be the *owner* and *holder* of the note to foreclose under the WDTA. Not one of the senators on the Senate Financial Institutions, Housing & Insurance Committee questioned this claim, or even appeared to give it a second thought. They did not do so because it is axiomatic that the beneficiary of a DOT must be the owner of the debt obligation that the DOT secures. How else can one benefit from a DOT that provides the sole benefit of securing repayment of a debt?! The idea that a person who owns no part of a debt secured by a DOT can be the "beneficiary" of that DOT is ludicrous and not really worthy of serious discussion.

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[5] February 18, 2009 Hearing of Senate Financial Institutions, Housing and Insurance Committee, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009021219, beginning at 59:55.
[6] *Id.* beginning at 60:40.
[7] *Id.* beginning at 69:45

The Legislature did not define the beneficiary as the owner of the note because merely by stating a person is the beneficiary of a DOT you are simultaneously stating that the person is the owner of the debt that the DOT secures. This reasoning is confirmed by the provisions of the WDTA recited above that require the beneficiary to be the owner of the promissory note.

On March 23, 2009, the House Judiciary Committee conducted one of the final hearings concerning SB 5810 prior its passage. Senator Kauffman, the bill's sponsor, testified at that hearing as well. During her testimony, she made it clear that the *holder* of the note and the *owner* of the note, and therefore the beneficiary of the DOT, are the same person.[8] Again, this testimony raised no eyebrows. None of the members of the House Judiciary Committee appeared to give the Senator's assertion a second thought. Remember, this is one of the final hearings before SB 5810 was passed. And SB 5810 made RCW 61.24.030(7)(a) law in the State of Washington. RCW 61.24.030(7)(a) requires the trustee to obtain proof that the beneficiary is the *owner* of the promissory note secured by the DOT before the trustee is authorized to record a notice of trustee's sale. Without recording a notice of trustee's sale, a lawful foreclosure sale cannot take place in Washington.

[8] March 23, 2009 Hearing of House Judiciary Committee, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181 beginning at 46:58

In other words, it is so obvious that the beneficiary of a DOT that secures repayment of a debt cannot be anyone other than the person who lent the money that created that debt --- or who purchased the debt from the Lender --- that the Legislature did not waste time defining the beneficiary of the DOT in terms of ownership of the debt (i.e., the note). Instead it used the definition of beneficiary contained in RCW 61.24.005(2) to address a real problem at the time: Lenders who were foreclosing while not holding the notes that they claimed to own. Forcing owners of the debts (i.e., beneficiaries of the DOT's) to prove that they actually held the notes that the DOT's secured is the reason the beneficiary is defined as the *holder* of the note in RCW 61.24.0005(2). That the beneficiary of the DOT must be the *owner* of the debt that the DOT secures is made clear by other WDTA provisions: RCW 61.24.030(7)(a), 61.24.040(2), 61.24.070(2), and 61.24.163(5) and (5)(c).

D. As is true of the Western District of Washington line of foreclosure cases that hold MERS is the beneficiary of a DOT, the Western District of Washington line of cases that hold loan servicers are beneficiaries of the DOT are wrongly decided.

The Western District of Washington line of foreclosure cases that have decided financial institutions are beneficiary and are therefore entitled to utilize the WDTA to foreclose are simply wrongly decided. The Western District, uniformly, has had a difficult time interpreting the WDTA. This is the same court that routinely decided, for years, that the WDTA permitted MERS to foreclose as

the beneficiary of the DOT. It would still be doing so if not for the Washington Supreme Court's decision in *Bain*.

Today, the Western District Court regularly fails to recognize the importance of the *ownership* language in RCW 61.24.030(7)(a) or other provisions of the WDTA, or even to acknowledge that there is such language in the statute.

1. Because of RCW 62A.9A.-313(h), Wells Never became the holder of the note.

Moreover, the Western District apparently has never appreciated the fact that, because of the language in RCW 62A.9A.-313(h),[9] financial institutions that maintain physical custody of promissory notes owned by Fannie Mae (as is true in this case) are not *holders* of those notes. Wells obtained Appellant's promissory note by requesting it from Fannie Mae on Fannie Mae Form 2009. Form 2009 required Wells to return the note when the note was no longer needed for the foreclosure.

Under RCW 61.24.-313(h), if the servicer promises to return the note, Fannie Mae does not relinquish possession of the note when it gives physical

[9] A secured party having possession of collateral *does not relinquish possession* by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

custody of the note to the servicer. Accordingly, the servicer never gains possession of the note.

Respondent's claim that it was entitled to record the notice of trustee's sale in this case is based on the foundational claim that Wells was the beneficiary because Wells had physical custody of a bearer instrument---Appellant's promissory note. RCW 62A.9A.-313(h) is fatal to that claim. Respondent therefore had no statutory authority to record the notice of trustee's sale.

2. Respondent either knew or should have known Wells was not the holder of the note and that Respondent therefore had no lawful authority to record the notice of trustee's sale or sale the property.

Selling someone's home involuntarily is a very serious business. As an entity that engages in the business of selling people's homes involuntarily, Respondent is legally responsible for knowing and understanding all of the laws that circumscribe the business, whether it actually knows those laws or not. In this case, Respondent was legally obligated to know Wells was neither the owner nor the holder of the note and, on the basis of that knowledge, to refuse to sell the property. Instead, Respondent ignored the evidence and sold the property. Respondent thereby violated its RCW 61.24.010 (4) duty of good faith and should be held accountable for having done so.

CONCLUSION

In this case, both parties agree that Fannie Mae owned the debt obligation long before the foreclosure proceeding was initiated and continued to own it, uninterrupted, throughout the entire foreclosure proceeding. Therefore, under the WDTA, Fannie Mae was the only entity that had the right to foreclose non-judicially. Fannie Mae, however, did not foreclose; Wells did. The foreclosure proceeding was therefore unlawful. Respondent conducted that foreclosure sale and should be held responsible.

DATED this 25th day of November, 2013.

By: ROCIO TRUJILLO

Rocio Trujillo, Plaintiff Pro se

IN THE WASHINGTON STATE COURT OF APPEALS FOR DIVISION

ROCIO TRUJILLO, Appellant, vs. NORTHWEST TRUSTEE SERVICES, INC; and WELLS FARGO BANK, NA, Respondents.	Case No.: 705920 CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I did the following:

On the 25th day of November, 2013, on behalf of myself, I mailed and emailed copies of the of the Reply Brief in Appeals Court Cause No. 705920 to:

1. Abraham K. Lorber, WSBA# 40668
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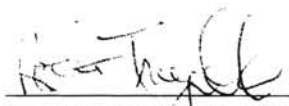
Dated this 25th day of November, 2013 in Seattle, WA.



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