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75044-5

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

NO. 75044-5-1

MICHAEL SHIELDS and BONNIE SHIELDS,

Defendants/Appellants,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE
FOR SAXON ASSET SECURITIES TRUST 2006-2 MORTGAGE
LOAN ASSET BACKED CERTIFICATES, SERIES 2006-2

Defendant/Respondent.

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

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

| | | |
|-----|--|----|
| I | INTRODUCTION..... | 1 |
| II | ASSIGNMENTS OF ERROR..... | 4 |
| | A. Issue Pertaining to Assignments of Error..... | 4 |
| III | STATEMENT OF THE CASE..... | 4 |
| IV | LEGAL STANDARDS OF REVIEW..... | 9 |
| | A. SUMMARY DISMISSAL OF ACTIONS..... | 9 |
| V | ARGUMENT..... | 11 |
| | A. Holder and Related Concepts Defined..... | 11 |
| | B. Under Washington law, the Holder of a Secured Mortgage Note is Entitled to enforce the DOT that Secures the Note..... | 12 |
| | 1. There is no Evidence Respondent has any connection to Appellant 1’s Note..... | 12 |
| | 2. Respondent has never Held the Note..... | 13 |
| V | CONCLUSION..... | 15 |

TABLE OF AUTHORITIES

STATE STATUTES

RCW CHAPTER 61.24

| | | |
|-----|--------------------|----|
| (1) | RCW 61.24.005..... | 11 |
|-----|--------------------|----|

RCW CHAPTER 62A.1

| | | |
|-----|--------------------|-----------------|
| (1) | RCW 62A.1-201..... | 2, 3, 9, 11, 15 |
|-----|--------------------|-----------------|

RCW CHAPTER 23.95

| | | |
|-----|--------------------|---|
| (1) | RCW 23.95.505..... | 1 |
|-----|--------------------|---|

CASE LAW

1. *Bain v. Metro. Mortg. Grp., Inc.*,
175 Wn.2d 83 (2012).....11

2. *Balise v. Underwood*, 62 Wn.2d 195,
381 P.2d 966 (1963).....10

3. *Barber v. Bankers Life & Cas. Co.*,
81 Wn.2d 140, 500 P.2d 88 (1972).....10

4. *Brown v. Washington Department
of Commerce*, 184 Wn.2d 509 (2015).....9, 12, 15

5. *LaPlante v. State*, 85 Wn.2d 154, 158,
531 P.2d 299 (1975).....9, 10

6. *Morris v. McNicol*, 83 Wn.2d 491,
519 P.2d 7 (1974).....10

7. *Preston v. Duncan*, 55 Wn.2d 678, 681,
349 P.2d 605 (1960).....10

MISCELLANEOUS AUTHORITY

1. *6 J. Moore, Federal Practice* 56.07, 56.15(3)
(2d ed. 1948).....10

2. *Trautman, Motions for Summary Judgment:
Their Use and Effect in Washington*, 45
Washington Law Review 1, 15 (1970).....10

I INTRODUCTION

On March 31, 2006, Saxon Mortgage, Inc. ("Saxon") originated a mortgage refinance loan on behalf of Defendant/Appellant Michael Shields ("Appellant 1"). The loan consisted of a note ("Note") and deed of trust ("DOT"), both allegedly executed on or about March 31, 2006. The Note and DOT named Saxon the Lender, and the DOT named Fidelity National Title as the trustee and Saxon as the beneficiary. Stewart Mortgage Services recorded the DOT in the King County Auditor's Office under File no. 200604250015978 on April 25, 2006. *Id.*

At some undetermined point in time, Appellant 1's Loan (Note and DOT) was allegedly transferred into a securitized trust. The name of the trust that Appellant 1's Loan was allegedly transferred into is Saxon Asset Securities Company Mortgage Loan Asset Backed Securities, Series 2006-2 ("Trust 1"). There is no evidence in the record that Appellant 1's Loan was ever actually transferred into Trust 1. Respondent is not Trust 1.

Moreover, Trust 1 did not commence the lawsuit that is the subject of this appeal. This lawsuit was commenced by Respondent (Deutsche Bank National Trust Co., as trustee for Saxon Asset Securities Trust 2006-2 Mortgage Loan Asset Backed Certificates, Series 2006-2).

