70592-0

70592-0

No. 90509-6

No. 70592-0-I

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

ROCIO TRUJILLO

Appellant,

vs.

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

Appellees

OPENING BRIEF OF APPELLEE
NORTHWEST TRUSTEE SERVICES, INC.

Submitted By:
Joshua S. Schaer, WSBA No. 31491
RCO LEGAL, P.S.
13555 S.E. 36th St., Suite 300
Bellevue, WA 98006
(425) 457-7810

ORIGINAL

TABLE OF CONTENTS

I. Statement of the Case 1

II. Response to Assignments of Error 3

III. Response Argument 3

A. Standard of Review 3

B. Under Washington Law, the Note Holder is the Beneficiary 5

C. *Bain* Supports the Conclusion that a Beneficiary Must be the Note Holder. 6

D. An Ownership Interest in the Note Does Not Alter Wells Fargo's Status as the Note Holder, *i.e.*, Beneficiary 7

E. NWTS Received a Proper Declaration Before Recording theNotice of Trustee's Sale 13

1. Trujillo Lacks Standing to Assert that NWTS Could Not Rely on the Beneficiary Declaration or that NWTS was Improperly Appointed as the Successor Trustee 13

2. The Beneficiary Declaration Satisfied RCW 61.24.030(7) 15

3. Reliance on the Beneficiary Declaration Did Not Create a Lack of Good Faith. 17

F. Trujillo's Policy Concerns are Unwarranted. 20

IV. Conclusion 22

TABLE OF AUTHORITIES

Case Law

Abram v. Wachovia Mortg., 2013 WL 1855746
(W. D. Wash. Apr. 30, 2013) 17

Badgett v. Security State Bank, 116 Wn.2d 563,
807 P.2d 356, 360 (1991) 18

Bain v. Metro. Mortg. Group, Inc., 175 Wn.2d 83,
285 P.3d 34 (2012) 6

Beaton v. JPMorgan Chase Bank N.A., 2013 WL 1282225
(W. D. Wash. Mar. 25, 2013) 17

Brophy v. JPMorgan Chase Bank Nat'l Ass'n, 2013 WL 4048535
(E. D. Wash. Aug. 9, 2013) 14

Broughton Lumber Co. v. Burlington N. Santa Fe Ry. Co.,
174 Wn.2d 619, 625, 278 P.3d 173 (2012) 15, 17

Brown v. MacPherson's, Inc., 86 Wn.2d 293, 297,
545 P.2d 13 (1975) 3

Brummett v. Washington's Lottery, 171 Wn.App. 664, 678,
288 P.3d 48 (2012) 13

Carpenter v. Longan, 83 U.S. 271, 275, 21 L. Ed. 313 (1872) 6

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809,
828 P.2d 549 (1992) 19

Dave Robbins Const., LLC v. First Am. Title Co.,
158 Wn.App. 895, 899, 249 P.3d 625, 626 (2010) 3

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126
372 P.2d 193 (1962) 19

Elene-Arp v. Fed. Home Fin. Agency, 2013 WL 1898218
(W. D. Wash. May 6, 2013) 17

Gorman v. Garlock, Inc., 155 Wn.2d 198, 215, 118 P.3d 311 (2005).....4

Haberman v. Washington Public Power Supply System,
109 Wn.2d 107, 744 P.2d 1032 (1987)..... 4-5

Hansen v. Friend, 59 Wn.App. 236, 797 P.2d 521 (1990).....4

In re Butler, 2012 WL 8134951 (Bankr. W. D. Wash. Nov. 2, 2012).....11

In re Reinke, 2011 WL 5079561, *11
(Bankr. W.D. Wash. Oct. 26, 2011)..... 10-11

In re Tr.'s Sale of Real Prop. of Burns, 167 Wn. App. 265, 270,
272 P.3d 908 (2012)..... 21-22

In re Veal, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011).....8

Javaheri v. JPMorgan Chase Bank N.A., 2012 WL 3426278, *6
(C.D. Cal., Aug. 13, 2012).....14

John Davis & Co. v. Cedar Glen No. Four, Inc.,
75 Wn.2d 214, 222–23 (1969).....8

Kennebec, Inc. v. Bank of the West, 88 Wn.2d 718, 724-25,
565 P.2d 812, 816 (1977).....6

