70592-0

70592-0

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

SUPPLEMENTAL BRIEF OF APPELLANT

ROCIO TRUJILLO, PRO SE
33725 – 32ND AVE. SW
FEDERAL WAY, WA 98023-7723
(206) 892-8010

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED

A. Whether the word "holder" in RCW 61.24.005(2) incorporates the definition of "holder" in 62A.1-201(b)(21)? 3

B. Whether the record establishes that Wells Fargo was a holder of the Note? 4

1. One must *possess* a note to be the *holder* of the note. 4

2. Under the fact presented in this case, *physical custody* does not equal *possession*. 6

C. When the beneficiary identified in a deed of trust is not legally qualified to act as the beneficiary, what is the procedure, if any, for correcting this deficiency before a non-judicial foreclosure can occur? 9

TABLE OF AUTHORITIES

WASHINGTON CASES

Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 285 P.3d 34 (2012) 4

Leschi v. Highway Commission, 84 Wn.2d 271, 525 P.2d 774 (1974) 3, 4

Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). 3

Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed2d 70 (1978) 3

STATUTORY PROVISIONS

RCW Chapter 61.24

RCW 61.24.005(2)	3

RCW Chapter 62A.

RCW 62A.1-201(b)(21)	3, 4, 5, 8
RCW 62A.3-301	4
RCW 62A.9A.-102(a)(28)(A)	6
RCW 62A.9A.-313(h)	5, 6, 7

FANNIE MAE DOCMENTS

Fannie Mae Form 2009	5, 6, 8
Designated Custodian Master Custodial Agreement	7
Fannie Mae Single Family 2012 Servicing Guide	
1. § 202.07.02	5, 6
2. § 202.07.03	7
3. § 202.07.04	7
Master Custodial Agreement	7

QUESTIONS PRESENTED

A. Whether the word "holder" in RCW 61.24.005(2) incorporates the definition of "holder" in 62A.1-201(b)(21)?

For at least two reasons, the answer is "yes."

First, the Washington version of the Uniform Commercial Code (UCC) generally controls the transfer of holder (RCW 62A.3) and owner (RCW 62A.9) interests in, and enforcement (RCW 62A.3) of, promissory notes in Washington. A mortgage note is merely a specific type of promissory note. Generally, therefore, the UCC controls the transfer of holder (RCW 62A.3) and owner (RCW 62A.9) interests in, and enforcement (RCW 62A.3) of, mortgage notes in Washington.

When a general statute generally controls certain subject matter and a special statute specifically controls the same subject matter, the provisions of the special statute prevail if there is a conflict between the two statutes.[1] *Simpson v. United States*, 435 US 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978); *Leschi v. Highway Commission*, 84 Wn.2d 271, 306-307, 525 P.2d 774 (1974). However, if the special statute contains no rules that apply to or control a given issue, then the general statute's rules, if any, regarding that issue apply and control. In view of the fact that the word "holder," used in RCW 61.24.005(2) in the phrase, "*holder* of the instrument . . . evidencing the obligations secured by the deed of trust," is

[1] This principle holds even if the general statute was passed after the specific statute was passed. *See generally Preiser v. Rodriguez*, 411 U.S. 475, 489-490, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973).

not defined in the Washington Deed of Trust Act (WDTA)[2] (the special statute), the "holder" definition in RCW 62A.1-201(b)(21)[3] – the general statute -- applies and controls.

Secondly, in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012), the Court was asked to decide the same question. After quoting the definition of "Holder" and the definition of "Person entitled to enforce,"[4] the Court made the following statement: "The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually ***possess*** the promissory note or be the payee. (cite omitted). We agree."[5] *Bain* at 104. (Emphasis and underscoring added).

B. Whether the record establishes that Wells Fargo was a holder of the Note?

The short answer is no.

