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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

NO. 465205

VALERIE SLOTKE, an unmarried woman,
Appellant.

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST
2006-HE3 MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2006-HE3,

Respondent.

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

APPELLANT SLOTKE'S OPENING BRIEF

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ORIGINAL

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I ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in finding that Plaintiff-Respondent Deutsche was the holder of the Note.
2. The trial court erred in finding Plaintiff-Respondent Deutsche was the beneficiary of the deed of trust.
3. The trial court erred in finding Plaintiff-Deutsche was entitled to enforce the Note and deed of trust simultaneously.
4. The trial court erred in granting Plaintiff's Motion for Summary Judgment in its entirety.

5. The trial court erred in dismissing all claims of Defendant-Appellant Slotke with prejudice.
6. The trial court erred in entering the Judgment and Decree of Foreclosure.

B. Issues Pertaining to Assignments of Error

1. Was Plaintiff-Respondent entitled to a Decree of Foreclosure based upon Defendant-Appellant's failure to pay the Note according to its terms?
2. Was Plaintiff-Respondent entitled to Summary Judgment and a Decree of Foreclosure in the complete absence of proof that it was the owner of an enforceable security interest in the Note and DOT?

II STANDARDS OF REVIEW

A. Summary Judgment Standard

The purpose of summary judgment is to avoid trial when there is no genuine issue of material fact. A "material fact" is one upon which the outcome of the litigation depends. *Barber v. Bankers Life & Cos. Co.*, 81 Wn.2d 140, 500 P.2d 88 (1972).

The moving party must demonstrate by uncontroverted evidence that there is no genuine issue of material fact. *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); and *6 J. Moore, Federal Practice* 56.07, 56.15(3) (2d ed. 1948). If the moving party does not sustain that burden, the court should not grant summary judgment, regardless of whether the non-moving party submits affidavits or other materials or not. See also *Trautman, Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Washington Law Review 1, 15 (1970).

This court must consider all of the material evidence and all of the reasonable inferences that can be drawn from that evidence most favorably to Defendant. If reasonable people might reach different conclusions about the evidence, then Plaintiff's motion should be denied. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

III STATEMENT OF RELEVANT FACTS

On or about May 16, 2006, in return for a loan that Appellant received from First Financial Services, LLC, DBA The Lending Center ("TLC"), Appellant executed a promissory note in the amount of \$253,575.00 (the "Payment Right") in favor of TLC. CP 4: 2-4. Deutsche Bank National Trust Company as trustee for IXIS Real Estate Capital Trust 2006-HE3 Mortgage Pass-Through Certificates Series 2006-HE3 ("Plaintiff-Respondent") was not the original lender.

The Payment Right, and the underlying mortgage-debt obligation ("Obligation") for which the Payment Right was taken as payment by TLC, were secured by a deed of trust ("DOT") in favor of TLC, the Lender. CP 4: 5-7. The DOT was given to TLC to secure, to TLC (*i.e., the Lender and "owner" of the beneficial interest in the Payment Right and the Obligation for which the Payment Right was taken by TLC as payment, and no one else in the world*): (1) performance of the agreements and covenants contained in the Payment Right; and (2) repayment of the Obligation for which the Payment Right was taken as payment, and all renewals, extensions and modifications of the Payment Right. *Id.*

The DOT encumbered Appellant's property located at 203 Fox Island Blvd., Fox Island, Washington, 98333 ("Property"). CP 4: 6-7. TLC recorded the DOT on May 24, 2006. CP 4: 8-9.

In the Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Memorandum"), Plaintiff-Respondent indicates that the Mortgage Electronic Registration Systems, Inc. ("MERS") assigned MERS interest in the DOT to Plaintiff-Respondent and recorded the assignment on August 5, 2011. CP 4: 11-14. Further, the Memorandum asserts Plaintiff-Respondent is the "holder of the Payment Right (i.e., the Note) and "beneficiary of the DOT." CP 4: 15-16.