There is evidence that Trust 1 exists as a legal person, but there is *no evidence* in the record, not a shred, that Respondent exists as a legal person. Only a legal person can initiate a legal proceeding in the State of Washington. *See RCW 23.95.505(2).*

CR 17(a) demands that every action be prosecuted in the name of the real party in interest. An entity that is not a legal person cannot prosecute an action in Washington. Therefore an entity that is not a legal person cannot be a real party in interest. Accordingly, on the basis of Respondent's lack of legal status, without regard to other legal impediments, Respondent had no legal right to commence the foreclosure.

Appellants raised the real party in interest issue in the trial court. The trial court agreed that Respondent was not the real party in interest.

Finally, Appellant 1's Note bears a *specific endorsement* from Saxon to Deutsche Bank National Trust Co. as Trustee for the Registered Holders of Saxon Asset Securities Trust 2006-2, Mortgage Loan Asset Backed Certificates, Series 2006-2 ("Trust 2"). Therefore, even if Respondent had been a legally viable person, and had been the real party in interest, Respondent still would not have been entitled to commence this foreclosure.

Respondent apparently has possession of Appellant 1's Note. Under current Washington law, however, only the *holder* of a secured mortgage note is entitled to enforce the DOT that secures repayment of the debt obligation for which the mortgage note is taken as payment.

RCW 62A.1-201(b)(21) offers two ways to become the *holder* of a promissory note: (1) take possession of a blank indorsed note; or (2) take possession of a specifically indorsed note and be the person to whom the note is indorsed. Since Appellant 1's Note was specifically indorsed to

someone other than Respondent, even though Respondent has possession of the Note, Respondent cannot be the Note Holder.

Respondent is not the person to whom the Note is indorsed. Saxon, the Loan originator, specifically indorsed the Note to Trust 3. As a result, though Respondent possesses the Note, Respondent is not the Note Holder, and never has been the Note Holder. *RCW 62A.1-201(b)(21)*.

In Washington, the Note Holder is the beneficiary, and only the beneficiary is entitled to foreclose, judicially or non-judicially. Resultantly, Respondent was not entitled to commence this foreclosure, even though Respondent had possession of the Note. *Id.*

The trial court agreed with the analysis contained in this Introduction. Nevertheless, the court denied Appellants' motion for summary judgment and conditionally granted Respondent's motion for summary judgment. The court conditionally granted Respondent's motion because Respondent represented to the court that Saxon had indorsed the Note to Respondent, even though Respondent knew Saxon had indorsed the Note to Trust 3.

The condition imposed by the court was that, after Respondent's summary judgment hearing, Respondent file a Note containing an indorsement from Saxon in Respondent's *exact name*. Respondent knew the Note contained no such indorsement, but allowed the court to believe the Note contained such an indorsement to win the motion. Respondent

has not filed a Note in the trial court that contains an indorsement from Saxon in Respondent's *exact name*.

The only indorsement on the Note is an indorsement to Trust 2. Consequently, the trial court's condition has never been met.

For each of the reasons stated above, Appellants' motion to dismiss should have been granted, and Respondent's motion for summary judgment should have been denied.

This court should reverse the lower court's conditional summary judgment order in favor of Respondent (because the trial court's condition has never been, and can never be, met) and remand the case to the lower court with instructions to grant Appellants' motion for dismissal.

II ASSIGNMENTS OF ERROR

1. The Trial Court erred by failing to grant Appellants' Motion for Dismissal.
2. The Trial Court Erred by granting Respondent's Motion for Summary Judgment.

A. Issue Pertaining to Assignments of Error

1. Is Respondent Entitled to Foreclose if Respondent is not a legal person in Washington, and Respondent does not hold Appellant 1's Note?

III STATEMENT OF THE CASE

On March 31, 2006, Saxon originated a mortgage refinance loan on behalf of Appellant 1. The loan consisted of the Note and DOT. *VRP of July 17, 2015 Hearing* ("VRP 1"), at 5: 9-10.

On September 26, 2008, Saxon assigned all of its interest in the Note and DOT to Deutsche Bank National Trust Co. as trustee for Saxon Asset Securities Trust 2006-2 (“Trust 3”) (“Assignment 1”). *Id.*, at 9: 16-19. Saxon recorded the assignment in the King County Auditor’s Office on October 3, 2008 under file no. 20081003000851.

On or about October 22, 2008, the Loan fell into default. *Id.*, at 5: 10-11. Approximately 14 months later, on December 29, 2009, Trust 3, acting through its purported attorney in fact, Ocwen Loan Servicing, LLC (“Ocwen”), assigned all of its interest in the DOT, *not the Note*, to Trust 2 (“Assignment 2”).¹ *Id.*, at 9: 19 through 10: 2.