1. One must ***possess*** a note to be the ***holder*** of the note.

RCW 62A.1-201(b)(21), in pertinent part, provides: "'Holder' with respect to a negotiable instrument, means the person in ***possession*** if the

---

[2] *RCW Chapter 61.24, et seq.*

[3] In pertinent part, *RCW 62A.1-201(b)(21)* defines "***Holder***" as: The person in ***possession*** of a negotiable instrument that is payable either to bearer or to an identified person that is the person in ***possession***[.] (Italics and underscoring added). For the reasons provided throughout the remainder of this Supplemental Brief, under the facts here presented, it is impossible to determine what the term "***possession***" contained in RCW 62A.1-201(b)(21) means without consulting RCW 62A.9A.-313.

[4] RCW 62A.3-301, in relevant part -- (i) the ***holder*** of the instrument[.]

[5] In *Bain*, the Court was not asked to decide whether ***physical custody*** was the equivalent of *"**possession**"* as the term *"**possession**"* is used in the UCC. The fact that MERS had never obtained ***physical custody*** of the mortgage note was uncontested. And, the "***constructive possession***" concept, which, under RCW 62A.9A.-313 and the law of agency, is the law in Washington, was not an issue in *Bain*. Accordingly, by ruling that the beneficiary must actually *"**possess**"* the note, the Court was not making any statement about the meaning of the term *"**possession**"* as that term is used in the UCC. Given the facts in this case, ***constructive possession*** is a central issue. For that reason, the remainder of this Supplemental Brief contains a detailed discussion of that issue.

instrument is payable to bearer. . . ." (Emphasis, italics and underscoring added). Accordingly, an indispensable element of Respondents' claim that Wells is the "*Holder*" of Appellant's mortgage note is the antecedent claim that Wells obtained *possession*[6] of the note, as the term "*possession*" is used in the UCC, when it secured *physical custody* of the note from Fannie Mae prior to commencement of the foreclosure.[7]

In essence, Respondents argue that any time a servicer obtains *physical custody* of mortgage documents it has obtained *possession* of those documents. This claim is without merit.

As the remainder of this Supplemental Brief proves, Wells did not obtain *possession* of Appellant's mortgage note when it secured *physical custody* of the note from Fannie Mae prior to commencement of the foreclosure.[8]

---

[6] The term, "*possession*" as used in the UCC is a term of art. It is a fact that in the UCC, under most factual circumstances, *physical custody* is equivalent to *possession*. It is also a fact, however, that under a few factual circumstances, clearly-delineated in the UCC, *physical custody* does not equal *possession*. Fannie Mae explicitly acknowledges these UCC-related facts in the second and fourth **RECITALS** of its Master Custodial Agreement (Fannie Mae Form 2003); the agreement Fannie Mae requires each of its document custodians and servicers to execute before a document custodian is permitted to take *physical custody* of Fannie Mae mortgage documents. *Master Custodial Agreement at 3.* The Master Custodial Agreement can be found at https://www.fanniemae.com/content/guide_form/2003.pdf. Application of the clearly-delineated factual circumstances set out in RCW 62A.9A.-313(h) to the factual circumstances presented in this case establishes that Wells obtained *physical custody*, but not *possession*, of Appellant's mortgage note from Fannie Mae prior to commencement of the foreclosure proceeding.

[7] The claim that Wells took *possession* of the note when it secured *physical custody* of the note is indispensable to the claim that Wells is the "*holder*" of the note because, under RCW 62A.1-201(b)(21), one cannot be the "*holder*" of a bearer note unless one has "*possession*" of that note.

[8] Respondents cite a line of Western District of Washington Federal District Court cases in support of their claim that Wells was the "*holder*" of the note and therefore was entitled to foreclose. Under factual circumstances similar to the essential facts in this case, the judge in each of the cited cases appears to hold, at least in part, that if a servicer has "*physical custody*" of a note, it is the *holder* of the note and is therefore entitled to foreclose. In each of those cases, the judge fails to discuss, or even mention, the impact of RCW 62A.9A.-313 on the servicer's claim to be the *holder* of the note. It is next to impossible to arrive at a correct decision in a case of this type without considering the impact of RCW 62A.9A.-313. Why? Because, in a case of this type (a case in which the servicer receives temporary custody of the note and promises to return it to the secured party), RCW62A.9A.-313 is the statutory provision that provides the definitive legal requirements for determining whether the servicer receives *possession* of the note when it obtains *physical custody* of the note from the secured party. And as this court knows, under RCW 62A.1-201(b)(21), if a servicer does not *possess* a note, it cannot be the *holder* of that note.