IV STATEMENT OF THE CASE

For at least two reasons, Plaintiff-Respondent's failure to prove that it is the "*owner*" of the Payment Right (i.e., the Note) and of the Obligation for which the Payment Right was taken as payment should have caused the trial court to deny Plaintiff-Respondent's Motion for Summary Judgment and Decree of Foreclosure.

The first reason is the simplest and easiest to comprehend. Under both the Uniform Commercial Code ("UCC") -- RCW 62A.3-310(b)(3) -- and the Washington Deeds of Trust Act ("WDTA") -- RCW 61.24.030(4) -- a person may not, *simultaneously*, enforce the Payment Right (i.e., the Note) and the Obligation. In the Motion for Summary Judgment and accompanying Affidavit in Support of Plaintiff's Motion for Summary Judgment, Plaintiff-Respondent bases the claim that it is entitled to a Decree of Foreclosure on Defendant-Appellant's failure to make the [Note] payment on April 1, 2010 and failure to make any subsequent *Note payments*. CP 5: 3-7; and CP 10: 4-10. Thus, from its inception, this

litigation has been an attempt to enforce the Note and the Deed of Trust *simultaneously*.

As indicated above, both RCW 62A.3-310(b)(3) and RCW 61.24.030(4) preclude simultaneous enforcement of the Payment Right (i.e., Note) and Obligation by foreclosure under the DOT. If there had been no other basis, on the basis of Plaintiff-Respondent's attempt to enforce the Note and Obligation simultaneously, the trial court should have denied the Motion for Summary Judgment and Decree of Foreclosure. But there is another basis that requires denial.

RCW 62A.9A.-203(a), (b) and (g) is the UCC's codification of the common law "security follows the Note" legal axiom. The provision establishes the requirements that must be met for a person to obtain an *enforceable* "security interest" (i.e., ownership interest) in a promissory note and the deed of trust that secures that note and the Obligation for which the note is taken as payment.¹

In the Foreclosure Complaint, Plaintiff-Respondent alleged it was the "owner" of the note. However, Defendant-Appellant denied that allegation in Defendant-Appellant's Answer to the Foreclosure Complaint, thereby putting Plaintiff-Respondent -- as the party who has the burden of proving the contested allegations in the complaint -- to its proof on the issue.

To prove "ownership" of the note, Plaintiff-Respondent was obligated to meet the three requirements of RCW 62A.9A.-203(b). Plaintiff-Respondent had to prove: (1) *value* was given for the Note; (2) rights in the note were transferred to Plaintiff-Respondent by someone who had rights in the note or who had the right to transfer rights in the

¹ Official Comment 9 to UCC §9-203 makes it clear that this provision is the codification of the common law principal that the "transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." That is, the "security follows the note" legal axiom.

note; and (3) Plaintiff-Respondent had “*possession*” of the note, as the term “possession” is understood in the UCC,² before it commenced this litigation. If Plaintiff-Respondent failed to meet any one of these three requirements, then it failed to obtain an enforceable security interest (i.e., “ownership interest”) in the Note and, because of RCW 62A.9A.-203(g), simultaneously failed to obtain an enforceable security interest in the DOT.

Plaintiff-Respondent’s pleadings offer *no proof on any one of these three issues*. As a result, independent of the statutory prohibition against simultaneous enforcement of the note and DOT, a prohibition which, standing alone, should have caused the trial court to reject Plaintiff-Respondent’s Motion for Summary Judgment and Decree of Foreclosure. Plaintiff-Respondent never demonstrated that it had an enforceable interest in Note or the DOT. Thus, even if simultaneous enforcement was not prohibited by statute, Plaintiff-Respondent would not have been entitled to Summary Judgment or a Decree of Foreclosure.