Lynott v. Mortg. Elec. Registration Sys., 2012 WL 5995053 at *2
(W. D. Wash. Nov. 30, 2012).....5

McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96,
233 P.3d 861 (2010) (Johnson, J., dissenting).....4

Mickelson v. Chase Home Fin. LLC, 2011 WL 5553821
(W. D. Wash. Nov. 14, 2011).....18

Norcon Builders, LLC v. GMP Homes VG, LLC,
161 Wn.App. 474, 486, 254 P.3d 835 (2011).....19

Osediacz v. City of Cranston, 414 F.3d 136, 140 (1st Cir. 2005).....13

Petheram v. Wells Fargo Bank, 2013 WL 4761049, *10
(W. D. Wash. Sept. 3, 2013) 17

Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 725,
189 P.3d 168 (2008) 4

Rouse v. Wells Fargo Bank, N.A., Case No. 13-5706-RBL
(W. D. Wash. October 2, 2013) 11, 17

Salts v. Estes, 133 Wn.2d 160, 171, 943 P.2d 275 (1997) 10

Sherman v. JPMorgan Chase Bank, N.A., 2012 WL 3071246
(W. D. Wash. July 29, 2012) 11

State Fin. Co. v. Moore, 103 Wash. 298, 174 P. 22 (1918) 11-12

Ullery v. Fulleton, 162 Wn. App. 596, 604, 256 P.3d 406 (2011) 13

Walker v. Quality Loan Service Corp., Slip Opin. No. 65975-8-I,
2013 WL 3989666 (Aug. 5, 2013) 13

Court Rules

CR 12(b)(6) 3, 4, 5, 12

CR 56(c) 3

R.A.P. 9.6(a) 1

R.A.P. 9.10 1

Secondary Sources

Legislative Materials

SB 5191, § 1(1) 10

SB 5191 § 2(10) 10

Treatises

11 Am. Jur. 2d *Bills and Notes* § 210 (2009).....8

Websites

http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5191.....10

http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/
Senate%20Bills/5191.pdf.....10

Statutes and Codes

Other State Statutes

I.C. § 45-1502(1).....5

ORS 86.705(2).....5

Revised Code of Washington

RCW 61.24.005(2).....5, 7, 8, 15, 16, 22

RCW 61.24.010(2).....8, 14, 19

RCW 61.24.030(7).....5, 13, 15, 17, 22

RCW 61.24.030(7)(a).....9, 15, 16, 18

RCW 61.24.030(7)(b).....9, 18

RCW 61.24.030(8).....9, 19

RCW 61.24.030(9).....9

RCW 61.24.031.....2, 9

RCW 61.24.031(a).....9

RCW 61.24.040.....9

RCW 61.24.050 9

RCW 61.24.070 9

RCW 61.24.100 9

RCW 61.24.100(1) 21

RCW 61.24.140 9

RCW 61.24.163 9

RCW 62A.3-103 7

RCW 62A.3-109 6

RCW 62A.3-201 5

RCW 62A.3-301 8

RCW 62A.9A-102 7

RCW 62A.9A-102(55) 6

RCW 62A.9A-203(g) 21

RCW 62A.9A-308(e) 21

RCW 62A.9A-310 20

RCW 62A.9A-607(a)(3) 21

I. STATEMENT OF THE CASE

On or about March 29, 2006, Appellant Rocio Trujillo ("Trujillo") executed a promissory note (the "Note") in the amount of $185,900.00, payable to Arboretum Mortgage Corp. Brief of Appellant at 5; CP 18 at ¶ F (showing amount of Note), Compl. at ¶ 10.[1] Trujillo secured repayment of the Note with a Deed of Trust. *Id.*; CP 17-34. On March 31, 2006, the Deed of Trust was recorded with the King County Auditor, and encumbered real property located in King County (the "Property"). CP 17, 19.

On November 1, 2011, Trujillo defaulted on the terms of the Note and Deed of Trust when she failed to make any further required loan payments. Brief of Appellant at 6; Compl. ¶ 17.

On February 2, 2012, an Assignment of Deed of Trust in favor of Wells Fargo Bank, N.A. was recorded under King County Auditor's No. 20120202000141. CP 35.

On or about March 14, 2012, Wells Fargo Bank, N.A. ("Wells Fargo") executed a sworn declaration (the "Beneficiary Declaration") stating that it was the actual holder of the Note. CP 36.