2. Under the fact presented in this case, *physical custody* does not equal *possession*.

Under RCW 62A.9A.-313(h),[9] if a person (Wells in this case)[10] takes *physical custody* of collateral (Appellant's[11] mortgage note in this case) after agreeing to either: (1) hold the collateral (Appellant's note) for the benefit of a secured party (Fannie Mae in this case);[12] or (2) return the collateral (Appellant's note) to the secured party (Fannie Mae),[13] then the secured party (Fannie Mae) does not relinquish "*possession*" of the collateral (Appellant's note) when the secured party (Fannie Mae) gives temporary *physical custody* of the collateral (Appellant's note) to the person (Wells).

State law supersedes the internal regulations of private entities. Relating this maxim to the facts of this case, RCW 62A.9A.-313 supersedes any of Fannie Mae's internal protocols to which RCW 62A.9A.-313 applies. Consequently, if, prior to receiving *physical custody* of Appellant's mortgage note, Wells agreed to

---

The federal judges in each of the cases cited by Respondents failed to consult RCW 62A.9A.-313 prior to rendering their decisions. As a result, with respect, each of those judges reached the wrong decision---in much the same way that they did for years regarding MERS prior to *Bain*. This court should give no weight to the Federal District Court cases cited by Respondents.

[9] **Secured party's delivery to person other than debtor.** 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.

[10] Wells is a person other than Appellant (the debtor) or a lessee of Appellant (the debtor) in the ordinary course of Appellant's (the debtor's) business.

[11] Appellant is the "*debtor*" as that term is used in RCW 62A.9A.-313(h) and as the term is defined in RCW 62A.9A.-102(a)(28)(A).

[12] Wells obtained Appellant's mortgage note from Fannie Mae's document custodian only after agreeing that it was obtaining the note for the purpose of foreclosing *on Fannie Mae's behalf. See Fannie Mae Form 2009 (Fannie Mae Form 2009* is found at https://www.fanniemae.com/content/guide_form/2009.pdf.); *See also, Fannie Mae Single Family 2012 Servicing Guide (Servicer Guide), Part I, Ch. 2, § 202.07.02 at 102-39.* (Fannie Mae Single Family 2012 Servicing Guide is found at https://www.fanniemae.com/content/guide/svc031412.pdf)

[13] *Id.*

either: (1) hold or utilize the note for Fannie Mae's benefit; *or* (2) return the note to Fannie Mae, then RCW 62A.9A.-313(h), notwithstanding any of Fannie Mae's internal protocols, operated to prohibit Fannie Mae from granting Wells temporary *possession* of Appellant's mortgage note.

Fannie Mae attempts to grant a servicer *temporary possession* of any mortgage documents the servicer needs "whenever the servicer, acting in its own name, *represents the interests of Fannie Mae* in foreclosure actions." *Fannie Mae Single Family 2012 Servicing Guide (Servicer Guide), Part I, Ch. 2, § 202.07.02 at 102-39.* The *temporary* transfer occurs automatically and immediately upon the *servicer's representation*, in its name, *of Fannie Mae's interest in the foreclosure*. *Id.*

The Servicer Guide protocol for attempting to temporarily grant servicers "*holder*" status self-servingly states that the servicer becomes the *holder* of the note, constructively, when Fannie Mae *temporarily* and *constructively* transfers *possession* of the note to the servicer under either of two clearly-delineated sets of circumstances. *Id.* Additionally, if the servicer needs *actual physical possession* (physical custody) of the original mortgage note *to represent the interests of Fannie Mae* in a foreclosure, the servicer can obtain *possession* of the original note by submitting an executed Fannie Mae Request for Release/Return of Documents Form 2009 (Form 2009) to the document custodian. *Id., § 202.07.03 at 102-39/40.*

