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No. 71143-1-I

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

DARLENE T. HOBBS and JOEL HOBBS

Appellants,

vs.

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

Respondents,

BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

Submitted By:
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I. COUNTERSTATEMENT OF ISSUES

NWTS incorporates by reference the Counterstatement of Issues in Wells Fargo's Response Brief.

II. STATEMENT OF THE CASE

NWTS incorporates by reference the factual and procedural background set forth in Wells Fargo's Brief ("Wells Fargo's Brief"). NWTS repeats the relevant facts to this Brief below.

On or about September 11, 2006, Darlene Hobbs executed a promissory note payable to MortgageIT, Inc. (MortgageIT) evidencing a loan of $235,200.00 (the Note). CP 471; 309-18; 538-546. The Hobbs secured the Note with a Deed of Trust against certain real property commonly known as 9224 36th Avenue South, Seattle, Washington 98118 (the Property). CP 471; 135-163.

Thereafter, MortgageIT specifically indorsed the Note to Wells Fargo and then Wells Fargo indorsed the Note in blank. CP 541. Freddie Mac purchased the loan and Wells Fargo retained the right to service the loan. Br. of App. at 6; CP 322.

The Hobbs failed to make the payments required by the Note. CP 471; 486; 498. On September 25, 2012, Northwest Trustee Services, Inc. (NWTS), in its capacity as Wells Fargo's agent, issued a notice of default identifying a default of almost $30,000. CP 293-298. On October 30,

2012, Wells Fargo executed a "Beneficiary's Declaration of Ownership of Note," identifying Wells Fargo as the actual holder of the Note and Freddie Mac as the actual owner of the Note. CP 298. On January 17, 2013, NWTS was appointed the successor trustee under the Deed of Trust. CP 172. On January 22, 2013, NWTS recorded a Notice of Trustee's Sale of the Property, scheduling a trustee's sale for May 31, 2013. CP 178-180. NWTS subsequently postponed the trustee's sale to June 21, 2013. CP 184.

III. ARGUMENT

A. Standard of Review

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times, Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

B. Under Washington Law, the Note Holder is the Beneficiary

The Washington Deed of Trust Act ("DTA") defines a beneficiary as "the *holder* of the instrument or document evidencing the obligations

secured by the deed of trust." RCW 61.24.005(2).

Basic principles of negotiable instruments establish that, if a note is payable to bearer, it may be negotiated by transfer of possession alone. RCW 62A.3-201. If a note is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. *Id.* This may be either a special indorsement, which identifies a person to whom the note is now payable, or a blank indorsement that makes the note bearer paper. RCW 62A.3-109. "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its *holder*.[1]

C. 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).[2]

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[1] After negotiation of a note, the holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment. *See Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812, 816 (1977); *see also Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872), RCW 62A.9A-102(55).

[2] In *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

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

> [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.

Bain v. Metro. Mortg. Grp., Inc.,175 Wn.2d 83, 104, 285 P.3d 34 (2012).[3]

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).

The Supreme Court's interpretation of what constitutes a beneficiary and the express language of RCW 61.24.005(2) refute Hobbs'

> 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...."

Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 910, 912 (B.A.P. 9th Cir. 2011) (citations omitted).

[3] 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).

position that the holder and the owner must be the same entity- their position is inconsistent with the UCC provisions that guide the definition of holder under the DTA.

Furthermore, the DTA expressly acknowledges that an entity other than the beneficiary can have an ownership interest in a note. In a foreclosure mediation under RCW 61.24.163, the beneficiary is required to meet in person for the mediation session and address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including modification of the loan. *See*, RCW 61.24.163(8)(a) and (9). If the beneficiary claims it cannot implement a modification due to limitations in a *pooling and servicing agreement* or *other investor restriction*, the beneficiary is required to disclose the "portion or excerpt of the *pooling and servicing agreement* or *other investor restriction* that prohibits the beneficiary from implementing a modification". RCW 61.24.163(4)(j) and 2014 Wash. Legis. Serv. Ch. 164 (H.B. 2723)[4] (emphasis added).

