96339-8

COURT OF APPEAL NO. 76622-8
KING COUNTY NO. 14-2-11741-8

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DARLA J. PARDO, a single woman,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, a Washington corporation; RCO LEGAL, P.S., a Washington Professional Services Organization; OCWEN LOAN SERVICING, LLC, a limited liability company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a foreign corporation; MERSCORP HOLDINGS, INC., a foreign corporation; and FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States Government Sponsored Enterprise,

Respondents.

APPELLANT DARLA PARDO'S PETITION FOR REVIEW

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I. Relief Requested

Appellant Darla Pardo ("Ms. Pardo") respectfully requests the Washington Supreme Court accept discretionary review of the Division One for the Court of Appeals' July 30, 2018, decision ("Pardo Decision") terminating review pursuant to RAP 13.4. Under the Pardo Decision, legal conclusions are acceptable proof at summary judgment. Furthermore, the Pardo Decision changes the analysis of what constitutes "control" for the purpose of establishing agency. Because the Pardo Decision represents a radical departure from established precedent and concerns issues of substantial public interest, the Supreme Court should accept review.

II. Identity of Petitioner

Ms. Pardo is the appellant in this action. She was the plaintiff at the trial court, and she was the appellant at the Court of Appeals.

III. Citation to Court of Appeals Decision

The Court of Appeals issued its decision in *Pardo v. Nw. Tr. Servs.*, 2018 WL 3625777 (2018) on July 30, 2018. Ms. Pardo filed a motion for reconsideration, which was denied on August 24, 2018.

IV. Issues Presented For Review

1. Are legal conclusions contained in a document incorporated by reference into a contract sufficient proof at summary judgment?
2. Is control established for agency purposes by being able to request

property from a custodian, pay a custodian, and fire a custodian?

V. Statement of the Case

Ms. Pardo sued Respondent Ocwen Loan Servicing, LLC ("Ocwen") and other defendants for, *inter alia*, unlawfully foreclosing on her home. CP 1-34. Ms. Pardo alleged that Ocwen was not the beneficiary of her note because it was not the holder of the Note. *Id.*

Ocwen moved for summary judgment, claiming it was the beneficiary of Ms. Pardo's Note because the Fannie Mae Servicing Guide states that, generally, servicers of Fannie Mae notes become holders of those notes at the commencement of foreclosure proceedings. CP 3183-84. Ocwen claimed it had constructive possession of the note by virtue of the Fannie Mae Servicing Guide stating that, generally, servicers of Fannie Mae notes gain constructive possession of those notes at the commencement of foreclosure proceedings. CP 3185.

Ms. Pardo argued that Ocwen was not the beneficiary of the note because Ocwen was not the holder of her note. Ocwen was not the holder of the Note it did not actually possess the note during the foreclosure and did not constructively possess the note through the document custodian ("Custodian") who did possess the Note. Ms. Pardo argued Ocwen could not constructively possess the Note through Custodian because Custodian was not Ocwen's agent. CP 3200-02.

Ms. Pardo pointed to (1) the Custodial Agreement between Ocwen and Custodian that required Custodian comply with Fannie Mae's requirements for possessing the note, (2) the language in the Servicing Guide stating document custodians hold Fannie Mae notes exclusively for Fannie Mae, and (3) the Collateral File Activity Log kept by the Custodian showing Custodian possessed the Note for Fannie Mae. *Id.* Ms. Pardo also cited the language in the Servicing Guide saying the provisions in the guide were not absolutes, and it is up to servicers to implement the requirements of the Servicing Guide. CP 2431.[1]In sum, Ms. Pardo argued Ocwen could not control Custodian for purposes of creating an agency relationship because Ocwen could not change Fannie Mae's requirements. *Id.*

The Trial Court initially granted Ms. Pardo's motion for partial summary judgment in 2015 on the issue of whether Ocwen was a beneficiary, finding it was not a holder. CP 887-89. The Court of Appeals denied discretionary review of this 2015 decision. CP 2954-66. After a new judge was assigned to the case, Ocwen moved for summary judgment again on the issue of whether Ocwen was a beneficiary; the Trial Court reversed the previous judge's ruling and granted Ocwen summary judgment in 2017. CP 3261-62. Ms. Pardo appealed to the Court of

[1] "...where Fannie Mae has set forth a 'requirement' [in the Servicing Guide], it has not enumerated specifically ***how*** a servicer should implement it." (Emphasis in original.)

Appeals, seeking review of the dismissal of her claims[2] against Ocwen. Pardo Decision at *1. The Court of Appeals affirmed the trial court. *Id.* In the Pardo Decision, the Court of Appeals relies on several legal conclusions contained in the Fannie Mae Servicing Guide:

1. "Fannie Mae gives the servicers [constructive] possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions." Pardo Decision at *4 (citing CP 2597);
2. "The 'temporary transfer of [constructive] possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure.'" Pardo Decision at *4 (citing CP 2597); and
3. "For those notes held by a document custodian, 'the custodian also has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit.'" Pardo Decision at *5 (citing CP 2597).

[2] Ms. Pardo sought review of her claims under the Deeds of Trust Act, Consumer Protection Act, Consumer Loan Act, and Negligence. All of her claims depend on Ocwen not being the holder of the note at the time during the nonjudicial foreclosure. Ms. Pardo does not waive any of those arguments and seeks to litigate them should the Court accept discretionary review of the Pardo Decision.

