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No. 70592-0-I

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

ROCIO TRUJILLO

Appellant,

vs.

NORTHWEST TRUSTEE SERVICES, INC. and
WELLS FARGO BANK, N.A.

Respondents.

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

Submitted By:
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I. SUMMARY OF QUESTIONS PRESENTED

1. Whether "holder" in RCW 61.24.005(2) incorporates the definition of "holder" in RCW 62A.1-201(21), and whether the record establishes that Wells Fargo was a holder of the Note?

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

II. RESPONSE TO QUESTIONS PRESENTED

1. A holder under the Uniform Commercial Code ("UCC") as adopted in Washington is also a holder as defined under the Deed of Trust Act ("DTA"). The record establishes that Northwest Trustee Services, Inc. ("NWTS") possessed the requisite proof of Wells Fargo's authority to record a Notice of Sale; Wells Fargo did submit evidence of its status as Note holder below, but Trujillo has only appealed the decision in favor of NWTS.

2. The alleged misidentification of a "beneficiary" in a deed of trust has no legal effect in Washington because the Note holder is always the beneficiary as a matter of law. The beneficiary is entitled to enforce a default on the obligation and foreclose in satisfaction thereof, regardless of what the parties assert in the security instrument.

III. ARGUMENT

A. The Term "Holder" in RCW 61.24.005(2) is Defined in Accordance with RCW 62A-1.201(21).

Under the DTA, a beneficiary is 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." RCW 61.24.005(2).[1]

The State Supreme Court expressly agrees that the UCC definition of "holder" is consistent with the term found in the DTA, stating in *Bain v. Metro. Mortg. Grp., Inc.*:

> [t]he 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.... We agree. This accords with the way the term 'holder' is used across the deed of trust act and the Washington UCC.

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[1] In *Veal v. Am. Home Mortg. Servicing, Inc.* (*In re Veal*), the United States Bankruptcy Appellate Panel for the Ninth Circuit extensively discusses the UCC in the context of enforcing promissory notes; the Court observes:

> At least two ways exist in which a person can acquire 'person entitled to enforce' status. To enforce a note under the method most commonly employed, the person must be the 'holder' of the note. The concept of a 'holder' is set out in detail in UCC § 1-201(b)(21)(A), providing that a person is a holder if the person possesses the note and either (i) the note has been made payable to the person who has it in his possession or (ii) the note is payable to the bearer of the note. [...]
>
> One can be an owner of a note without being a 'person entitled to enforce.' This distinction may not be an easy one to draw, but it is one the UCC clearly embraces. While in many cases the owner of a note and the person entitled to enforce it are one and the same, this is not always the case...."

450 B.R. 897, 910, 912 (B.A.P. 9th Cir. 2011) (citations omitted).

175 Wn.2d 83, 104, 285 P.3d 34 (2012).[2]

Bain cites to the definition of "holder" in former RCW 62A.1-201(20), but it does not change the Supreme Court's analysis. *Id.* at 104.[3] The Supreme Court specifically mentions that:

> Stoebuck and Weaver note that the transfer of mortgage backed obligations is governed by the UCC, which certainly suggests the UCC provisions may be instructive for other purposes.

Id. at 103, *citing* 18 STOEBUCK & WEAVER, § 18.18 at 334.

This controlling authority firmly cuts against Trujillo's contention that a beneficiary must *also* be the "owner" of a promissory note. Brief of Appellant at 13, *inter alia*.[4]

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[2] The term "holder" under the DTA is consistent with, but not exclusively governed by the UCC; otherwise, a Deed of Trust could only ever secure negotiable instruments, which is not the case. *See, e.g., Rodgers v. Seattle-First Nat. Bank*, 40 Wn.App. 127, 129-30 & n.1, 697 P.2d 1009 (1985) (discussing notes secured by Deed of Trust, where the notes were not negotiable instruments).

[3] The Supreme Court in *Bain* interpreted "beneficiary" as encompassing not just a holder as defined by former RCW 62A.1-201(20), but also cited to RCW 62A.3-301 ("Persons Entitled to Enforce Instrument") which includes *both* holders and non-holders "with the rights of a holder." 175 Wn.2d at 104. Notably, in assessing who is a beneficiary, the Supreme Court expressly relied on that portion of the UCC providing that "[a] person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument*." *Id., quoting* RCW 62A.3-301 (emphasis added); *see also John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 22-23, 450 P.2d 166 (1969).