V. STATEMENT OF ISSUES

1. **Was Plaintiff-Respondent entitled to Summary Judgment and a Decree of Foreclosure based upon its simultaneous enforcement of the Note and DOT?**
2. **Was Plaintiff-Respondent entitled to Summary Judgment and a Decree of Foreclosure in the absence of proof that it was the owner of an enforceable security interest in the Note and DOT?**

² Under the UCC, “physical custody” does not necessarily equal “possession.” Under RCW 62A.9A.-313, if the person with *physical custody* of the note acknowledges that he holds the note for the benefit of a third party, the third party has “possession” of the note, not the person who has physical custody of the Note. In the Pooling and Servicing Agreement, which Defendant-Appellant referenced in its Reply to Plaintiff’s Motion for Summary Judgment (CP 48: 22 through 49: 5), Plaintiff-Respondent repeatedly acknowledges that it holds the Note for the sole benefit of the certificate holders.

VI. ARGUMENT

A. **Plaintiff-Respondent was not entitled to enforce the Note and DOT simultaneously and therefore was not entitled to Summary Judgment or a Decree of Foreclosure.**

Under UCC § 3-310(b) (RCW 62A.3-310(b)), in the absence of proof that the “holder” of a Note is also the owner of the Obligation for which the Note was taken as payment, the “holder” of the Note is not entitled to enforce the underlying debt obligation. To understand why this statement is true, it is necessary to have a clear understanding of: (1) the purpose of the note; (2) the purpose of the DOT; (3) the relationship between the Note and DOT; and (4) the person or persons to whom the respective obligations represented by each instrument are owed.

1. **The Note.**

The Note and DOT are part of a single transaction, but each is its own, self-contained contract. The borrower’s obligation to make payments under the note is created by and explained and defined in the note. Anyone who meets the requirements of RCW 62A.3-301 is “entitled to enforce the note.” Consequently, one need not “own” the “beneficial interest in the note” to be entitled to enforce the note.

2. **The underlying debt obligation.**

The borrower’s obligation to repay the Obligation, on the other hand, is created by and explained and defined in the DOT. The DOT, like the note, is its own, self-contained contract.

The DOT secures *the Lender* (i.e., the “owner” of the *beneficial interest in the note* and underlying mortgage debt obligation for which the note is taken as payment), *and no one else in the world*, against the borrower’s: (1) failure to make payments according to the note’s terms;

and (2) failure to repay the Obligation.³ It is critical to understand that, because a person may not enforce the note and foreclose simultaneously, the only obligation that may be enforced by foreclosure is the underlying mortgage-debt obligation.

The DOT does not secure repayment of the underlying mortgage debt obligation to the “holder of the note” unless the “holder” also happens to be the *owner* of the beneficial interest in the note (i.e., the Lender). See *RCW 62A.3-310(b) and Official Comment 3 thereto and RCW 62A.9A.-203 and Official Comment 9 thereto*. And it does not secure repayment of the Obligation to the “*person entitled to enforce the note.*” unless the “*person entitled to enforce the note*” also happens to be the *owner* of the beneficial interest in the note (i.e., the *Lender*).

Under Paragraph 22 of a standard DOT, of which Defendant-Appellant’s DOT is one, if a breach of any of the covenants or agreements in the DOT occurs, it is *the Lender* (i.e., the *owner* of the beneficial interest in the Note and Obligation), not the “*holder*” of the note or the “*person entitled to enforce the note,*” who is empowered to: (1) invoke the power of sale and inform the Borrower that the Lender has declared a default; (2) require payment in full; (3) recover costs, including attorney fees; and (4) give notice to the Trustee of a default and of the *Lender’s election* to sell the property.