---

[1] Trujillo did not designate the Complaint as part of the Clerk's Papers on appeal. *Cf.* R.A.P. 9.6(a). Nonetheless, this brief will cite to that document in the event that the record is corrected in accordance with R.A.P. 9.10.

On or about May 30, 2012, as a result of Trujillo's default, Northwest Trustee Services, Inc. ("NWTS") sent her a Notice of Default. Brief of Appellant 6; CP 37-39.[2]

On June 8, 2012, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers of the original trustee, was recorded under King County Auditor's No. 20120608001749. CP 40.

On or about July 10, 2012, a Notice of Trustee's Sale was recorded under King County Auditor's No. 20120710001233. CP 41-44. This Notice set a sale date of November 9, 2013. *Id.* On March 7, 2013, Trujillo obtained an order enjoining the foreclosure from being completed. CP 46-47.

On May 31, 2013, the Hon. Judge Beth Andrus granted NWTS' Motion to Dismiss, and entered an order to that effect. CP 80-81. This appeal followed.

//

//

//

//

---

[2] Under RCW 61.24.031, a Notice of Default may be issued by the trustee, beneficiary, or *an authorized agent*. NWTS acted in the latter capacity prior to its appointment as successor trustee.

II. RESPONSE TO ASSIGNMENTS OF ERROR[3]

1. The trial court did not err in granting NWTS' Motion to Dismiss; the question of being a "real party in interest" does not pertain to a foreclosure trustee.

2. The trial court did not err in determining that NWTS could rely upon a Beneficiary Declaration prior to recording the Notice of Trustee's Sale.

III. RESPONSE ARGUMENT

A. Standard of Review.

An order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn.App. 895, 899, 249 P.3d 625, 626 (2010), *citing Burton v. Lehman,* 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).[4]

---

[3] Trujillo does not assign error to the dismissal of any specific cause of action, *i.e.*, Criminal Profiteering, violation of the Consumer Protection Act, or Intentional Infliction of Emotional Distress. Rather, she focuses solely on an issue that essentially forms the underlying basis for her arguments. Given the lack of substantive argument presented by Trujillo on these claims, which should itself provide a basis to affirm the decision below, NWTS will not directly address the elements of each one.

[4] Trujillo contends that the standard of review is equivalent to consideration under CR 56(c). Brief of Appellant at 11. Given that: 1) Wells Fargo's participation in the case was resolved via summary judgment, and 2) the trial court could have easily converted NWTS' dismissal to summary judgment based on reviewing material outside the pleadings, *e.g.*, the Beneficiary Declaration, then it would be most economical to adopt Trujillo's argument on the applicable standard. If so, then this Court need not assume the validity of any hypothetical facts in Trujillo's Complaint. *See Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975) ("a dismissal motion should be treated as a motion for summary judgment, if only to keep the court from having to act completely in the dark as to the actual nature of the plaintiff's cause of action.").

Under CR 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief can be granted. The gravamen of the court's inquiry is whether the plaintiff's claim is legally sufficient, which is answered by looking to the face of the pleadings. *Id.*; *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008). Dismissal is proper where the claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). Hypothetical facts must bear a logical relation to the claims raised in the complaint. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010) (Johnson, J., dissenting). The court is "not required to accept a complaint's legal conclusions as true." *Rodriguez* at 717-18.

In addition to the pleadings, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Id.* at 726. Submission of extraneous material normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn.App. 236, 797 P.2d 521 (1990). However, "if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, [the] motion remains one under CR 12(b)(6)." *Haberman v. Washington Public Power Supply System*,

109 Wn.2d 107, 744 P.2d 1032 (1987).

Here, the presented facts did not entitle Trujillo to relief against NWTS, regardless of whether considered under CR 12(b)(6) or converted to summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

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

Trujillo's lengthy deconstruction of RCW 61.24.030(7) ignores one crucial fact: the Washington Deed of Trust Act ("DTA") defines a beneficiary as "the *holder* of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2).[5]

Basic principles of negotiable instruments establish that, if a note is payable to bearer, it may be negotiated by transfer of possession alone. RCW 62A.3-201. If a note is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. *Id.* This may be either a special indorsement, which identifies