Respondent—which is not Trust 1, 2, or 3--commenced this lawsuit on or about August 15, 2014. *Id.*, at 5: 11-12. Respondent commenced the lawsuit on behalf of Saxon Asset Securities Trust 2006-2 Mortgage Loan Asset Backed Certificates, Series 2006-2 (“Trust 4”). *Id.*, at 2: 18-21. Respondent is Trust 4.

No evidence was ever presented to the lower court that established that Trust 4 had ever had, at any point in time, any interest in Appellants’ Note or DOT. In fact, no evidence was ever presented to the lower court that established Trust 4 (Respondent) is even a legal entity under the laws of the State of Washington.

On July 17, 2015, Appellants brought on for hearing a motion for summary judgment. *Id.*, at 2: 11-12. In relevant part, the motion was based

¹ Trust 2 is the same entity to which Saxon specifically endorsed the Note.

on Appellants' claim that Respondent was not the real party in interest because Saxon had assigned Appellant 1's Loan to Trust 3 by Assignment 1 on September 26, 2008, and Trust 3 had subsequently assigned the DOT to Trust 2 via Assignment 2 on December 29, 2009. *Id.*, at 7: 23 through 8: 4. Respondent (Trust 4) is neither Trust 2 nor Trust 3. Consequently, Respondent had never been entitled to foreclose because Respondent had never held any interest in Appellant 1's Note. *Id.* The lower court appeared to agree with Appellants' analysis. *Id.*, at 10: 2-18.

Respondent responded by arguing that, regardless of the two assignments, Respondent was entitled to foreclose because it was the note holder. *Id.*, at 12: 19 through 13: 10; and 19: 5 through 20: 7. In making this argument, Respondent did not challenge Appellants' assertion that Assignment 2 was made to a person—Trust 2--*other than Respondent*. *Id.*

The court informed Respondent that Respondent was not an entity to which the Note had been indorsed or to which the DOT had been assigned. *Id.*, at 21: 22-25. Respondent then indicated Assignment 1 had been made to Respondent. *Id.*, at 22: 1-4. The court disagreed. It found the Note had never been assigned to Respondent, and that Respondent never had a recorded interest in the Note or DOT. *Id.*, 29: 12-14.

At the conclusion of the hearing, the court, while leaning in the direction of granting Appellants' summary judgment motion, decided to allow additional briefing on specific issues. *Id.*, at 36: 11-15.

There was an intervening hearing on October 28, 2015. VRP of October 28, 2015 hearing (“VRP II”). At that hearing, over Appellants’ objection, the court permitted Appellants’ counsel to withdraw. *VRP II*, at 11: 6-7.

The next hearing was held on February 4, 2016. It was held for the purpose of deciding Respondent’s motion for summary judgment. VRP of February 4, 2016 hearing (“VRP III”), at 3: 4-6.

Respondent argued it was entitled to foreclose, notwithstanding Assignments 1 and 2, because it was the holder of the note, and there were no genuine issues of material fact. *Id.*

The court explained that it was concerned because it could not trace how Respondent became the holder of the Note. Ultimately, the court, after quickly and not very thoroughly inspecting the Note, made the following statement:

They [Respondent] have the note that was signed over from Saxon Meeting, Inc., who was the owner of the note, right? And it was signed over to Deutsche Bank National Trust Company as trustee for Saxon Asset Securities *Trust 2006-2*, Mortgage Loan Asset Backed *Certificates*, Series 2006-2.

VRP III, at 10: 15-19. (emphasis added).

The court then informed the hearing participants that, upon Respondent meeting one condition, the court would be satisfied that Saxon had transferred the Note and DOT to Respondent. The condition was that Respondent would have to:

file the document [Note] that shows that there was, in fact, a transfer from the owner of the note, and the owner of the

deed of trust to the plaintiff – the exact named plaintiff. Maybe it wasn't this case. Maybe it was another Deutsche Bank case where people kept doing the names differently and saying it doesn't matter, but it does matter. So you need to file that [the Note with the exact-named-plaintiff endorsement]. And then I am satisfied – I am satisfied based on that, that they are the holders of the note, and they are entitled to enforce the note and foreclose on the deed of trust.

VRP III, at 19: 21 through 20: 7. (emphasis added).