[4] *Cf. Bank of America, N.A. v. Cloutier*, 61 A.3d 1242 (Me. Supr. Ct. 2013) (Maine Supreme Court holds that the term "certify proof of ownership" requires identification of the "owner *or* economic beneficiary of the note," and "if... not the owner, to indicate the basis for... authority to enforce the note pursuant to Article 3-A of the UCC.") (Emphasis added.)

B. The Record Establishes that the Trustee Possessed the Requisite Proof of Wells Fargo's Authority as the Beneficiary.

A non-judicial foreclosure trustee is entitled to rely on a Beneficiary's Declaration, averring to its *holder status*, prior to recording a Notice of Sale, unless the trustee has violated its duty of good faith in some way. RCW 61.24.030(7). As the United States District Court for the Western District of Washington has stated:

> The issue seems to be conclusively settled by statute in Washington: RCW 61.24.030(7)(a) specifically says that the only proof of beneficial ownership required prior to foreclosure is 'A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note'.

Bavand v. OneWest Bank FSB, 2013 WL 1208997 (W.D. Wash. Mar. 25, 2013).[5]

Trujillo's Complaint alleged that NWTS violated its duty of good faith merely by accepting Wells' Fargo Beneficiary Declaration. Compl. at 7, ¶ 30.[6] But there is no statutory requirement for a trustee to "investigate" or "confirm" the beneficiary's authority as set forth in a sworn declaration. *See Mickelson v. Chase Home Fin. LLC*, 2012 WL

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[5] The DTA requires this proof be presented to the *trustee*, but *not the borrower*. *See, e.g., Douglass v. Bank of Am. Corp.*, 2013 WL 2245092 (E.D. Wash. May 21, 2013); *Petree v. Chase Bank*, 2012 WL 6061219 (W.D. Wash. Dec. 6, 2012); *Tuttle v. Bank of N.Y. Mellon*, 2012 WL 726969 (W.D. Wash. Mar. 6, 2012); *Oliveros v. Deutsche Bank Nat'l Trust Co., N.A.*, 2012 WL 113493 (W.D. Wash. Jan. 13, 2012).

[6] As stated in NWTS' Opening Brief, Trujillo failed to designate her Complaint in the record, but Trujillo's claims rely on that pleading and citations to it are necessary.

6012791 , *3 (W.D. Wash. Dec. 3, 2012) ("the duty of good faith does not create a duty to conduct an independent verification of sworn affidavits."); *accord Toone v. Wells Fargo Bank, N.A.*, 2011 WL 4499299 (D. Utah Sept. 27, 2011), *aff'd*, 716 F.3d 516 (10th Cir. 2013), *citing Burnett v. Mortg. Elec. Registration Sys.*, 2009 WL 3582294 (D. Utah Oct. 26, 2009), *aff'd* 706 F.3d 1231 (10th Cir. Utah 2013) (duty of good faith does not require a trustee "to halt their work and investigate a trustor's claims of a lack of authority to foreclose.").[7] In this case, NWTS could therefore rely on the "Beneficiary Declaration (*Note Holder*)" that Wells Fargo executed. CP 36 (emphasis added).

It must also be noted that Trujillo selectively appealed only NWTS's dismissal, and not Wells Fargo's successful summary judgment. *See* Case No. 13-2-06928-8 SEA, Dkt. 36. Had Wells Fargo been a respondent before this Court, a more complete record of its authority as Note holder would exist. *Id.*, Dkt. 27 (Dep. of Trujillo) at 21 (admitting modification from Wells Fargo and her default); Dkt. 28 (Dec. of Weatherly) at ¶ 6 (Wells Fargo possessed Note indorsed in blank since

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[7] *But see Frase v. US Bank, N.A.*, 2011 WL 3444238 (W.D. Wash. Aug. 8, 2011) (declaration did not name *any* beneficiary, thus creating "serious questions" about compliance with RCW 61.24.030(7)).

2006).[8] As such, the Court should find that NWTS fulfilled *its* responsibility under RCW 61.24.030(7), and not attempt to ascertain whether Wells Fargo itself evidenced its authority as the beneficiary.

C. The Beneficiary is Always the Note Holder, Regardless of the Identification in a Deed of Trust.

It is a longstanding rule of law in Washington that the security (the Deed of Trust) follows the debt (the Note) – but not vice versa. *See, e.g., Mut. Sec. Fin. v. Unite*, 68 Wn.App. 636, 639, 847 P.2d 4 (1993); *Fidel v. Deutsche Bank Nat'l Trust Co.*, 2011 WL 2436134 (W.D. Wash. June 14, 2011) (citing cases). In *Bain*, the Supreme Court confirmed that to have the right to foreclose on a Deed of Trust as the beneficiary, you must have the right to enforce the Note: "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." 175 Wn.2d at 104.