The Pardo Decision concluded that, based on these legal conclusions in the Servicing Guide, Ocwen was the holder of the note because it was the servicer of a Fannie Mae note. Pardo Decision at *4. The Pardo Decision concluded Ocwen received constructive possession of the Note upon commencement of the foreclosure because the Servicing Guide says so. *Id.* The Pardo Decision additionally ruled that Ocwen had control over Custodian because Ocwen could pay, fire, or demand the note back from Custodian. Pardo Decision at *5.

Ms. Pardo motioned for reconsideration and was denied on August 24, 2018.

VI. Argument

The Pardo Decision is in conflict with Supreme Court and published Court of Appeals decisions regarding summary judgment and agency. Summary judgment and agency are issues of substantial public interest. Because the Pardo Decision radically departs from the established case law, the Court should accept discretionary review.

A. Summary Judgment

The Pardo Decision first quotes the Servicing Guide, which says servicers become holders and receive constructive possession of Fannie Mae notes upon commencement of foreclosure proceedings. Pardo Decision at *4. Without any analysis of agency (which is required to

establish constructive possession in the context of negotiable instruments[3]) or citation to any fact in the record specific to Ocwen, Custodian, or Ms. Pardo's note, the Pardo Decision summarily concludes Ocwen "became the holder of the note and beneficiary" because the "provisions of the [servicing guide] controlled possession of the note." *Id.*

The Pardo Decision then ignores evidence from the record in favor of legal conclusions. The Pardo Decision notes that the Servicing Guide was incorporated by reference into the Custodial Agreement. *Id.* at *1. The Pardo Decision says the Guide states custodians possess Notes exclusively for Fannie Mae and notes that the Custodial File Log shows Custodian possessing the Note for Fannie Mae at all times relevant to the foreclosure. *Id.* at *5; *id.* at n. 19. The Pardo Decision proceeds to ignore these facts in favor of legal conclusions contained in the Guide about constructive possession and holder status. *Id.* at *5.

The Pardo Decision's embrace of legal conclusions and disregard for actual evidence conflicts with Washington precedent regarding evidence at summary judgment.

1. The Pardo Decision is in conflict with Supreme Court decisions

The Washington Supreme Court has issued several decisions on the evidentiary standard at summary judgment.

[3] *See* RCW 62A.3-201 cmt. 1 ("...nobody can be a holder without possessing the instrument, either directly or through an agent.").

In *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988), the defendant put forth an affidavit which set forth specific facts and events leading to the plaintiff's termination. In response, the plaintiff submitted an affidavit only containing conclusions, and did not lay out any specific facts or events supporting those conclusions. *Id.* The *Grimwood* Court ruled that the plaintiff's affidavit was not sufficient at summary judgment because the affidavit did not describe an event, an occurrence, or that which took place, but instead merely contained conclusions. *Id.* Under *Grimwood*, it is not enough to present conclusions at summary judgment; a party must present events, occurrences, or that which actually took place. *Id.* The Pardo Decision conflicts with *Grimwood* because the Pardo Decision simply accepts the legal conclusions in the Servicing Guide as facts at summary judgment.

The Washington Supreme Court has repeatedly stated facts, not legal conclusions, are required to establish agency. *Rho v. Dept. of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989) ("agency is a legal concept that depends on the manifest conduct of the parties"); *Matsumara v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (agency does not exist unless the facts establish agency elements); *Busk v. Hoard*, 65 Wn.2d 126, 130, 396 P.2d 171 (1964) (citing *McCall v. Smith*, 184 Wash. 615, 622, 52 P.2d 338 (1935)) (whether agency exists depends on all the facts of a case,

and no one fact may be said to be conclusive or controlling under any and all circumstances).

In *Washington Imaging Services v. Dept. of Revenue*, 171 Wn.2d 548, 563, 252 P.3d 885 (2011), the Washington Supreme Court reviewed whether or not Washington Imaging was exempt from tax on certain pass through revenue received by Imaging from patients to pay a radiology lab. The revenue was not subject to tax if Imaging received such revenue as agent of the lab. *Id.* at 560. The Washington Supreme Court noted that the payments were not made pursuant to an agency relationship merely because the contract between Imaging and the lab stated the payments were pass through payments (which could only be pass through payments if Imaging was the agent of the lab) and noted whether an agency relationship existed depended on the facts and circumstances of that case. *Id.* at 563. The Pardo Decision conflicts with *Washington Imaging* because the Pardo Decision simply accepts the "constructive possession" and "holder" labels in the Servicing Guide as facts rather than simply legal conclusions insufficient at summary judgment.

In the Deeds of Trust Act context, this Court in *Bain* made clear that simply labeling a party with a legal conclusion in a contract is not proof. MERS argued that because MERS deeds of trust stated MERS was a beneficiary, that should control. *Bain v. Metro. Mortg. Grp.*, 175 Wn.2d

83, 104-5, 285 P.3d 34 (2012). This Court rejected that argument because there was no evidence MERS could be controlled by holders of promissory notes. *Id.* at 107. This Court specifically rejected contractually modifying statutory requirements. *Id.* at 107-08. The Pardo Decision allows Ocwen to modify the DTA's protections by contract by incorporating a Servicing Guide that says servicers are holders and have constructive possession generally. The Pardo Decision conflicts with *Bain*.