---

[5] Trujillo's statement, "the beneficiary of the DOT is the owner of the promissory note or other obligation secured by the deed of trust," overlooks that Washington defines beneficiary strictly in the context of holding a note, not just receiving the beneficial interest in a deed of trust, such as the Oregon or Idaho Trust Deed Acts require. Brief of Appellant at 13 (emphasis omitted); *compare* RCW 61.24.005(2), ORS 86.705(2) ("Beneficiary means a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the persons successor in interest...."), I.C. § 45-1502(1) (same definition); *see also Lynott v. Mortg. Elec. Registration Sys.*, 2012 WL 5995053 at *2 (W. D. Wash. Nov. 30, 2012) (possession of a note, not transfer of a deed of trust, makes one a beneficiary). Thus, the phrase "beneficiary of the DOT" has no statutory meaning in Washington.

a person to whom the note is now payable, or a blank indorsement that makes the note bearer paper. RCW 62A.3-109. "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its *holder*.[6]

C. *Bain* Supports the Conclusion that a Beneficiary Must be the Note Holder.

In *Bain*, Judge Coughenour of the United States District Court for the Western District of Washington certified three issues for review under RCW 2.60: 1) whether MERS is a lawful beneficiary in Washington, 2) what is the legal effect of MERS acting as an unlawful beneficiary, and 3) whether a CPA violation accrues against MERS if it acted as an unlawful beneficiary. *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

The Washington Supreme Court answered that, according to the DTA, MERS could not be a beneficiary if it "never *held* the promissory note or other debt instrument secured by the deed of trust." *Id.* at 110 (emphasis added). However, the Court could not rule on the effect of this result based on the record presented. *Id.* at 114.

---

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

Nonetheless, *Bain* clearly finds that one must be "the *holder* of the instrument or document evidencing the obligations secured by the deed of trust" in order to qualify as a lawful beneficiary under state law. *Id.* at 99-103 (emphasis added). In fact, the requirement that "the beneficiary must hold the promissory note" was the Supreme Court's principal concern. *Id.* at 102, 120.

Bain states:

> [f]inding that the beneficiary must *hold* the promissory note (or other 'instrument or document evidencing the obligation secured') is also consistent with recent legislative findings to the foreclosure fairness act of 2011, Laws of 2011, ch. 58, § 3(2).
>
> [...]
>
> There are many different scenarios, such as when homeowners need to deal with the *holder* of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance.

Id. at 118 (emphasis added).

Trujillo's "idea that the *owner* of the debt is the *beneficiary*..." has been refuted by the Supreme Court's interpretation of what constitutes a beneficiary, and by the express language of RCW 61.24.005(2). *Cf.* Brief of Appellant at 30 (emphasis in original).

D. An Ownership Interest in the Note Does Not Alter Wells Fargo's Status as the Note Holder, *i.e.*, Beneficiary.

The term "owner" is not defined in either RCW 62A.3-103

(negotiable instruments) or RCW 62A.9A-102 (secured transactions). RCW 62A.3-301, however, explicitly states that "[a] person may be a person entitled to enforce the instrument even though the person is *not the owner* of the instrument…." (emphasis added). *See also In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) ("one can be an owner of a note without being a holder."); 11 Am. Jur. 2d *Bills and Notes* § 210 (2009) (discussing differences between a "holder" of a note, and an "owner" of a note).

Indeed, "the holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is *not necessary* for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969) (emphasis added, citation omitted).

The DTA itself does not define the terms "owner", "holder", or "actual holder."[7] But the DTA does provide that: (1) the *beneficiary* is the only party entitled to remove or appoint a trustee (RCW 61.24.010(2)), (2) that the *beneficiary*, its agent, or trustee must transmit a notice of

---

[7] The DTA specifically excludes "investors," *i.e.*, those with a separate contractual obligation relating to the Note, from the definition of "beneficiary" unless the investor has the right to enforce the Note in its own right. *See* RCW 61.24.005(2) (beneficiary excludes entities with an interest in Note "as security for a different obligation.").

default (RCW 61.24.030(8); RCW 61.24.031(a))[8], (3) that the trustee may rely on the *beneficiary's* declaration referenced in RCW 61.24.030(7)(a) (RCW 61.24.030(7)(b)), (4) that the *beneficiary* must satisfy the "initial contact" and "due diligence" requirements under RCW 61.24.031[9], (5) the *beneficiary* must transmit a notice of trustee's sale (RCW 61.24.040), (6) the *beneficiary* may declare the trustee's sale or trustee's deed void (RCW 61.24.050), (7) that the *beneficiary* may issue a credit bid at the trustee's sale (RCW 61.24.070), (8) that the *beneficiary* may not seek a deficiency judgment after the sale (RCW 61.24.100), (9) the *beneficiary* is restricted pursuant to RCW 61.24.140 from demanding or collecting rents from a tenant, and (10) the *beneficiary* is subject to the statutory mediation process under RCW 61.24.163.