Bain accepts the Washington Attorney General's reading of RCW 61.24.005(2):

> [t]he 'instrument' obviously means the promissory note because the only other document in the transaction is the deed of trust and it would be absurd to read this definition as saying that 'beneficiary means the holder of the deed of trust secured by the

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[8] *See also Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952) (citing cases) ("A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it.").

> deed of trust.' We agree that an interpretation 'beneficiary' that has the deed of trust securing itself is untenable.

175 Wn.2d at 101 (citation omitted). Consequently, a purported misidentification of the beneficiary in the Deed of Trust is of no legal effect in Washington, because a "beneficiary" is *always* the entity entitled to enforce the Note regardless of what the security instrument asserts. *Compare* RCW 61.24.005(2), ORS 86.705(2), I.C. § 45-1502(1) (beneficiary defined by trust deed in Oregon and Idaho); *see also Johnson v. CitiMortgage, Inc.*, 2013 WL 6632108 (W.D. Wash. Dec. 17, 2013).

The insignificance of this ostensible "deficiency" under Washington law is underscored by the fact that, before a non-judicial foreclosure can occur under the DTA, the requisites set forth in RCW 61.24.030 must be satisfied.

This includes "[t]hat a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell." RCW 61.24.030(3). Moreover, the beneficiary or trustee must transmit a Notice of Default including "[a] statement that the beneficiary has declared the borrower or grantor to be in default." RCW 61.24.030(8)(c). Thus, it is the *Note holder's* assertion of a default in the underlying obligation secured by the Deed of Trust that is necessary for commencing a non-judicial foreclosure.

In other words, once a default occurs on the debt (*i.e.* the Note) the DTA grants a Note holder the power to foreclose on the collateral named in the Deed of Trust in satisfaction of the debt owed. This principle is precisely why there is "no authority... for the suggestion that *listing an ineligible beneficiary on a deed of trust* would render the deed void and entitle the borrower to quiet title." *Bain*, 175 Wn.2d at 112 (emphasis added).

Indeed, under *Bain*, the particular language in the subject Deed of Trust stating, "MERS is the beneficiary under this Security Instrument," does not affect who has the right to foreclose.[9] This is because, as referenced above, the definition of "beneficiary" in Washington is not based on the security instrument. *Compare* RCW 61.24.005(2), CP 17-18 at ¶ (E). The Deed of Trust's designation of the "lender" is sufficient to identify the "beneficiary" under Washington law, no matter what else the parties choose to call each other. What matters for the purpose of a proper non-judicial foreclosure is *who actually has the right to enforce the Note.*[10]

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[9] A designation of the Note holder's agent (where that agent is not the Note holder) as Deed of Trust "beneficiary" in a nominee capacity has no bearing on the holder's ability to foreclose. Thus, the Deed of Trust's reference to MERS as beneficiary – solely as agent for the Note holder and its successors and assigns – is legally irrelevant because it is a lender's status as Note holder, and not the parties' own labels, that controls the authority to foreclose.

[10] Trujillo's Complaint even recognized that, according to the Note, "anyone who took the Note by transfer and was entitled to receive payments *under the Note* would become the Note Holder." Compl., ¶ 11 (emphasis in original).

Nothing under Washington law requires that the Deed of Trust define *any* entity as the "beneficiary" – so long as the Deed of Trust identifies who the Note holder is, because the Note holder is the beneficiary by operation of law. Nor is there any requirement that a subsequent Note holder record an "assignment" so that it is reflected as beneficiary of record, since assignments are not necessary to foreclose.[11]

The Deed of Trust in the record here clearly states that MERS was named as "beneficiary" *solely as nominee for Lender and Lender's successors and assigns*. CP 19 (emphasis added).[12] Therefore, MERS's capacity as the purported "beneficiary" was only that of an agency relationship with the actual and disclosed Note holder, *i.e.*, the Lender.

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[11] *See, e.g., St. John v. Nw. Tr. Serv., Inc.*, 2011 WL 4543658,* 3 (W.D. Wash. 2011), *citing* RCW 61.24.005(2) ("Washington State does not require recording of such transfers and assignments" to foreclose); *Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102, 1109 (W.D. Wash. 2011) ("The WADOTA does not require that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure."); *In re Reinke*, 2011 WL 5079561, *10 (Bankr. W.D. Wash. 2011); *Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *8 (E.D. Wash. 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed.").