As the above quote indicates, the court's ruling was conditioned on Respondent filing a copy of the Note that contained a specific indorsement from Saxon to Respondent – Deutsche Bank National Trust Company as trustee for Saxon Asset *Securities* Trust 2006-2 Mortgage Loan Asset Backed *Certificates*, Series 2006-2 (Trust 4). *Id.*

A note containing such an endorsement has never been filed. If a Note has been filed by Respondent since the February 4, 2016 hearing, the Note, unless it was a forgery, would contain a specific indorsement from Saxon to Trust 2, the same entity to which, in Assignment 2, Trust 3 assigned whatever interest it had in the Note and DOT.²

Trust 2 is not Respondent (Trust 4). The two entities are not the same entity. In fact, there is no evidence in the record that either entity is a legal person in Washington.

² At the moment the court was imposing the condition, Respondent clearly was aware that the indorsement had not been made to Respondent.

At some undetermined point in time, Appellant 1's Loan (Note and DOT) was allegedly transferred into Trust 1. However, there is no evidence in the record that Appellant 1's Loan was ever actually transferred into Trust 1.

Moreover, Trust 1 did not commence the lawsuit that is the subject of this appeal. This lawsuit was commenced by Respondent—Trust 4.

Finally, Appellant 1's Note bears a *specific endorsement* from Saxon to Trust 2. Under current Washington law, the *holder* of a secured mortgage note, and no one else (not even the owner of the note), is entitled to enforce the DOT that secures repayment of the debt obligation for which the note is taken as payment. *Brown*, 184 Wn.2d at 539 – 541. Since Appellant 1's Note was specifically endorsed to Trust 2 by Saxon, and Respondent is not Trust 2, Respondent is not the Holder of the Note. Respondent is in possession of a note that is specifically indorsed, but Respondent is not the entity to which the note is indorsed. *RCW 62A.1-201(b)(21)*.

The appeal followed the trial court's grant of Respondent's motion for summary judgment.

IV LEGAL STANDARDS ON REVIEW

A. Summary Dismissal of Actions

The purpose of summary judgment is to avoid trial when there is *no* genuine issue of material fact. On the other hand, a trial is *absolutely necessary* if there is a genuine issue as to *any* material fact. *LaPlante v.*

State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). A "material fact" is one upon which the outcome of the litigation depends. *Morris v. McNicol*, *supra*; and *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 500 P.2d 88 (1972).

Plaintiff must demonstrate by uncontroverted evidence that there is no genuine issue of material fact. *LaPlante v. State*, *supra* at 158; *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 Plaintiff does not sustain that burden, the court should not grant summary judgment, *regardless of whether Defendant submits affidavits or other materials or not*. *Preston v. Duncan*, *supra* at 683; 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 the non-moving party. In this case, if, after considering the material evidence in a light most favorable to Appellants, reasonable people might reach different conclusions about that evidence, then the trial court should have denied Respondent's motion for summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); *See Also* 6 J. Moore, *Federal Practice* 56.11(3), 56.15(3).

In this case, there was no issue of material fact regarding Respondent's status as the holder of the Note. It is absolutely clear that Respondent was not the holder of the Note when Respondent commenced the foreclosure action that is the subject of this litigation. Respondent's motion for summary judgment should have been denied, and Appellants' earlier motion for summary judgment should have been granted.

V ARGUMENT

A. Holder and Related Concepts Defined.

The term "holder" as utilized in RCW 61.24.005(2) is defined in RCW 62A.1-201(b)(21) as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." If an indorsement identifies the person to whom it makes the instrument payable, it is a *special indorsement*. RCW 62A.3-205(a). After an instrument has been specially indorsed, it becomes payable to the identified person and may be negotiated only by the indorsement of that person. *Id.* If the person to whom the note is indorsed has physical possession of the Note, then the person to whom the note is indorsed is also the *holder* of the Note. RCW 62A.1-201(b)(21).

RCW 61.24.005(2) defines the beneficiary of a deed of trust as the *holder* of the note. Washington courts accept the UCC definition of *holder* as the applicable definition for the purpose of Determining who is the beneficiary under RCW 61.24.005(2). *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 120 (2012).

Respondent bases its right to foreclose entirely on the claim that it is the *holder* of Appellant 1's Note.

B. Under Washington law, the Holder of a Secured Mortgage Note is Entitled to enforce the DOT that Secures the Note.

In *Brown v. Dept. of Commerce*, 184 Wn.2d 509 (2015), the Washington Supreme Court held the *holder* of a secured mortgage note is entitled to enforce the DOT that secures the note. *Brown*, 184 Wn.2d at 540. Thus, if Respondent is the holder of the Appellant 1's Note, as Respondent claims, then Respondent was entitled to enforce the DOT, and the foreclosure was proper. If, on the other hand, Respondent was not the holder of the Note, then Respondent was not entitled to enforce the DOT, and the foreclosure was void.