Recently, in *Afoa v. Port of Seattle*, ___ Wn.2d ___, 421 P.3d 903, 912 (July 26, 2018), the Washington Supreme Court rejected an airport worker's claim that the Port of Seattle was controlling airlines at SeaTac to make the airlines agents of the Port when the jury did not make any findings regarding such control. Without facts establishing the agency relationship, there could be no finding of agency. However, the Pardo Decision summarily concludes that there was agency because of legal conclusions contained in the Servicing Guide. The Pardo Decision conflicts with *Afoa*.

At footnote 14, the Pardo Decision notes that *Brown* discussed a similar transfer of holder status without disapproval, and the Washington Supreme Court did not criticize this procedure. Pardo Decision at n. 14. The reliance on *Brown* is misguided because *Brown* dealt with a different issue and a different servicing guide.

The parties in *Brown* **conceded** the servicer was the holder, and the *Brown* Court dealt with a completely different issue: whether a borrower is entitled to mediate with the holder or the owner of the promissory note under RCW 61.24.163. *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 533, 359 P.3d 771 (2015) (Brown was entitled to mediation if the beneficiary was the owner of the note; Brown was not entitled to mediation if the beneficiary was the holder/servicer). The parties in *Brown* disputed whether "'a beneficiary of deeds of trust' in the [mediation] exemption statute means the 'owner' or the 'holder' of the note." 184 Wn.2d at 533. The reason the *Brown* Court did not disapprove or criticize the split of holder status from ownership is because the parties did not ask the Supreme Court to weigh in on whether the servicer was actually the holder.

Here, the Pardo Decision's interpretation of *Brown* is that, if a Servicing Guide says a loan servicer is a holder, then the loan servicer is the holder. By interpreting *Brown* as accepting legal conclusions in the Servicing Guide to establish constructive possession via agency, the Pardo Decision effectively interprets *Brown* to overrule previous Washington Supreme Court cases requiring facts to establish agency. *See*, *e.g. Washington Imaging*, 171 Wn.2d at 563; *Rho*, 113 Wn.2d at 570; *Matsumara*, 74 Wn.2d at 368; *Busk*, 65 Wn.2d at 130 (facts are needed to

establish agency). The Pardo Decision's interpretation of *Brown* conflicts with Washington Supreme Court precedent requiring factual proof to establish agency.

Because the Pardo Decision is in conflict with Supreme Court precedent regarding legal conclusions serving as proof at summary judgment, the Supreme Court should accept review under RAP 13.4(b)(1).

2. The Pardo Decision is in conflict with published Court of Appeals decisions

In addition to conflicting with Supreme Court decisions, the Pardo Decision conflicts with published Court of Appeals decisions regarding the summary judgment evidentiary standard.

The Court of Appeals has published cases holding that evidence submitted in support of, or in response to, a motion for summary judgment must set forth facts as to what took place, an act, an incident, or a reality as distinguished from supposition. *Snohomish County v. Rugg*, 115 Wn. App. 218, 225, 61 P.3d 1184 (Div. I 2002); *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 116, 529 P.2d 466 (Div. II 1974) ("it has long been the rule that each party must furnish the **factual evidence** upon which he relies." (emphasis added)). "[U]ltimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient" for the purpose of summary judgment. *Ainsworth v. Progressive Cas. Ins.*

Co., 180 Wn. App. 52, 61, 322 P.3d 6 (Div. I 2014); *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (Div. I 2011).

Published Court of Appeals decisions also weigh in on the evidentiary standard at summary judgment to establish agency. *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 831, 166 P.3d 1263 (Div. III 2007) (agency always depends on facts and circumstances of each case); *Stansfield v. Douglas County*, 107 Wn. App. 1, 18, 27 P.3d 205 (Div. III 2001), *aff'd*, 146 Wn.2d 116, 43 P.3d 498 (2002) (facts are required for agency).

Here, the Pardo Decision simply accepts the Servicing Guide's legal conclusions as evidence, in contrast to published Court of Appeals cases. Because the Pardo Decision is in conflict with published Court of Appeals precedent regarding legal conclusions serving as proof at summary judgment, the Supreme Court should accept review under RAP 13.4(b)(2).

3. Summary judgment is an issue of substantial public interest

Summary judgment is a common motion heard in trial courts all over Washington. Under the Pardo Decision, a contract incorporating a document containing legal conclusions may be used to establish those legal conclusions absent supporting evidence. Under GR 14.1(1), the

Pardo Decision may be cited to trial courts to accept legal conclusions at summary judgment. Washington litigants need to know what may be relied on at summary judgment. The Court should accept review of the Pardo Decision to clarify that legal conclusions are not sufficient at summary judgment under RAP 13.4(b)(4).

B. Agency

The Pardo Decision incorrectly concludes the bailment agreement between Ocwen and Custodian established control for the purposes of agency because Ocwen could demand the Note, pay, and fire Custodian. Pardo Decision at *5. This is not sufficient to establish control.

