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Supreme Court Case No. 94093-2

Court of Appeals Case No. 74264-7-1

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROBERT AND DORIS CUMMINGS

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC. et al.

Respondents.

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**RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S  
ANSWER TO PETITION FOR REVIEW**

Submitted By:  
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**I. IDENTITY OF ANSWERING PARTY**

Respondent Northwest Trustee Services, Inc. (“NWTS”) hereby answers the Petition for Review of Appellants Robert and Doris Cummings as follows below.

**II. STATEMENT OF RELIEF SOUGHT**

NWTS requests that the Washington Supreme Court decline to accept review of the unpublished decision in *Cummings v. NWTS*, 2016 WL 68952623 (Div. 1, Nov. 28, 2016).

**III. STATEMENT OF THE CASE**

A. Factual History.

On or about April 12, 2006, in consideration for a mortgage loan, Appellants executed a promissory note (the “Note”) in the amount of \$240,000, payable to First Franklin a division of National City Bank of Indiana. CP 287-290.

Appellants also executed a Deed of Trust securing repayment of the Note. CP 292-311. The recorded Deed of Trust encumbered a piece of real property commonly known as 21603 54<sup>th</sup> Ave. W., Mountlake Terrace, WA 98043 (the “Property”). CP 294.

On or about October 6, 2011, an Assignment of Deed of Trust in favor of Deutsche Bank National Trustee Company, as Trustee, in trust for

the registered Certificateholders of First Franklin Mortgage Loan Trust 2006-FF8, Asset-Backed Certificates, Series 2006-FF8 (the “Loan Trust”) was recorded with the Snohomish County Auditor. CP 313-314.

On or about August 27, 2014, an unambiguous beneficiary declaration was executed, stating that the Loan Trust was the actual holder of the Note, and the Note had not been “assigned or transferred to any other person or entity.” CP 316.

On or about September 5, 2014, another unambiguous beneficiary declaration was executed, *again* stating that the Loan Trust was the actual holder of the Note. CP 318.

On September 16, 2014, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded with the Snohomish County Auditor. CP 320.

On or about September 24, 2014, as a result of Appellants’ November 2010 default on payments due under the secured Note, they were sent a Notice of Default. CP 322-324.

On November 5, 2014, a Notice of Trustee’s Sale was recorded with the Snohomish County Auditor, setting a sale date of March 13, 2015 for the Property. CP 326-330. Appellants failed to seek a restraining

order to prevent the sale from occurring, and on March 13, 2015, the Property was sold at auction. CP 332-333.

B. Procedural History.

On March 20, 2015, Appellants filed an Amended Complaint that became the operative pleading in the action. CP 403-423. Appellants readily admitted that the foreclosure was proper, but they disputed who should have conducted the process. CP 417.

On April 1, 2015, NWTS moved to dismiss all claims in the Amended Complaint pursuant to CR 12(b)(6). CP 269-333. Appellants did not submit a written response to this motion.<sup>1</sup>

On April 16, 2015, after hearing oral argument, the Hon. Marybeth Dingley of the Snohomish County Superior Court granted NWTS' Motion to Dismiss. CP 267-268. On June 4, 2015, Judge Dingley also denied Appellants' reconsideration request. CP 145-146.

Appellants immediately attempted to seek review from Division One of the Court of Appeals, but because there had not been a final judgment, the case was remanded for further proceedings. Case No. 73707-4-I, Notation Ruling (Sept. 9, 2015).

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<sup>1</sup> No response brief is found in the record because none was filed.

On October 27, 2015, the Hon. Millie Judge of the Snohomish County Superior Court granted summary judgment to Mortgage Electronic Registration Systems, Inc. (“MERS”) and the Loan Trust. CP 6-8.

On November 12, 2015, Appellants filed their Notice of Appeal. CP 1-5.

On November 28, 2016, Division One issued an unpublished decision confirming NWTS was not subject to the appeal, and affirming the trial court’s summary judgment ruling in favor of MERS and the Loan Trust. On January 3, 2017, Division One denied Appellants’ reconsideration motion.

#### **IV. RESPONSE ARGUMENT**

##### **A. Standard of Review.**

The discretionary acceptance of a decision terminating review may only be granted based on the criteria set forth in R.A.P. 13.4(b). Appellants contend there is a “significant question of law” and “issue of substantial public interest.” Petition for Review at 5. However, the record does not support either basis.

##### **B. NWTS Was Not a Proper Litigant to the Appeal.**

As a threshold matter, Appellants conspicuously omit mention of their failure to comply with R.A.P. 2.4(a), which rendered NWTS’

dismissal not subject to appellate review.