Because the DOT, unlike the note, secures *only* the *owner* of the Note and Obligation for which the note is taken as payment, only the *owner* of the note is entitled to utilize the DOT to protect the owner’s

³ TRANSFER OF RIGHTS IN THE PROPERTY

“The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS. *This Security Instrument secures to Lender:* (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; *and* (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property” *Deed of Trust* at 3.

interest in the Note and Obligation. Hence, a person who is “entitled to enforce the note,” but who does not “*own*” the beneficial interest in the note, is never entitled to utilize the DOT to enforce the note.⁴

There are more than one hundred other rights and responsibilities enumerated in the deed of trust that are owed to, or required to be performed by, the *Lender*. There is not a single right or responsibility that is owed to or required to be performed by the “*holder of the note*” or “*person entitled to enforce the note.*”

3. Connection between the note and deed of trust.

So long as the note is paid according to its terms, the underlying mortgage debt obligation is suspended.⁵ Suspension of the underlying obligation continues until the note is either paid off or dishonored.⁶ If the note is dishonored, and the obligee of the underlying mortgage debt obligation (i.e., the Lender) for which the note was taken as payment is also the “person entitled to enforce the note,” then the *obligee* – not the “*holder of the note*” or the “*person entitled to enforce the note*” – may enforce *either* the note or the underlying obligation.⁷ And if the *obligee* is *not* the person entitled to enforce the note, then *neither* the person entitled to enforce the note *nor* the obligee is entitled to enforce the underlying mortgage debt obligation by foreclosing.⁸ This is a second critical point that proves only the *owner* of the note and underlying debt obligation is entitled to utilize the DOT to foreclose judicially or non-judicially.⁹

⁴ RCW 62A.3-310(b)(3).

⁵ RCW 62A.3-310(b) and (b)(2).

⁶ RCW 62A.3-310(b)(2).

⁷ RCW 62A.3-310(b)(3).

⁸ Official Comment 9 to UCC §3-310.

⁹ A person may never use the DOT to judicially enforce his interest in the note because, under RCW 62A.3-310(b)(3) and RCW 61.24.030(4), a person may not enforce the note and DOT simultaneously.

4: The note and DOT may not be enforced simultaneously.

Under RCW 62A.3-310(b)(3), if the note is dishonored, *and* the *obligee* of the underlying mortgage debt obligation is the person entitled to enforce the note, then the *obligee* of the underlying mortgage debt obligation may enforce *either* the mortgage note *or* the underlying mortgage debt obligation, *not both*.

The right to enforce the note and the right to enforce the underlying mortgage debt obligation are *mutually exclusive rights*. If the *obligee* – not the “holder of the note” or “person entitled to enforce the note” decides to judicially enforce the note by suing on the note, it may not simultaneously foreclose, judicially or non-judicially, the underlying mortgage-debt obligation. Conversely, if the *obligee* – not the “holder of the note” or “person entitled to enforce the note” -- decides to foreclose, judicially or non-judicially, on the underlying mortgage-debt obligation, it may not simultaneously enforce the note by suing on it.¹⁰ Consequently, Plaintiff-Respondent’s attempt to enforce the Note and DOT simultaneously by judicially seeking a Decree of Foreclosure upon Defendant-Appellant’s failure to make the Note payments was illegitimate from its inception. By foreclosing on the basis of Defendant-Appellant’s failure to make Note payments, Plaintiff-Respondent was attempting to enforce the Note by judicially foreclosing.

B. Plaintiff-Respondent was not entitled to Summary Judgment and a Decree of Foreclosure in the absence of proof that it was the “owner” of the beneficial interest in the Note and DOT?

1. RCW 62A.9A.-203, the UCC’s codification of the “security follows the note” legal axiom, is a

¹⁰ RCW 61.24.030(4).

**“ownership” transfer concept, not an
“enforcement rights” transfer concept.**

UCC §§9-203 and 9-313 apply to the creation of “security interests” in *deeds of trust, mortgages and other real property liens* with the same force and effect with which they apply to the creation of security interests in *personal property*. UCC §9-203 is the codification of the “security follows the note” legal maxim.¹¹

It is no accident that UCC §9-203 was placed in Article 9 and not in Article 3. Article 9 is the UCC Article that controls creation, enforcement and transfer of “*ownership interests*” (i.e., *security interests* (RCW 62A.1-201(35)) in *secured* promissory notes, *including the deeds of trust that attend those promissory notes*. Article 3 controls creation, enforcement and transfer of “*enforcement rights*” in notes.