In its most recent session, the Washington Legislature considered, *but declined to adopt*, a bill that would have changed the definition of "beneficiary" from its current meaning of "holder" to:

> *[o]wner* of the instrument or document, including a promissory note, evidencing the obligations secured by the deed of trust, *even if another party or parties are named as the holder*, seller, mortgagor, nominee, or agent, excluding persons holding the same as security for a different obligation.

---

[8] As part of the notice of default requirement, the *beneficiary* must declare the borrower or grantor in default and must certify it has complied with RCW 61.24.031 and RCW 61.24.163, if applicable. RCW 61.24.030(8), (9).

[9] RCW 61.24.031 refers to "*beneficiary*" forty-eight times, and not once to "owner."

SB 5191, § 1(1) (emphasis added).[10]

The same bill would also have required that "only the owner of the beneficial interest or the authorized agent of the owner of the beneficial interest may foreclose a deed of trust.... The foreclosure must be in the name of the owner of the beneficial interest." *Id.* at pp. 6-7, § 2(10). But SB 5191 did not leave a State Senate committee.[11]

Thus, the Legislature has considered and rejected the very legal requirement that Trujillo now asks the Court to adopt. This Court should not impose a new rule of law where the Legislature has declined to do so. *See, e.g.*, *Salts v. Estes*, 133 Wn.2d 160, 171, 943 P.2d 275 (1997) (Court will not "transform" statutory language through judicial construction).

Rather, courts interpreting Washington law have consistently found that a Note holder and Note owner are distinct legal entities.[12] For example, the United States Bankruptcy Court for the Western District of Washington recently found:

> [t]he issue of ownership, however, is largely immaterial... [b]ecause under Washington law the focus of the analysis is on who is the holder of the note, and thus the beneficiary under the [DTA], Plaintiff's concern should be whether he knows who to pay.

---

[10] http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Bills/5191.pdf
[11] http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5191
[12] Certainly, a Note holder can *also* be the owner, depending on the factual circumstances, but it does not follow that they *must* be one and the same.

> *In re Reinke*, 2011 WL 5079561, *11 (Bankr. W.D. Wash. Oct. 26, 2011), *citing In re Veal*, 450 B.R. 897, 912 (9th Cir. B.A.P. 2011); *see also In re Butler*, 2012 WL 8134951 (Bankr. W. D. Wash. Nov. 2, 2012) (rejecting plaintiff's claim "that a holder of a note must also prove that it is the owner of the obligation....").

Furthermore, Judge Ronald Leighton of the United States District Court for the Western District of Washington recently dismissed an action that presented the same issue, finding that "courts have uniformly rejected that only the 'owner' of the note may enforce it." *Rouse v. Wells Fargo Bank, N.A.*, Case No. 13-5706-RBL (W. D. Wash. October 2, 2013), *citing Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102 (W. D. Wash. 2011), *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728 (W. D. Wash. May 13, 2013) (authority to foreclose based on possession of a note indorsed in blank, *not* because of Fannie Mae's ownership interest); *see also Sherman v. JPMorgan Chase Bank, N.A.*, 2012 WL 3071246 (W. D. Wash. July 29, 2012) (enforceability of note and deed of trust based on holder status, not ownership).

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

> [s]ection 3509, Rem. & Bal. Code... provides that a negotiable instrument is discharged when the debtor becomes the holder of the instrument at or after maturity, in his own right.

> [...]
>
> [t]he record shows that the Birches were not the holders of the note, but the owners thereof, and the statute grants a discharge only to the holder. The record further shows that the Birches became the owners of the note before maturity, and the statute only discharges the obligation when the principal debtor becomes a holder 'at or after maturity'.
>
> *Id.* at 301.