1. The Pardo Decision is in conflict with Supreme Court decisions regarding control to show agency

In the seminal case regarding agency, *Moss v. Vadman*, the Supreme Court examined a botched real estate deal. *Moss v. Vadman*, 77 Wn.2d 396, 397, 463 P.2d 159 (1969). Moss and a partner were in the business of buying and selling land and employed Vadman to be their accountant and at times advise on real estate transactions. *Id.* Vadman acquired rights to a property that Moss wanted and assigned those rights to someone other than Moss. *Id.* Moss sued, alleging that Vadman breached duties owed to Moss as agent. *Id.* The Supreme Court found that there was no agency because Moss did not control Vadman for the purposes of

obtaining the rights to the property, even though Moss paid Vadman, and could fire Vadman as its accountant and advisor. *Id.* at 402. Significantly, under the reasoning of the Pardo Decision, *Moss* was decided incorrectly. This is an untenable result.

In *Kamala v. Space Needle*, 147 Wn.2d 114, 52 P.3d 472 (2002), an employee of a firework contractor sued a jobsite owner alleging, *inter alia*, that the contractor was the agent of the jobsite owner. Despite the owner paying the contractor, being able to fire the contractor, providing a space to work, crowd control, and paying the contractor's permit fees, the *Kamala* Court found that the owner did not control how the contractor set up the fireworks or completed its work. *Id*. at 121-22. The *Kamala* Court noted control was not established by having a right to order the work "stopped or resumed, to inspect progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." *Id.* at 121. The Pardo Decision conflicts with *Kamala* because the Pardo Decision finds that control is established because Ocwen could stop the bailment by asking for the note back or by firing Custodian.

In *Bill v. Gattavara*, 24 Wn.2d 819, 838, 167 P.2d 434 (1946), the Washington Supreme Court stated "even though an employer has the right to stop work which is not properly done, that fact does not, in and of itself,

operate to create the relation of master and servant between the owner and those engaged in the work." The Pardo Decision conflicts with *Bill* because the Pardo Decision finds that simply because Ocwen can pay and stop the work being done (in this case, by requesting the note back from Custodian), control is established.

Nawrocki v. Cole, 41 Wn.2d 474, 249 P.2d 969 (1952) presented a similar issue to Ms. Pardo's case. There, a mechanic possessed a car on behalf of an owner, was to be paid for work to be done on the car and had to turn over the car to the owner upon demand. *Id.* at 476. The mechanic took the car on the road, at the owner's insistence, to determine whether the car was properly functioning, and got into an accident with the plaintiff. *Id.* The Washington Supreme Court decided that this was not enough to establish the mechanic was controlled by the owner for the purposes of agency, because the owner could not control how the mechanic drove the car on the road. *Id.* at 477-78. Similar to the mechanic in *Nawrocki*, Custodian was paid by Ocwen, had to turn over Pardo's Note upon demand, and could have been fired by Ocwen, but, instead of following the *Nawrocki* precedent, the Pardo Decision found control.

The traditional rule in Washington is that bailees are not the agents of bailors unless the bailors can control the manner of performance: how the bailees possess the property subject to the bailment. *Nawrocki*, 41

Wn.2d at 477-78; *Hamp v. Universal Auto*, 173 Wash. 585, 586-87, 24 P.2d 77 (1933) (no agency where dealership could not control how test driver used dealer's car); *Lloyd v. Northern Pac. Ry. Co.*, 107 Wash. 57, 58, 181 P. 29 (1919) (driver of car was not agent of owner where owner could not control how driver operated the car). Ocwen does not have any right to control how Custodian possessed Notes for Fannie Mae; Custodian's actions are controlled by the Servicing Guide, which Ocwen cannot change. The Pardo Decision, however, turns any bailee being paid into an agent for its bailor simply by virtue of being able to end the bailment and paying the bailee.

Because the Pardo Decision is in conflict with Supreme Court precedent regarding control for agency purposes, the Supreme Court should accept review under RAP 14.3(b)(1).

2. The Pardo Decision is in conflict with published Court of Appeals decisions regarding control to show agency

Court of Appeals precedent holds that "control" for purposes of agency means whether or not a principal can control the manner of the agent's performance. *Stansfield*, 107 Wn. App. at 18 ("...control establishes agency only if the principal controls the manner of performance…"); *Bloedel Timberlands Development v. Timber Indus.*, 28 Wn. App. 669, 673, 626 P.2d 30 (Div. II 1981) ("...control establishes

agency only if the principal controls the manner of performance, in this case the actual cutting [of timber]."). The Pardo Decision conflicts with that by finding being able to fire, pay, and request property back from a bailee establishes control.

Because the Pardo Decision is in conflict with published Court of Appeals precedent regarding control for agency purposes, the Supreme Court should accept review under RAP 13.4(b)(2).

3. Control for agency purposes is an issue of substantial public interest

The Pardo Decision makes all bailees for hire agents of their bailors. If this is to be the law moving forward, and being able to pay, fire, and request property back from a bailee establishes control for agency purposes, the Supreme Court needs to announce it in a published case under RAP 13.4(b)(4).

VII. Conclusion

The Pardo Decision accepts legal conclusions as evidence of agency for the purposes of being a holder through constructive possession. The Pardo Decision also finds control for purposes of agency simply because a bailor can pay, fire, and request property back from a bailee. These holdings are in conflict with a myriad of Washington Supreme Court and published Court of Appeals cases. The Supreme Court should

accept discretionary review of the Pardo Decision to clarify what constitutes proof at summary judgment, and what constitutes control for agency purposes.