As the Court of Appeals observed, “[t]he notice of appeal dated November 11, 2015 designates only the order granting summary judgment to MERS and Deutsche Bank. It neither designates nor refers to the prior order dismissing NWTS.” Opin. at \*4.

Appellants’ previous attempt to seek discretionary review of NWTS’ dismissal, before all defendants obtained dismissal orders, had “no effect upon consideration of a later appeal from a final judgment unless designated in that later appeal.” *Id.* at \*5, *citing State v. Thorne*, 39 Wn.2d 63, 65, 234 P.2d 528 (1951). Moreover, the order in favor of NWTS was not entwined with the subsequent order granting dismissal to MERS and Deutsche Bank, meaning review could also not be obtained under R.A.P. 2.4(b). *Id.* at \*5, *citing Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

Because of Appellants’ procedural error, there is no reason to subject NWTS to further litigation in this case.

C. Appellants’ Claims Were Also Meritless.

Essentially, the Petition for Review argues that this Court’s unanimous decision in *Brown v. Wash. Dep’t of Commerce*, 184 Wn.2d 509, 543, 359 P.3d 771 (2015), was incorrect and NWTS should be held



liable for foreclosing in the name of the Note holder, instead of the Note's "owner."

But the right to foreclose is strictly vested with a note's *holder* because Washington law recognizes the general principle that a security instrument (Deed of Trust) follows the debt (Note) with or without formal assignment. *See, e.g., Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 177, 367 P.3d 600 (2016) ("Washington courts have long recognized that the security instrument follows the note that it secures.").

*Brown* correctly states a holder – and not the owner – is entitled to enforce a note through non-judicial foreclosure of property that secures repayment of the note as collateral. 184 Wn.2d at 543. Under the DTA, "[o]wnership of the note is not dispositive." *Trujillo v. NWTS*, 181 Wn. App. 484, 498, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014), *rev'd on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

In the wake of *Brown*, courts have applied its holding to reject borrowers' claims just like the one pled below. *See, e.g., Worm v. NWTS*, 2016 WL 6885907 (Div. 2, Nov. 22, 2016) (unpublished) (the "law in Washington is well settled" that only a holder can non-judicially foreclose); *Leonard v. Recontrust Co., N.A.*, 2016 WL 304802, \*6 (W.D. Wash. Jan. 26, 2016) ("To the extent that they assert that the Washington

State Supreme Court’s decision in *Brown* was ‘wrongly decided’ and that if properly decided Defendants would not have complied with the statute, their argument is without merit.”).

In its unchallenged Motion to Dismiss, NWTS demonstrated that it possessed *two* substantive, unambiguous declarations approved of in *Brown*. CP 316, 318. The first declaration was even more specific and stated that the Note had “not been assigned or transferred to any other person or entity.” CP 316.

Given this sufficient proof shown in the factual record of this case, which was within the scope of allegations pled for purposes of CR 12(b)(6), the DTA did not require NWTS to receive some other form of documentation prior to recording the Notice of Trustee’s Sale and proceeding accordingly. *See, e.g. Bavand v. OneWest Bank*, 196 Wn. App. 813, 385 P.3d 233 (2016), *as modified* (Dec. 15, 2016) (finding no CPA liability when NWTS possessed an unequivocal beneficiary declaration); *McAfee v. Select Portfolio Serv., Inc.*, 193 Wn. App. 220, 228, 370 P.3d 25 (2016) (same).

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**V. CONCLUSION**

The decision in favor of NWTS below was not properly subject to review due to Appellants' omission of the trial court's order in their Notice of Appeal.

Moreover, this Court should reject Appellants' invitation to revisit *Brown*. There is neither a "significant question of law" nor "issue of substantial public interest" presented.

The Petition for Review must therefore be denied.

DATED this 17<sup>th</sup> day of February, 2017.

**RCO LEGAL, P.S.**



By: /s/ Joshua S. Schaer  
Joshua S. Schaer, WSBA #31491  
Attorneys for Respondent Northwest  
Trustee Services, Inc.

**Declaration of Service**

The undersigned makes the following declaration:

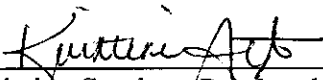
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On February 17, 2017 I caused a copy of **Respondent Northwest Trustee Services, Inc.’s Answer to Petition for Review** to be served to the following in the manner noted below:

James A. Wexler Attorney at Law 2025 201st Ave. SE Sammamish, WA 98075 Attorneys for Appellants	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
John E. Glowney Vanessa S. Power Stoel Rives, LLP 600 University St., Suite 3600 Seattle, WA 98101 Attorneys for Respondents	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 17<sup>th</sup> day of February, 2017.

  
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Kristine Stephan, Paralegal