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

Here, Trujillo admits that Wells Fargo had possession of the Note when the foreclosure process began. Compl. at ¶ 26.[13] Her principal contention, however, is that Fannie Mae's ownership interest should defeat Wells Fargo's authority – as the Note holder – to foreclose on the Property. Brief of Appellant at 6, 7. But although Trujillo may suggest that ownership is required to act as a beneficiary under the DTA, her position is contradicted by numerous well-reasoned case law holdings to the contrary. Because Wells Fargo held the Note when foreclosure commenced, it was therefore the beneficiary entitled to effectuate that process, and entitled to execute a declaration for the trustee to rely upon.

//

//

---

[13] This statement must be accepted as true for the purposes of CR 12(b)(6).

E. NWTS Received a Proper Declaration Before Recording the Notice of Trustee's Sale.

1. Trujillo Lacks Standing to Assert that NWTS Could Not Rely on the Beneficiary Declaration or that NWTS was Improperly Appointed as the Successor Trustee.

Trujillo was not a party to either the Beneficiary Declaration or the Appointment of Successor Trustee. CP 36, 40. She cannot permissibly insert herself *ex post facto* into those transactions for the purpose of questioning their propriety.[14] *See, e.g., Brummett v. Washington's Lottery*, 171 Wn.App. 664, 678, 288 P.3d 48 (2012), *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406 (2011), *citing Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987); *see also Osediacz v. City of Cranston*, 414 F.3d 136, 140 (1st Cir. 2005) (there is a "general prohibition on a litigant raising another person's legal rights.").

The Beneficiary Declaration was prepared and transmitted to NWTS in accordance with the provisions of RCW 61.24.030(7); state law does not mandate recording such declaration or providing a copy of it to a borrower.

---

[14] Because NWTS did not execute either document, even a purported error would not constitute the *trustee's* failure to materially comply with the provisions of the DTA. *Accord Walker v. Quality Loan Service Corp.*, Slip Opin. No. 65975-8-I, 2013 WL 3989666 (Aug. 5, 2013).

The Appointment of Successor Trustee was executed by the beneficiary through its attorney-in-fact, and Trujillo agreed to the possibility of a successor trustee being appointed when she signed the Deed of Trust. CP 28 at ¶ 24 (Deed of Trust); CP 40 (Appointment); *see also* RCW 61.24.010(2) (appointment right vested with beneficiary, *i.e.*, Note holder).

As the United States District Court for the Eastern District of Washington wrote in *Brophy v. JPMorgan Chase Bank Nat'l Ass'n*, 2013 WL 4048535 (E. D. Wash. Aug. 9, 2013):

> Plaintiff does not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party beneficiary of this agreement, he could not have been injured by the alleged fraud.
>
> *Id.* at *7, *citing Javaheri v. JPMorgan Chase Bank N.A.*, 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012).[15]

In this case, Trujillo concedes that she agreed to the terms of the Note and Deed of Trust, and that she later defaulted. Brief of Appellant at 5-6, *see also* Compl. at ¶ 10, 17. But her claim that Wells Fargo "did not have the lawful authority to appoint a successor trustee" – not just specifically NWTS – is contradicted elsewhere in her Complaint, as she

---

[15] *See Javaheri* at *6 ("The only injury [plaintiff] alleges is the pending foreclosure on his home, which is the result of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so [plaintiff] suffered no injury as a result of this substitution.").

asserts Wells Fargo possessed the secured Note "as soon as [they] began the foreclosure process…." *Compare* Compl. at ¶ 26-28, Compl. at ¶ 36.

Thus, if Wells Fargo held the Note, then Wells Fargo was the beneficiary, and Wells Fargo could appoint a successor trustee and execute a Beneficiary Declaration. Trujillo should not be allowed to raise arguments against the trustee for the alleged acts of Wells Fargo – the undisputed beneficiary.

2. The Beneficiary Declaration Satisfied RCW 61.24.030(7).

Even if the legitimacy of the Beneficiary Declaration is reached, Trujillo's reading of RCW 61.24.030(7)(a) would vitiate the plain text of RCW 61.24.005(2), which defines beneficiary as the Note holder.[16] But such result cannot be the law, as a court must "avoid interpretations that yield unlikely, absurd or strained consequences." *Broughton Lumber Co. v. Burlington N. Santa Fe Ry. Co.*, 174 Wn.2d 619, 625, 278 P.3d 173 (2012).