A "pooling and servicing agreement" or "investor restriction" that prohibits a beneficiary from implementing a loan modification only exists if there is an investor or owner of a loan that is not the beneficiary participating in the mediation. In other words, a pooling and servicing

[4] RCW 61.24.163(j) was amended in 2014 to include "or other investor restriction".

agreement or investor restriction would not exist if the beneficiary under the DTA was required to be both holder and owner, and Hobbs' position would result in an illogical outcome and render this section of the DTA meaningless. *See Blondheim v. State,* 84 Wn.2d 874, 879, 529 P.2d 1096 (1975) (statutory construction should avoid illogical or absurd results).

D. The Record Establishes that NWTS 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 the beneficiary's *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]

[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).

Hobbs argues that NWTS did not have the requisite proof under RCW 61.24.030(7)(a) because it knew that another entity had a beneficial interest in the Note. Br. of App. at 2. This argument again relies on Hobbs' position that a beneficiary under the DOT must be both the holder and the owner. In addition to the DTA's definition of a beneficiary as holder of the note, the Supreme Court's holding in *Bain*, and the UCC provisions addressed above (*see supra.* § B), courts interpreting Washington law have specifically held that in the context of the DTA, the holder of the note (not an "owner", "investor", or "entity with beneficiary interest") is the beneficiary.

The United States District Court for the Western District of Washington recently rejected Hobbs' exact argument in *Mulcahy v. Fed. Home Loan Mortgage Corp.*, C13-1227RSL, 2014 WL 1320144, (W.D. Wash. Mar. 28, 2014). In addressing RCW 61.24.030(7)(a)'s use of the term "owner", that court held that, "'owner' in this context does not mean the entity or entities that have a beneficial interest in the note… Because the note is bearer paper, the DTA defines 'beneficiary' as the 'holder' of the note, *i.e.*, the entity that has actual physical possession of the paper itself." *Id.* at *3. The court further held that the trustee was "obligated to ascertain only whether Wells Fargo was the holder of the promissory note

before issuing the notice of trustee's sale, not whether some other entity had a beneficial interest in the proceeds of the note." *Id.*

Other courts interpreting Washington law have also consistently found that a Note holder and Note owner are distinct legal entities.[6] For example, the United States Bankruptcy Court for the Western District of Washington found:

> [t]he issue of ownership, however, is largely immaterial... [b]ecause under Washington law the focus of the analysis is on who is the holder of the note, and thus the beneficiary under the [DTA], Plaintiff's concern should be whether he knows who to pay.
>
> *In re Reinke*, 2011 WL 5079561, *11 (Bankr. W.D. Wash. Oct. 26, 2011), *citing In re Veal*, 450 B.R. 897, 912 (9th Cir. B.A.P. 2011); *see also In re Butler*, 2012 WL 8134951 (Bankr. W. D. Wash. Nov. 2, 2012) (rejecting plaintiff's claim "that a holder of a note must also prove that it is the owner of the obligation....").

Furthermore, Judge Ronald Leighton of the United States District Court for the Western District of Washington dismissed an action that presented the same issue, finding that "courts have uniformly rejected that only the 'owner' of the note may enforce it." *Rouse v. Wells Fargo Bank, N.A.*, Case No. 13-5706-RBL (W. D. Wash. October 2, 2013), *citing Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W. D. Wash. May 13, 2013) (authority to foreclose based on possession of a note indorsed in

[6] A Note holder can *also* be the owner, depending on the factual circumstances, but it does not follow that they *must* be one and the same.

blank, *not* because of Fannie Mae's ownership interest); *see also Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246 (W. D. Wash. July 29, 2012) (enforceability of note and deed of trust based on holder status, not ownership).