Respectfully submitted this 20th day of September, 2018.

s/ Brian J. Fisher
Brian J. Fisher, WSBA# 46495
BOULDER LAW

s/ Joshua B. Trumbull
Joshua B. Trumbull, WSBA# 40992
JBT & ASSOCIATES, P.S

CERTIFICATE OF SERVICE

I, Ashley Brogan, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1.At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 20th day of September, 2018, I caused to be served a true and correct copy of Darla Pardo's Petition for Review to respondents in the above title matter by causing it to be delivered to:

David A. Perez Cody Weston Perkins Coie, LLP 1201 3rd Ave Suite 4900 Seattle, WA 98101 dperez@perkinscoie.com cweston@perkinscoie.com	☒ U.S. First Class Mail Postage Paid ☐ Hand Delivery ☐ Legal Messenger ☒ Electronic-Email

DATED this 20th day of September, 2018 at Arlington, Washington.

s/ Ashley Brogan
Ashley Brogan
Paralegal
JBT & Associates, P.S.

APPENDIX A - OPINION

2018 WL 3625777
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

Darla J. PARDO, a single woman, Appellant,
v.
NORTHWEST TRUSTEE SERVICES, a Washington corporation; RCO Legal, P.S., a Washington Professional Services Organization; Ocwen Loan Servicing LLC, a limited liability company, Respondents, Mortgage Electronic Registration Systems, Inc., a foreign corporation; MERSCORP Holdings, Inc., a foreign corporation, Defendants, and
Federal National Mortgage Association, a United States Government Sponsored Enterprise, Respondent.

No. 76622-8-I
|
FILED: July 30, 2018

Appeal from King County Superior Court, 14-2-11741-8, Theresa B. Doyle, Judge.

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UNPUBLISHED OPINION

Trickey, J.

***1** Darla Pardo took out a loan (the Loan) to purchase her home. She signed a promissory note (the Note) secured by a deed of trust. Federal National Mortgage Association (Fannie Mae) was the holder of the Note. Ally Bank (Ally) was the document custodian. Ocwen Loan Servicing, LLC (Ocwen) serviced the loan on behalf of Fannie Mae.

After Pardo failed to make her mortgage payments, Ocwen referred the Loan for foreclosure and appointed Northwest Trustee Services (NWTS) as the successor trustee. NWTS sold the home at a trustee's sale, and Pardo sued.

Pardo alleged that the sale was improper and violated multiple statutes, including the deeds of trust act (DTA), chapter 61.24 RCW; the Consumer Protection Act (CPA), chapter 19.86 RCW; and the Consumer Loan Act (CLA), chapter 31.04 RCW. The trial court ultimately dismissed Pardo's claims on summary judgment. We conclude that Ocwen had constructive possession of the Note and therefore affirm.

FACTS

In January 2008, Pardo executed the Note, secured by a deed of trust on her home. Land Home Financial Services (LHFS) was the lender on the Note. The deed of trust listed Pardo as the grantor, Mortgage Electronic Registration Systems, Inc. (MERS) as the grantee and beneficiary, LHFS as the lender, and Fidelity National Title as the trustee. Fannie Mae purchased the Loan in March 2008 and became the owner, holder, and beneficiary of the Note. At that time, Ally took possession of the Note as document custodian and maintained the Note in its secure vault in Waterloo, Iowa. The Note was indorsed in blank.

GMAC Mortgage, LLC (GMAC) serviced the loan on behalf of Fannie Mae. In October 2012, GMAC sent Pardo a notice of default because she had not made her September and October mortgage payments. GMAC provided several payment options to Pardo so that she could avoid foreclosure on the home. Pardo failed to make any subsequent payments on the Loan.

In November 2012, Ocwen acquired the rights to service the Loan through an asset purchase and became the Loan servicer in February 2013. Ocwen serviced the loan under the terms of the 2012 Fannie Mae Single Family Servicing Guide (the Guide), which governed the contractual relationship between Fannie Mae and its loan servicers. The Guide specified that "Fannie Mae at all times has possession of and is the holder of the mortgage note, except in the limited circumstances expressly described below." [1]

Ocwen also entered a Custodial Agreement with Ally in February 2013. The Custodial Agreement established Ally as the "custodian and bailee" for Ocwen and outlined Ally's duties. [2] The Custodial Agreement specifically incorporated the Guide and required Ally to perform services for Ocwen in compliance with the Guide. Ally agreed to perform these duties in exchange for payment from Ocwen. Ocwen had the right to inspect or request transfer of its files from Ally and terminate the Custodial Agreement as needed.

In March 2013, Ocwen notified Pardo of the possibility of foreclosure proceedings on her home because of her overdue mortgage payments. Pardo requested a review of the Loan for modification but failed to provide all of the information required for the review.