Upon the record below, Respondent was not the holder of Appellant 1's Note when Respondent commenced this litigation on August 14, 2014.

1. There is no Evidence Respondent has any connection to Appellant 1's Note.

Two assignments—Assignments 1 and 2--were executed and recorded in this case. Assignment 1 assigned the Note and DOT from Saxon to Trust 3. And even if Trust 3 is a trust for which Deutsche serves as trustee, Trust 3 is not the trust for which Deutsche commenced the litigation.

There is a similarity in the names between Trust 4 (Respondent) and Trust 3, so there may be a temptation to say Trust 3's name is close

enough to Respondent's name that Assignment 1 can be said to have been made to Respondent. But if that is true, Respondent assigned away all of its interests in Appellant 1's DOT to Trust 2 in Assignment 2.

So, even if Respondent did receive an interest in Appellant 1's Note and DOT by virtue of Assignment 1, Respondent transferred its interest in the DOT to Trust 2 in Assignment 2. Since the DOT contains the *power of sale* clause that grants the trustee the right to sell the property at public auction upon the borrower's default under the terms of the Note, Assignment 2—from Trust 3 (Respondent if Trust 3 and Respondent are deemed to be the same entity) to Trust 2--eliminated the successor trustee's right to sell the property at public auction for the benefit of Respondent.

Respondent will claim none of these facts matter because Respondent is the *holder* of the Note.

2. Respondent has never Held the Note.

At the February 4, 2016 summary judgment hearing, Respondent produced the Note for the court's inspection. After reviewing the Note very briefly, the court declared that Saxon, the originator of Appellant 1's Loan, had endorsed the Note to Respondent. *VRP III*, at 10: 15-19. On condition that Respondent would file the Note, and the Note would contain an indorsement that showed Saxon had transferred the Note to Respondent in Respondent's *exact name*, the court found Respondent was the holder of the Note.

Because it is currently the rule in Washington that the holder of a secured mortgage note is entitled to enforce the DOT, the court's ruling meant Respondent was entitled to foreclose--if and only if Respondent filed Appellant 1's Note, and the Note showed that Saxon transferred the Note to Respondent in Respondent's *exact name*. *VRP III*, at 19: 21 through 20: 7.

A note showing Saxon transferred the Note to Respondent in Respondent's *exact name* have never been filed. No such note was ever filed because no such note exists.

The specific indorsement on the Note is to Trust 2. The court simply did not examine the indorsement on the Note closely enough to realize the Note had not been indorsed to Respondent. Had it reviewed the Note more closely, based on everything the court stated in each of the three hearings, Appellants' summary judgment motion would have been granted.

Trust 2 is the same entity Respondent assigned the DOT to in Assignment 2 on December 29, 2009.

Thus, on August 14, 2014, the date on which Respondent commenced the litigation, the Note had already been indorsed to Trust 2 (if any such trust actually exists), and the DOT had already been assigned to the same trust. Consequently, while Respondent may have possession of the Note, Respondent is not, and has never been, the *holder of the Note*. Respondent is in possession of a Note that is indorsed to a specific person,

and Respondent is not that person. *RCW 62A.1-201(b)(21)*. What's more, Trust 2 also is not the Note Holder. Appellant 1's Note is specifically endorsed to Trust 2, but that trust, if it exists, does not have possession of the Note. *Id.*

Currently, in Washington, the holder of the note is the beneficiary, and only the beneficiary is entitled to foreclose. *Brown*, 184 Wn.2d at 539-540. Since Respondent has never held the Note, Respondent has never been entitled to foreclose.

VI CONCLUSION

In Washington, the holder of the note is the beneficiary and is the only person entitled to initiate a foreclosure action, judicially or non-judicially. If a note has been specifically indorsed, the only way a person can become the holder of the Note is if they have possession of the Note and they are the person to whom the Note is indorsed. *RCW 62A.1-201(b)(21)*.

In this case, the Note is specifically indorsed to someone other than Respondent. Hence, while Respondent may have possession of the Note, Respondent cannot be, and never has been, the holder of the Note. In the absence of holding the Note, Respondent was not entitled to foreclose.

The trial court's ruling should be reversed, and the case should be remanded to the trial court with instructions to dismiss the case.

Respectfully submitted,

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DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused Plaintiff's Amended Opening Brief to be served on the following representative for Defendants at the below stated address by U.S. Mail as previously agreed between the parties to this litigation:

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BONNIE SHIELDS



**Bonnie Shields,
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