Indeed, as far back as 1918, the Supreme Court has recognized that the statutory rights of a negotiable instrument's holder are distinct from an ownership interest. *State Fin. Co. v. Moore*, 103 Wash. 298, 174 P. 22 (1918). In *Moore*, the Court wrote:

> [s]ection 3509, Rem. & Bal. Code... provides that a negotiable instrument is discharged when the debtor becomes the holder of the instrument at or after maturity, in his own right.
>
> [...]
>
> [t]he record shows that the Birches were not the holders of the note, but the owners thereof, and the statute grants a discharge only to the holder. The record further shows that the Birches became the owners of the note before maturity, and the statute only discharges the obligation when the principal debtor becomes a holder 'at or after maturity'.
>
> *Id.* at 301.

Moore consequently upheld the validity of a mortgage foreclosure. *Id.* at 303.

Here, NWTS possessed a Beneficiary Declaration stating that Wells Fargo was the actual holder of the Note. CP 298. The fact that a separate ownership interest existed, and was known, does not defeat Wells

Fargo's authority – as the Note holder – to foreclose on the Property. Br. of App. at 2, 3. Hobbs provides no case law supporting her position, while Appellees provide numerous well-reasoned cases supporting theirs. Because Wells Fargo held the Note, it was the beneficiary entitled to effectuate that process, and entitled to execute a declaration for the trustee to rely upon.

E. Reliance on the Beneficiary Declaration Did Not Create a Lack of Good Faith

It is circular reasoning for Hobbs to argue that NWTS' reliance on Wells Fargo's Beneficiary Declaration created the very lack of good faith that would lead to an inability to rely on the same Declaration. Br. of App. at 22. In other words, the entitlement to rely on the declaration cannot logically form a breach of good faith that causes a trustee to be unable to rely on the very same document. *See* RCW 61.24.030(7)(b). Such circular reasoning would produce an unsound result in interpreting the statute. *See Blondheim v. State,* 84 Wn.2d 874, 879, 529 P.2d 1096 (1975) (statutory construction should avoid illogical or absurd results). The use of "violated," in the past tense, means that a trustee must somehow otherwise fail to act in good faith apart from its protected reliance on the beneficiary declaration. RCW 61.24.030(7)(b).

RCW 61.24.030(7)(b) states, "*unless* the trustee has violated his or

her duty under RCW 61.24.010(4), the trustee is *entitled to rely on* the beneficiary's declaration as evidence of proof required under this subsection." (Emphasis added).

The Hon. Chief Judge Marsha Pechman of the United States District Court for the Western District of Washington agreed with this perspective in *Mickelson*:

> [t]he duty of good faith does not create a duty to conduct an independent verification of sworn affidavits. This expansive view of good faith remains untenable. NWTS relied, as they are specifically permitted to do, on a declaration made under penalty of perjury. They did not breach their duty of good faith in so doing.

Mickelson v. Chase Home Fin. LLC 2012 WL 6012791, *3 (W.D. Wash. Dec. 3, 2012).

If the Legislature intended for trustees to somehow "inquire" into a beneficiary declaration's validity, it could have easily included that mandate into the DTA during each of several amendments to the Act over the past few years – but the Legislature has never compelled trustees to verify or double-check the declaration they receive. This Court should also decline an invitation to create law where none exists. *See Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.*, 81 Wn.2d 283, 288, 501 P.2d 589, 592 (1972), *citing Anderson v. City of Seattle*, 78 Wn.2d 201, 471 P.2d 87 (1970) ("[i]t is not the prerogative of the courts to amend the acts of the legislature."); *see also Udall v. T.D. Escrow Servs., Inc.*,

159 Wn.2d 903, 909, 154 P.3d 882, 886 (2007), *quoting Tingey v. Haisch,* 159 Wn.2d 652, 657, 152 P.3d 1020, 1023 (2007) (" '[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.' ").

It would be "too great a demand" for a trustee to "conduct a secondary investigation into the papers filed by the beneficiary." *Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W. D. Wash. Nov. 14, 2011); *accord Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356, 360 (1991) (a duty of good faith "requires only that the parties perform in good faith the obligations imposed by their agreement.").