[12] Nothing in *Bain* suggests it is improper to designate MERS as "beneficiary" in a Deed of Trust as an agent for the disclosed lender. Indeed, *Bain* held that it was "likely true" that MERS could act as agent for a Note holder, that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." 175 Wn.2d at 106; *see also Estribor v. Mt. States Mortg.*, 2013 WL 6499535 (W.D. Wash. Dec. 11, 2013) ("At most, *Bain* stands for the proposition that MERS failed to meet its burden that it was acting as an agent for a lawful purpose. Thus… there is no standard set out in *Bain* for an action against MERS when MERS is acting as a nominee.").

Id.[13] Designation of an agent for a principal in mortgages has been permitted for more than 100 years. *See, e.g., Carr v. Cohn*, 44 Wash. 586, 588, 87 P. 926 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36, 214 P. 1056 (1923) (bond holders' agent authorized to prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).

Once MERS terminated its agency and assigned its nominee interest to Wells Fargo (the subsequent Note holder), MERS's role concluded and had no relevance to Wells Fargo's later non-judicial foreclosure. *See, e.g., Bhatti v. Guild Mtg. Co.,* 2013 WL 6773673 (9th Cir. Dec. 24, 2013); *Myers v. MERS, Inc.*, 2012 WL 678148, at *3 (W.D. Wash. 2012), *aff'd*, 2013 WL 4779758 (9th Cir. Sep. 9, 2013) ("Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds Mr. Myers's Note, not because of the [MERS] assignment."); *Cameron v. Acceptance Capital Mortg. Corp..*, 2013 WL 4664706, *3 (W.D. Wash. Oct. 16, 2013) (authority derived "from holding the Note itself," not the MERS assignment); *Lynott v MERS, Inc.*, 2012 WL 5995053, *2 (W.D. Wash. 2012) ("Plaintiff's claims arise from a fundamental misunderstanding of

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[13] And the Deed of Trust plainly provides that it "secures to *Lender*... the performance of Borrower's covenants and agreements under this Security Instrument and the Note." *Id.* (emphasis added).

the law. U.S. Bank is the beneficiary of the deed because it holds Plaintiff's note, not because MERS assigned it the deed....").

Lastly, even the terms of the Deed of Trust expressly contemplate that the parties' contractual designations are not intended to alter or contradict any legal rights:

> [i]n the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

CP 26 (Deed of Trust) at ¶ 16. This severability clause results in the Deed of Trust's effectiveness – as incident to the underlying debt owed – even if the designated beneficiary named therein is merely an agent for the Note holder and not the actual Note holder. *Accord McKee v. AT&T Corp.*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008); *Mukilteo Ret. Apartments, LLC v. Mukilteo Investors LP*, 176 Wn.App. 244, 262, 310 P.3d 814 (2013) (contract remains valid even if certain terms unenforceable).

In sum, the Court's question concerning a procedure for "correcting" the identification of a beneficiary in a deed of trust who is not legally qualified to act as the beneficiary can be answered simply: no correction is necessary because only the entity entitled to enforce the Note has the right to foreclose under the DTA, even if some other entity is identified as the purported "beneficiary" in the Deed of Trust.

IV. CONCLUSION

Both the DTA and UCC utilize the same definition of "holder," and in this case, NWTS was entitled to rely on the "Beneficiary Declaration (Note Holder)" that Wells Fargo executed. This declaration satisfied RCW 61.24.030(7)(a), and permitted NWTS to record a Notice of Trustee's Sale.

The presence of MERS as nominee for the disclosed original Lender and its successors and assigns in the Deed of Trust is not a "deficiency" that requires corrective action prior to the commencement of a non-judicial foreclosure, because Washington does not define "beneficiary" according to the terms of a security instrument. It is the Note holder that matters in foreclosure. *Bain*, 175 Wn.2d at 89.

Trujillo's claims concerning "ownership" and NWTS' reliance on the "Beneficiary Declaration (Note Holder)" were therefore appropriately dismissed below.

DATED this 2nd day of January, 2014.

RCO LEGAL, P.S.

By: _____
Joshua S. Schaer, WSBA #31491
Of Attorneys for Northwest Trustee Services, Inc.

STATE OF WASHINGTON
COURT OF APPEALS – DIVISION I

ROCIO TRUJILLO, Appellant, v. NORTHWEST TRUSTEE SERVICES, INC.; and WELLS FARGO BANK, N.A., Respondents.	Case No. 70592-0-I King County No. 13-2-06928-8 **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 January 2, 2014, I caused a copy of the **Supplemental Brief of Respondent Northwest Trustee Services, Inc. Pursuant to Court's Notation Ruling** to be served in the following in the manner noted below:

Rocio Trujillo 33725 32nd Ave. SW Federal Way, WA 98023 *Pro Se* Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

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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.

Signed this 2nd day of January, 2014.

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