***2** On March 18, 2013, MERS assigned the deed of trust to Ocwen. Ocwen referred the Loan for foreclosure on April 15, 2013. On April 19, 2013, Ocwen completed a sworn beneficiary declaration stating that "Ocwen Loan Servicing, LLC is the holder of the promissory note or other obligation secured by the Deed of Trust." [3]

Soon after, Ocwen agreed to a trial modification period for the Loan. According to the terms, Pardo would be eligible for revaluation of the Loan for permanent modification if she completed three payments during the trial period. Ocwen also agreed to discontinue foreclosure proceedings if Pardo complied with the terms of the trial period. Pardo received multiple notifications regarding the trial modification period, but failed to make any payments. Ocwen then notified Pardo that the Loan modification review had been discontinued.

In July 2013, Ocwen approved a second trial modification period for the Loan. Pardo again failed to make any of the trial payments and Ocwen notified her that the loan modification review had been discontinued.

Ocwen appointed NWTS as its successor trustee in August 2013. In September 2013, NWTS notified Pardo that she was in default on the Loan and provided information to help her seek immediate assistance. NWTS issued a notice of trustee's sale to Pardo in November 2013. The notice included a recommendation that Pardo contact a housing counselor or attorney without delay.

Between November 2013 and January 2014, Pardo sent several letters to NWTS concerning the trustee's sale of her home. The first letter was titled "RESPA QUALIFIED WRITTEN REQUEST – COMPLAINT, DISPUTE OF DEBT & VALIDATION OF DEBT LETTER, TILA REQUEST." [4] She described the letter as "A FORM OF PRE-TRIAL DISCOVERY." [5] She requested all records and documents pertaining to the "alleged" Loan, including the original Note, and posed many questions related to the mortgage, assignments, and servicing of the Loan. [6] She alleged fraudulent withholding of information and loan servicing errors. In response, NWTS provided Pardo with a copy of the Note and strongly encouraged her to engage counsel to pursue possible legal remedies.

Pardo sent three other letters to NWTS, which she described as notices of default and opportunities to cure. These letters asked NWTS to provide the Loan payoff amount and evidence establishing the identity of the lawful holder of the Note. NWTS responded with the Loan payoff information and advised Pardo that foreclosure would proceed absent new direction from the loan servicer or new information justifying a delay.

Pardo took no action to enjoin the trustee's sale, which took place on March 14, 2014.

Soon after the trustee's sale, Pardo filed suit against Ocwen, Fannie Mae, MERS, MERSCORP, NWTS, and NWTS's representative RCO Legal (collectively, the defendants), alleging that the trustee's sale violated the DTA, the CPA, and the Criminal Profiteering Act, chapter 9A.82 RCW. She also alleged negligence, breach of contract, and civil conspiracy. She based these claims on the theory that Ocwen was not the holder and lawful

beneficiary of the Note when it appointed NWTS as the successor trustee.

***3** In June 2015, Pardo and the defendants filed several motions for summary judgment, all of which the trial court denied. The defendants filed a joint request for reconsideration of their motion for summary judgment. Pardo filed a motion for reconsideration of her partial summary judgment motion against Ocwen regarding the issue of its status as holder and lawful beneficiary of the Note.

In response to Pardo's motion for reconsideration, the trial court requested further briefing from Ocwen concerning Ocwen's status as the holder of the Note. In August 2015, the trial court determined that Ocwen was not the holder of the Note and granted Pardo's motion for reconsideration. The trial court also granted the motion for reconsideration for MERS and MERSCORP and dismissed Pardo's claims against them. [7]

In September 2015, Ocwen filed a motion for discretionary review in this court. The motion was denied by a commissioner of this court on November 13, 2015.

In July 2016, Pardo filed a motion to amend her complaint, which the trial court granted. Several additional motions for summary judgment were filed following amendment of the complaint. NWTS and RCO Legal filed a motion for summary judgment, which was granted and the claims dismissed. [8] Ocwen and Fannie Mae filed a separate motion for summary judgment against Pardo. Pardo filed a motion for summary judgment against all defendants.

The trial court requested supplemental briefing on the issue of Ocwen's status as holder of the Note. After considering the supplemental briefing and hearing additional oral argument, the trial court granted summary judgment in favor of Fannie Mae and Ocwen and dismissed Pardo's claims with prejudice. Pardo filed a motion for reconsideration, which the trial court denied.

Pardo appeals only the order granting summary judgment in favor of Ocwen. [9] She does not seek review of the trial court's summary judgment decisions in favor of MERS, MERSCORP, NWTS, and RCO Legal.

ANALYSIS

Holder of the Note under the DTA

Pardo's arguments on appeal rest on the premise that Ocwen was not the holder of the Note, and therefore was an unlawful beneficiary. Ocwen responds that it had constructive possession of the Note, as transferred by Fannie Mae and held by Ally. We agree that Ocwen had constructive possession of the Note and was the lawful beneficiary.

The DTA "creates a three-party transaction in which a borrower conveys the mortgaged property to a trustee, who holds the property in trust for the lender as security for the borrower's loan." Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58, 65, 358 P.3d 1024 (2015), review denied, 184 Wn.2d 1036, 379 P.3d 953 (2016). If the borrower defaults, the lender must strictly comply with the requirements of the DTA to nonjudicially foreclose on the property through a trustee's sale. Barkley, 190 Wn. App. at 65-66. One requirement for a trustee's sale is that "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." RCW 61.24.030(7)(a).

The DTA defines "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). Washington courts have construed RCW 61.24.005(2) as requiring the beneficiary to be the actual holder of the note or other debt instrument. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 89, 285 P.3d 34 (2012).