Hobbs' fails to identify any specific violation of NWTS' duty of good faith besides the reliance on Wells Fargo's *accurate* representation of its authority as Note holder. Furthermore, Hobbs fails to address how relying on the Beneficiary Declaration in this case amounts to a violation of NWTS' duty of good faith. Even assuming NWTS did not have the requisite proof, Hobbs has not been prejudiced in any way since there has been no foreclosure sale and NWTS has proceeded under a good faith interpretation of the law- supported by case law, the UCC and the DTA.

Finally, the DTA does not require the recordation, publication, or

issuance of a beneficiary declaration.[7] That is because the declaration is intended to provide a safe harbor only for trustees to rely on before the sale notice is recorded with a county auditor, not for borrowers to use as a sword in litigation to pick apart various aspects of the non-judicial process. This is particularly true when, as here, it cannot be disputed that Wells Fargo, the entity for which NWTS was attempting to foreclose, was the note holder.

F. DTA and CPA Causes of Action

1. DTA Cause of Action Against NWTS

Even if the Court finds that NWTS did not have requisite proof under RCW 61.24.030(7), dismissal is still proper because, as Wells Fargo sets forth in its Brief, technical violations of the DTA are not grounds for avoiding a trustee's sale; the borrower must make a showing of prejudice. *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112-13, 752 P.2d 385 (1988); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988). Here, the borrower cannot make a

[7] Indeed, a borrower should not have standing to bring a challenge to a privately-transacted document such as the beneficiary declaration. *See, e.g., Brummett v. Washington's Lottery,* 171 Wn. App. 664, 678, 288 P.3d 48 (2012), *Ullery v. Fulleton,* 162 Wn. App. 596, 604, 256 P.3d 406 (2011), *citing Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987); *see also Osediacz v. City of Cranston,* 414 F.3d 136, 140 (1st Cir. 2005) (there is a "general prohibition on a litigant raising another person's legal rights."); *accord Brophy v. JPMorgan Chase Bank Nat'l Ass'n,* 2013 WL 4048535 (E.D. Wash. Aug. 9, 2013) (no standing to challenge appointment of successor trustee).

showing of prejudice because there has been no sale and the alleged defect complained of is purely technical- this is not a dispute about lack of notice to a borrower, the default that caused the initiation of the nonjudicial foreclosure, or about a risk of another entity attempting to enforce the debt at a later date. Wells Fargo holds the Note and is therefore entitled to enforce the Note under the UCC, and is entitled to foreclose on the Deed of Trust in a nonjudicial foreclosure.

2. CPA Cause of Action Against NWTS

A violation of the CPA requires:

> (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Even if Hobbs' underlying legal theory is correct, they have not shown that they could establish a CPA claim. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC,* 134 Wn. App. 210, 135 P.3d 499 (2006). An "act performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer

protection law." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997). Here, Hobbs was not misled and NWTS proceeded under an arguable interpretation of existing law. *Supra.*, § D.

Further, Hobbs cannot establish injury or causation. As further discussed in Wells Fargo's Brief, it is undisputed that the Hobbs defaulted, that the nonjudicial foreclosure could be instituted to sell the property, and the institution of nonjudicial foreclosure proceedings were caused by Hobbs' failure to repay their loan.

IV. CONCLUSION

RCW 61.24.005(2) defines beneficiary as a note holder. A separate provision that plainly requires a trustee to obtain proof of a note's owner through a declaration of holder status does not change that clear definition.

NWTS obtained a sworn statement from Wells Fargo entitled "Beneficiary Declaration (Note Holder)." CP 298. Because Hobbs did not allege that NWTS acted in bad faith apart from accepting this Declaration itself, NWTS was entitled to rely on it and record the Notice of Trustee's Sale.

All of the Hobbs' claims fail to establish a possible grant of relief under these circumstances, or alternatively, the claims do not give rise to a

genuine issue of material fact supporting liability against NWTS. This Court should affirm the ruling below.

DATED this 30th day of May.

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