RCW 61.24.030(7)(a) does require a trustee to have "proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. (Emphasis added.) However, one possible means of fully accomplishing

---

[16] *See* Brief of Appellant at 13 ("a 'declaration by the beneficiary' actually means 'a declaration by the owner of the Note'.").

this requirement is through a declaration averring that "the beneficiary is the actual *holder* of the promissory note or other obligation." *Id.*

Trujillo is correct that the statute permits proof of ownership to be established through proof of holder status. *See* Brief of Appellant at 21. While this may be illogical, it is *precisely what the Legislature deemed sufficient* for the purpose of recording a Notice of Trustee's Sale.

Consequently, Trujillo's argument that "courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute" directly supports a plain reading of RCW 61.24.030(7)(a). Brief of Appellant at 16, *quoting Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002). Otherwise, RCW 61.24.005(2) would *not* mean what *it* says, and a new definition of "beneficiary" would be inferred despite unambiguous language in that subsection.

As Trujillo notes, "the trial court was required to assume that the legislature meant exactly what it said." Brief of Appellant at 17, *citing Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), *Snohomish v. Joslin*, 9 Wn. App. 495, 513 P.2d 293 (1973). In construing RCW 61.24.030(7)(a) to mandate that a declaration from the Note holder provides a trustee with authority to record a Notice of Trustee's Sale, the trial court did exactly what Trujillo asserts it should have done, and without looking "outside the statute." Brief of Appellant at 27.

But even if the statute remained ambiguous, it would then be appropriate to refer to relevant case law. *See Broughton Lumber Co.*, *supra.* at 625, *citing Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Federal judges that have reviewed claims related to RCW 61.24.030(7) uniformly agree that a declaration of holder status is adequate "proof" for the trustee to rely on. *See*, *e.g.*, *Rouse v. Wells Fargo Bank, N.A.*, *supra.* at *13-14 ("Wells Fargo's declaration that it is the 'actual holder' meets this requirement."), *Petheram v. Wells Fargo Bank*, 2013 WL 4761049, *10 (W. D. Wash. Sept. 3, 2013), *Elene-Arp v. Fed. Home Fin. Agency*, 2013 WL 1898218 (W. D. Wash. May 6, 2013) ("[a]lthough there are probably many ways to satisfy the statute's proof requirement, the statute itself establishes one way."), *Abram v. Wachovia Mortg.*, 2013 WL 1855746 (W. D. Wash. Apr. 30, 2013), *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225 (W. D. Wash. Mar. 25, 2013). If there is a question about the construction of RCW 61.24.030(7), then this Court should likewise adopt the same outcome.

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

It is circular reasoning for Trujillo to argue that NWTS' reliance on Wells Fargo's Beneficiary Declaration created the very lack of good faith that would lead to an inability to rely on the same Declaration. *See*

Brief of Appellant at 15.

RCW 61.24.030(7)(b) states, "*unless* the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is *entitled to rely on* the beneficiary's declaration as evidence of proof required under this subsection." (Emphasis added). It would be "too great a demand" for a trustee to "conduct a secondary investigation into the papers filed by the beneficiary." *Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W. D. Wash. Nov. 14, 2011); *accord Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356, 360 (1991) (a duty of good faith "requires only that the parties perform in good faith the obligations imposed by their agreement.").

Trujillo's Complaint fails to identify any specific violation of NWTS' duty of good faith besides the reliance on Wells Fargo's *accurate* representation of its authority as Note holder. Compl. at 7, ¶ 30. Trujillo's comment that NWTS lacked a Beneficiary Declaration prior to issuing the Notice of Default is immaterial; RCW 61.24.030(7)(a) only directs the receipt of the requisite proof prior to the Notice of Trustee's Sale. *See* Brief of Appellant at 15.

Trujillo's Complaint also raises an argument she now abandons on appeal; namely, that NWTS could not issue a Notice of Default until being appointed as the successor trustee. Compl. at 6, ¶ 30.