In the foreclosure context, Form 2009 permits the servicer to obtain mortgage documents from the document custodian *only if:* (1) the servicer is foreclosing, in its own name, *on behalf of Fannie Mae; and/or* (2) the servicer agrees *to return the mortgage documents as soon as they are no longer needed for the foreclosure*. *Id., § 202.07.04 at 102-40; see also Form 2009.*

It is no accident that Form 2009 imposes these two specific conditions on servicers for obtaining mortgage documents from Fannie Mae. Under RCW 62A.9A.-313(h), by requiring Wells to agree to condition (1) and/or (2), Fannie Mae insures that it is not relinquishing *possession*, as the term is used in the UCC, when it temporarily grants *physical* custody of the mortgage documents to the servicer. Fannie Mae's failure to relinquish *possession* means Wells never obtains *possession*. Accordingly, the Servicer Guide protocol for granting servicers *temporary possession* and *holder* status contradicts the mandate of RCW 62A.9A.-313(h). Since RCW 62A.9A.-313(h) is the law of this State (and almost every other state in this Union), the Servicer Guide protocol is without legal force or effect in the courts of this state. As a result, Wells never took *possession* of Appellant's mortgage note when it obtained *physical custody* of the note from Fannie Mae prior to commencement of the foreclosure proceeding.

Since Wells has never taken *possession* of the note, as the term is utilized in the UCC, it has never been the *holder* of the note under RCW 62A.1-201(b)(21).

C. When the beneficiary identified in a deed of trust is not legally qualified to act as the beneficiary, what is the procedure, if any, for correcting this deficiency before a non-judicial foreclosure can occur?

The answer depends upon the nature of the legal disqualification. If the disqualification occurs because the beneficiary identified in the deed of trust holds the mortgage note as one of the loans in a mortgage-backed-securities (MBS) pool, and is therefore holding the mortgage note as security for a different obligation, then the disqualification is correctable only if the beneficiary repurchases the loan from the trust prior to commencement of the non-judicial foreclosure.

On the other hand, if the beneficiary is disqualified because for some reason it has given possession of the note to a third party, then the beneficiary need only require the third party to return the note. Also, if the third party is a person other than the debtor, the beneficiary, or a lessee of the note from the debtor in the ordinary course of the debtor's business, and agrees that either: (1) he holds the note for the beneficiary's benefit; or (2) he will return the note to the beneficiary, then, pursuant to RCW 62A.9A.-313, the beneficiary has legal possession of the note and arguably has the right to foreclose non-judicially.

DATED this 2nd day of January, 2014.

Respectfully submitted,

Rocio Trujillo

Rocio Trujillo, Appellant 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 that on January 3, 2013, I caused a copy of Appellant's Supplemental Brief to be served on the following in the manner specified below:

VIA FIRST CLASS MAIL AND EMAIL:

1. Abraham K. Lorber, WSBA# 40668
Attorney for Wells Fargo Bank, NA,
1420 Fifth Ave., Ste. 4200
Seattle, WA 98101-2375
(206) 223-7000
lorbera@lanepowell.com

2. Joshua Saul Schaer
Routh Crabtree Olsen, P.S.
13555 SE 36th St., Ste. 300
Bellevue, WA 98006-1489
(425) 586-1940
jschaer@rcolegal.com

ROCIO TRUJILLO
33725 – 32ND AVE. SW
FEDERAL WAY, WA 98023
(360) 892-8010

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing Certificate of Service is true and correct and that this Declaration was executed in Seattle, Washington.

Dated this 3rd day January, 2014 at Seattle, WA.

Rocio Trujillo

By: Rocio Trujillo, Appellant Pro se

ROCIO TRUJILLO
33725 – 32ND AVE. SW
FEDERAL WAY, WA 98023
(360) 892-8010