Under RCW 62A.3-301, one who “holds” a secured promissory note is “entitled to enforce the note.” Unless that “holder” is also the *owner* of the beneficial interest in that note, however, because of RCW 62A.3-310(b)(3),¹² that “holder,” is not entitled to utilize the security to enforce the underlying debt obligation for which the note was taken as payment. Moreover, under that same provision, unless the “person entitled to enforce the note” is also the owner of the note, the “person entitled to enforce the note” is *never* entitled to utilize the security to enforce the note.¹³

¹¹ Official Comment 9 to UCC §9-203 reads as follows: “**Collateral Follows Right to Payment or Performance.** Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on *personal or real property also transfers the security interest or lien.*”

¹² “Except as provided in subsection (b)(4), if the check or note is dishonored and the *obligee* of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the *obligee* may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the *obligee* by the obligor, discharge of the obligor on the instrument also discharges the obligation.”

¹³ *Id.*

The American Law Institute and National Conference of Commissioners on Uniform State Laws, the UCC's creators, placed the codification of the "deed of trust follows the note" maxim in Article 9 because the axiom is a transfer-of-"ownership rights"-in-secured-promissory notes maxim, *not* a transfer-of-"enforcement rights"-in-secured-promissory notes maxim.

If the axiom was an "enforcement rights" concept, the UCC's creators would have placed UCC §9-203(g) (RCW 62A.9A.-203(g)) somewhere in Article 3 – the UCC Article that contains the rules for creation, transfer, and enforcement of "enforcement rights" in promissory notes. But they didn't, because it isn't.

2. Subsequent to origination of a mortgage loan, UCC §9-203(g) provides the *only* method by which a person may obtain the right to enforce a deed of trust.

Pursuant to RCW 62A.9A.-203(g), subsequent to origination of a mortgage loan, the *only way* to obtain an enforceable "security interest"¹⁴ in a deed of trust is by obtaining an enforceable "security interest" in the note that the deed of trust secures.

RCW 62A.9A.-203(b) establishes the three criteria a transferee must satisfy to obtain an enforceable security interest in a promissory note. The transferee must: (1) give *value* for the note (RCW 62A.9A.-203(b)(1)); (2) take the note from a "*debtor*" (i.e., a *seller* of the note (RCW 62A.9A.-102(28)(B)) who has rights *in the note* or the power to transfer rights *in the note* to a "*secured party*" (i.e., a person to whom a

¹⁴ RCW 62A.1-201(b)(35), in pertinent part, defines the term "security interest" as any interest of a *buyer* of a promissory note in a transaction that is subject to Article 9. Consequently, RCW 62A.9A.-203 provides the rules for transfer of "*ownership*" interests in notes. This assertion is affirmed by the requirement in RCW 62A.9A.-203 that the transferee give "value" for the note.

note has been *sold* (RCW 62A.9A.-102(73)(D)) (RCW 62A.9A.-203(b)(2)); and (3) take "*possession*" of the note after purchasing it.

There is not a single piece of evidence in the record that Plaintiff-Respondent ever gave *value* for the note. Nothing. Thus, Plaintiff-Respondent failed to fulfill RCW 62A.9A.-203(b)(1). There is not a single item of proof that the note was sold to Plaintiff-Respondent. Nothing. Nor that the Note was sold to Plaintiff-Respondent by someone who had rights in the note or the right to transfer rights in the Note. Again, nothing. Consequently, Plaintiff-Respondent also failed to fulfill RCW 62A.9A.-203(b)(2). The failure to fulfill either 62A.9A.-203(b)(1) or (2), standing alone, was sufficient to deny Plaintiff-Respondent the right to enforce the Note and Obligation. As such, the trial court should have denied Plaintiff-Respondent's Motion for Summary Judgment and Decree of Foreclosure.