***4** The holder of the note may have actual or constructive possession. See RCW 62A.3-201 U.C.C. cmt. 1 (a holder may possess a note "directly or through an agent"); Gleeson v. Lichty, 62 Wash. 656, 659, 114 P. 518 (1911) ("But, if we assume that the note was not in [the defendant's] actual possession, it was clearly under his control, and therefore constructively in his possession."); Barkley, 190 Wn. App. at 69 (bank was holder of the note through its agent). This constructive control may occur through an agent. Bain, 175 Wn.2d at 106.

The DTA requires proof of the beneficiary's status as the holder of the note as a prerequisite to a trustee's sale. RCW 61.24.030(7)(a). "A declaration by the beneficiary

made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note" is sufficient proof that the beneficiary is, in fact, the holder. RCW 61.24.030(7)(a); see Brown v. Wash. State Dep't of Commerce, 184 Wn.2d 509, 544, 359 P.3d 771 (2015) ("[A] party's undisputed declaration submitted under penalty of perjury that it is the holder of the note satisfies RCW 61.24.030(7)(a)'s requisite to a trustee sale"). "[O]nly the actual holder of the promissory note ... may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." Bain, 175 Wn.2d at 89. When an unlawful beneficiary appoints a successor trustee, "the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 306, 308 P.3d 716 (2013), abrogated in part on other grounds by Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 334 P.3d 529 (2014).

An appellate court reviews de novo an order granting summary judgment and performs the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); Owen, 153 Wn.2d at 787.

Ocwen as Holder of the Note

In this case, Fannie Mae became the owner and holder of the Note upon purchase of the Loan. Fannie Mae constructively held the Note through Ally while Ocwen serviced the Loan under the terms established in the Guide. The Guide listed foreclosure actions among the "limited circumstances" that would alter Fannie Mae's status as the holder of the Note. [10] Specifically, the Guide stated that

> [i]n order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions. [11]

The Guide further specified that the "temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure." [12]

These provisions of the Guide controlled possession of the Note in the case at hand. As stated in the Guide, Ocwen, as servicer of the Loan, received temporary possession of the Note at the commencement of foreclosure proceedings against the home. Possession of the Note "automatically and immediately" transferred from Fannie Mae to Ocwen when foreclosure proceedings began. [13] Further, Ocwen filed a sworn beneficiary declaration on April 19, 2013, thus fulfilling the requirement for proof of beneficiary status under ROW 61.24.030(7)(a). See Brown, 184 Wn.2d at 544. [14] Thus, Ocwen became the holder of the Note and lawful beneficiary.

Ocwen's Constructive Possession of the Note

***5** Pardo also challenges Ally's ability to hold the Note on Ocwen's behalf. Specifically, she argues that Ally could not hold the Note for Ocwen as its agent because Ally was required to act exclusively on behalf of Fannie Mae. But the provisions of the Guide and the Custodial Agreement provide otherwise, allowing Ally to be the agent and hold the Note for both Ocwen and Fannie Mae in light of their common interests.

"[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." Moss v. Vadman, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970). This control of the agent by the principal is a prerequisite of agency. Bain, 175 Wn.2d at 107.

Under the terms of the Custodial Agreement between Ocwen and Ally, Ally was required to hold documents "for and on behalf of" Ocwen. [15] The Custodial Agreement also outlined other duties that Ally was to perform on behalf of Ocwen. For example, Ally was obligated to transfer physical possession of the Note to Ocwen within two business days of a proper request. [16] Ocwen agreed to pay for these services and could terminate the relationship. Thus, under the Custodial Agreement, Ally was required to perform duties on

behalf of Ocwen and was subject to Ocwen's control. Ocwen maintained ultimate control over the relationship, with the ability to request documents and terminate the relationship. Therefore, the Custodial Agreement established the requisite accountability and control of a principal over its agent to create an agency relationship between Ocwen and Ally.

Pardo argues that Ally could not serve as Ocwen's agent because the Guide, which was incorporated by the Custodial Agreement, specified that "[i]f Fannie Mae possesses the note through a document custodian, the document custodian has custody of the note for Fannie Mae's exclusive use and benefit." [17]

But the Guide also established provisions for the role of the document custodian upon transfer of possession of a note to a servicer. For those notes held by a document custodian, "the custodian also has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit." [18]

Based on this provision of the Guide, Ocwen became the holder of the Note through constructive possession even though the Note remained in Ally's physical custody. By transferring constructive possession of the Note to Ocwen, Ally properly performed its duties under both the Guide and the Custodial Agreement. Thus, in the context of the foreclosure proceedings initiated against the home, Fannie Mae's and Ocwen's interests were aligned and there was no conflict inherent in Ally's role as document custodian for both Fannie Mae and Ocwen. [19]

***6** Based on the terms of the Guide and Custodial Agreement, constructive possession of the Note transferred to Ocwen, making Ocwen the lawful beneficiary for the purposes of the DTA. As the lawful beneficiary, Ocwen had the legal authority to appoint a successor trustee to conduct the sale of Pardo's property. Therefore, we affirm the trial court's decision to dismiss Pardo's DTA claim with prejudice.