3. Plaintiff-Respondent has never held the Note.

Under the Pooling and Servicing Agreement, which was referenced in Defendant-Appellant's Reply to Plaintiff's Summary Judgment Motion,¹⁵ Plaintiff-Respondent agreed to hold Defendant-Appellant's Note solely for the benefit of certificate holders of the IXIS Real Estate Trust. Hence, pursuant to RCW 62A.9A.-313(c)(1) and (2),¹⁶ Plaintiff-Respondent has never had *possession* of the Note as that term is understood in RCW 62A.9A.-203. *Possession* of the Note has always been in the certificate holders. Accordingly, Plaintiff-Respondent has never met

¹⁵ CP 48: 22 through 49: 5.

¹⁶ (c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

the third condition for the transfer of an enforceable “ownership interest” (i.e., security interest) in the Note or the underlying mortgage-debt obligation for which the Note was taken as payment.

Since “*possession*” of the Note always has been in the certificate holders, Plaintiff-Respondent -- in addition to failing to prove or even assert that *value* was given for the Note, or that it received the Note from someone with rights in the Note or with the right to transfer rights in the Note -- has failed to fulfill the “*possession*” requirement of RCW 62A.9A.-203(b)(3)(B). The failure to fulfill that requirement also precluded Plaintiff-Respondent from obtaining an enforceable security interest in Defendant-Appellant’s Note. And, under 62A.9A.-203(g), the failure to obtain an enforceable security interest in the note was a simultaneous failure to obtain an enforceable security interest in Defendant-Respondent’s DOT.

Moreover, Plaintiff-Respondent’s proof that it was in physical possession of the note was, at best, *some* proof that Plaintiff-Respondent was the “holder” of the note.¹⁷ But, since the “holder” of the note need not be the “owner” of the note,¹⁸ proof that one is the “holder of the note” is *no* evidence that he is the “owner of the note.” Consequently, other than the unsubstantiated allegation contained in the Complaint that Plaintiff-Respondent is the “owner” of the Note, Plaintiff-Respondent has never

¹⁷ Because of RCW 62A.9A.-313, however, proof that one maintains **physical possession** of a note *is not* definitive proof that he is “*in possession*” of the note as that term is understood in the RCW 62A.9A.-203. *See RCW 62A.9A.-203(b)(3)(B)*.

¹⁸ Official Comment 1 to UCC §3-203 (RCW 62A.3-203).

provided a single item of proof that it is in fact the “owner” of the note and underlying mortgage-debt obligation for which the note was taken as payment.

Thus, if one agrees with the trial court’s finding that Plaintiff-Respondent is the “holder of the note,” which Defendant-Appellant does not; then, under RCW 62A.3-301 (a provision that *does not* require the “person entitled to enforce the note” to “*own*” the beneficial interest in the note), Plaintiff-Respondent was “entitled to enforce the note.”¹⁹ But Plaintiff-Respondent *was not* entitled to enforce the note or Obligation by foreclosing the DOT because: (1) the Note and underlying mortgage debt obligation for which the Note is taken as payment may not be enforced simultaneously by foreclosing the DOT; and (2) under RCW 62A.9A.-203(b)(3) (a provision that *does* require the enforcer to “*own*” the beneficial interest in the note and underlying obligation for which the note is taken as payment), Plaintiff-Respondent never acquired an enforceable “security interest” in the note. And, under RCW 62A.9A.-203(g), Plaintiff-Respondent therefore never obtained an enforceable security interest in the DOT that secured the Note and Obligation for which the Note was taken as payment.

This failure, without reference to Plaintiff-Respondent’s failure to take “*possession*” of the Note, independently precluded the possibility that Plaintiff-Respondent was entitled to enforce the DOT. RCW 62A.3-

¹⁹ So long as it did not simultaneously attempt to enforce the note and the underlying obligation by foreclosing, judicially or non-judicially, the DOT.