Additional Claims

Pardo raises CPA, CLA, and negligence claims based on Ocwen's allegedly deceptive behavior of posing as the beneficiary without being the actual holder of the Note. Pardo concedes that these claims fail if Ocwen was the lawful holder of the Note. Because Ocwen had constructive possession of the Note and was the beneficiary, we accept Pardo's well-taken concession as to her additional claims.

Finally, Pardo requests her fees on appeal under RAP 18.1(a) and RCW 19.86.090. Reasonable attorney fees are available for successful CPA claims. RCW 19.86.090. This includes attorney fees on appeal. Nguyen v. Glendale Constr. Co., Inc., 56 Wn. App. 196, 208, 782 P.2d 1110 (1989). Pardo has not prevailed on her CPA claim below or on appeal and therefore is not entitled to recover her reasonable attorney fees on appeal.

Affirmed.

WE CONCUR:

Spearman, J.

Dwyer, J.

All Citations

Not Reported in Pac. Rptr., 2018 WL 3625777

Footnotes

1 Clerk's Papers (CP) at 2596.

2 CP at 2641.

3 CP at 149 (boldface omitted).

4 CP at 1961 (boldface omitted). Pardo intended the letter to be a " 'qualified written request' " under the federal Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605(e). CP at 1961-62. She also alleged fraudulent withholding of disclosures and documentation in violation of the federal Truth in Lending Act (TILA), 15 U.S.C. § 1601. CP at 1962.

5 CP at 1961 (boldface omitted).

6 CP at 1962-68.

7 Pardo does not appeal this decision.

8 Pardo does not appeal this decision.

9 In Pardo's reply brief, she states that she “does not seek review of the dismissal of Defendants Fannie Mae, RCO Legal, P.S., Northwest Trustee Services, MERS, or MERSCORP Holdings, Inc.” See Appellant's Reply Br. at 1 n.1.

10 CP at 2596.

11 CP at 2597.

12 CP at 2597.

13 CP at 2597.

14 A similar transfer of holder status was discussed without disapproval in Brown, where the Freddie Mac Servicer's Guide provided that the servicer would gain actual or constructive possession of the original note before commencement of foreclosure proceedings. 184 Wn.2d at 523. Under the terms of the Freddie Mac Servicer's Guide, “the servicer is deemed to be in constructive possession of the note when the servicer commences a legal action.” Brown, 184 Wn.2d at 523. The Washington Supreme Court determined that this split of ownership from note enforcement was authorized and did not criticize the procedure. Brown, 184 Wn.2d at 523.

In the same way, Ocwen becomes the holder of the Note for the purposes of the foreclosure action under the terms of the Guide. As the holder of the Note, Ocwen was the lawful beneficiary entitled to appoint a successor trustee. See Walker, 176 Wn. App. at 306; Bain, 175 Wn.2d at 89.

15 CP at 2641.

16 In July 2014, Ocwen requested the Note from Ally and received the original note the next day.

17 CP at 2596.

18 CP at 2597.

19 Pardo also contends that Ocwen did not possess the Note because Ally's custodial log book showed that Ally continuously held the Note for Fannie Mae from March 2008 through July 2014, including the time period of the foreclosure proceedings beginning April 2013 and ending with the trustee's sale on March 14, 2014. The log shows that the Note was released and physically transferred to Ocwen on July 31, 2014.

Despite the lack of a record in the computer system, the Guide specified that at the commencement of foreclosure proceedings, constructive possession of the Note automatically transfers from Fannie Mae to the loan servicer while held by the document custodian. This transfer is immediate and automatic, without any additional requirements. Ally's failure to record the transfer of the Note in its internal computer tracking system did not alter or abrogate the process outlined in the Guide or impact Ocwen's status as the holder of the Note under the terms of the Guide.

End of Document

APPENDIX B - ORDER DENYING MOTION FOR RECONSIDERATION

FILED
8/24/2018
Court of Appeals
Division I
State of Washington

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

DARLA J. PARDO, a single woman,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, a Washington corporation; RCO LEGAL, P.S., a Washington Professional Services Organization; OCWEN LOAN SERVICING LLC, a limited liability Company; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States Government Sponsored Enterprise,

Respondents.

No. 76622-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Darla Pardo, has filed a motion for reconsideration. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Trickey, J

APPENDIX C - ORDER DENYING MOTION TO PUBLISH

FILED
8/24/2018
Court of Appeals
Division I
State of Washington

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

DARLA J. PARDO, a single woman, Appellant, v. NORTHWEST TRUSTEE SERVICES, a Washington corporation; RCO LEGAL, P.S., a Washington Professional Services Organization; OCWEN LOAN SERVICING LLC, a limited liability Company; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States Government Sponsored Enterprise, Respondents.	No. 76622-8-I ORDER DENYING MOTION TO PUBLISH

The appellant, Darla Pardo, has filed a motion to publish herein. The court has taken the matter under consideration and has determined that the opinion is not of precedential value.

Now, therefore, it is hereby

ORDERED that the unpublished opinion filed July 30, 2018, shall remain unpublished.

FOR THE COURT:

Trickey, J

JBT & ASSOCIATES, P.S.

September 20, 2018 - 1:36 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76622-8
Appellate Court Case Title:	Darla Pardo, Appellant v. RCO Legal et al, Respondent
Superior Court Case Number:	14-2-11741-8

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