310(b)(3)²⁰ and Official Comment 3 thereto definitively prove the point and make an even stronger point. Official Comment 3 reads:

If the check or note is dishonored, the seller may sue on *either* the dishonored instrument *or* the contract of sale if the seller has possession of the instrument and is the person entitled to enforce it. *If the right to enforce the instrument is held by somebody other than the seller, the seller can't enforce the right to payment of the price under the sales contract because that right is represented by the instrument which is enforceable by somebody else.* Thus, if the seller sold the note or the check to a *holder* and has not reacquired it after dishonor, *the only right that survives is the right to enforce the instrument.*

In the above quote, the instrument is the note, the sales contract corresponds to the deed of trust, the seller corresponds to whoever Plaintiff-Respondent claims sold it the Note, if anyone, and Plaintiff-Respondent, throughout this litigation, has consistently claimed to be the “holder,” and the trial court so found.

Re-reading Official Comment 3 with the corresponding references of the immediately preceding paragraph in mind reveals that if the “*person entitled to enforce the note*” is not the *owner* of the underlying mortgage debt obligation, then the “*person entitled to enforce the note*” is *not entitled to enforce the underlying mortgage debt obligation*. Moreover, the owner of the underlying mortgage debt obligation also is not entitled to enforce the underlying mortgage debt obligation.

RCW 62A.3-310 and Official Comment 3 run directly against the trial court ruling in this case.

²⁰ RCW 62A.3-310 is specifically designed to address the question whether a “person entitled to enforce a note.” by virtue of that entitlement, is also entitled to enforce the underlying obligation for which the note is taken as payment. The provision is the *only* section in Part 3 of Article 3 that specifically addresses the issue. Neither RCW 62A.3-301 nor the Official Comment thereto says *anything*, one way or the other, about the right of a “person entitled to enforce a note” to enforce the underlying obligation for which the note is taken as payment.

When the owner of the beneficial interest in a dishonored note transfers the right to enforce the note while retaining the beneficial interest in the note, the right to enforce the underlying mortgage debt obligation for which the note was taken as payment does not survive the transfer.²¹

CONCLUSION

UCC §9-203 (RCW 62A.9A.-203) requires a person to have an enforceable “ownership interest” (i.e., security interest) in the note and underlying mortgage-debt obligation for which the note is taken as payment to have an enforceable security interest in the deed of trust that secures the note and underlying mortgage debt obligation. The deed of trust itself contains the same requirement. Additionally, pursuant to RCW 62A.3-310(b), a person who merely has the right to enforce the note does not have the right to enforce the note does not have the right to foreclose and does not have the right to enforce the underlying mortgage-debt obligation by foreclosing while simultaneously enforcing the note.

Moreover, if only the right to enforce the note is transferred to a transferee, the right to enforce the underlying mortgage debt obligation by foreclosing the DOT does not survive the transfer.

Finally, the trial court found that Deutsche was the “beneficiary” of the DOT based on Deutsche’s *physical possession* of Defendant-Appellant’s Note. The finding lacked sufficient evidentiary basis because Plaintiff-Respondent never provided a scintilla of proof that it was the “owner of the Note.” Pursuant to RCW 62A.3-310(b), RCW 62A.9A.-203(a)(b) and (g) and the common law “security follows the note” legal axiom, the failure to provide proof of “ownership of the note” precluded

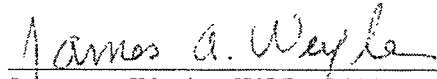
²¹ *Id.*

the possibility of proving that Plaintiff-Respondent was the “beneficiary of the DOT.”

For all of the reasons recited herein above, this Court should reverse the trial court’s ruling and remand this case to the trial court with instructions to the trial court that the case be reinstated and permitted to continue.

Dated this 13th day of October, 2014, in Sammamish, WA 98075.

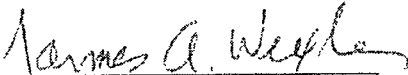
Respectfully submitted,



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DATED this 13th day of October, 2014, in Sammamish, WA 98075.


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