First, this statement is incorrect, as NWTS was allowed by statute to act as Wells Fargo's agent prior to becoming trustee. *Cf.* RCW 61.24.031(1)(a) (requirements before "[a] trustee, beneficiary, *or authorized agent*" can "issue a notice of default under RCW 61.24.030(8)....") (emphasis added).[17]

Second, Trujillo's Complaint openly states that NWTS "was legally appointed the successor trustee." Compl. at 7, ¶ 30; *see also* Compl. at ¶ 20. NWTS could *only* become "legally appointed" if the lawful beneficiary made the appointment. RCW 61.24.010(2). Since Trujillo also agrees that Wells Fargo was the entity that appointed NWTS, Trujillo unavoidably concedes Wells Fargo's proper authority to foreclose as the beneficiary. *See* Compl. at ¶ 20; *see also* CP 40 (Appointment). As such, the predicate assumption for claiming a lack of good faith, *i.e.*, "knowing" Wells Fargo was unable to enforce the obligation, is not supported by Trujillo's own allegations that should be accepted as true. *Id., cf.* Brief of Appellant at 15.

The absence of an identifiable fact signifying bad faith, combined

---

[17] The Court should not give credence to any argument by Trujillo on an inadequately-briefed issue. *See, e.g., Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011), *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities....").

with the necessary conclusion of Wells Fargo's authority drawn from Trujillo's allegations, should lead this Court to conclude that NWTS was allowed to trust the Beneficiary Declaration's validity prior to recording the Notice of Trustee's Sale.

F. Trujillo's Policy Concerns are Unwarranted.

Trujillo submits that requiring a Note holder to also be a Note owner is consistent with the Deed of Trust, and would prevent "thieves and others who obtain notes by illegal means from foreclosing on defaulting borrowers." Brief of Appellant at 30, 31.

First, the Deed of Trust recognizes that an entity collecting payments from a borrower might be unrelated to possession of the Note. *See* CP 27 at ¶ 20 (Deed of Trust). Thus, the right to receive funds that a borrower pays is not dependent on the authority to foreclose should default occur.

Second, the assignment of a security interest to another party does not require an additional filing to maintain perfection of that interest. *See* RCW 62A.9A-310. The Deed of Trust originally secured repayment of the loan to Arboretum Mortgage Corp., and when the loan was sold to Wells Fargo – a fact Trujillo declares in the Complaint – then Wells Fargo became the proper party entitled to enforce her obligation. *See* CP 17 (Deed of Trust), Compl. at ¶ 13. Even if Trujillo's allegation that "Wells

sold the loan to Fannie Mae" was assumed true, Trujillo also claims that "as soon as Wells began the foreclosure process, Fannie Mae transferred possession of the Note to Wells." *See* Compl. at ¶¶ 14, 26. Wells Fargo therefore became the Note holder, and by operation of law, the secured party under the Deed of Trust.[18] The question of an ownership right is not governed by the Deed of Trust, and it is immaterial to enforcement against the Property as collateral.

Third, the specter of Wells Fargo being a "thief" or "illegally" obtaining the Note is without evidentiary support. Trujillo admits her default. *See* Compl. at ¶ 17. Nonetheless, Trujillo apparently wants Fannie Mae to foreclose on the Property rather than Wells Fargo. *See* Compl. at 7, ¶ 30. There can be no other inference based on her assertion that only a Note owner can be the beneficiary. Brief of Appellant at 14, *inter alia*. But even in the unlikely event that the "wrong" party non-judicially foreclosed on the Property, Trujillo's underlying debt would be satisfied as a result. *See* RCW 61.24.100(1) (anti-deficiency provision), *but see In re Tr.'s Sale of Real Prop. of Burns*, 167 Wn. App. 265, 270,

---

[18] Under RCW 62A.9A-203(g) and 62A.9A-308(e), attachment of a security interest in a promissory note is also attachment of a security interest in a securing mortgage, and the perfection of a security interest in a promissory note is also perfection of a security interest in a securing mortgage. After a mortgagee's default, the secured party may exercise the mortgagee's rights with respect to any property that secures the mortgagee's obligations. *See* RCW 62A.9A-607(a)(3).

272 P.3d 908 (2012) (converse situation; suit on note allows successive action on deed of trust). In such a hypothetical scenario, the "real" beneficiary may pursue recourse against the party that non-judicially foreclosed through a trustee's sale, but Trujillo would be an uninterested, non-liable, third-party to that dispute.

It is incredulous for Trujillo to claim NWTS engaged in criminal profiteering, committed an unfair or deceptive act affecting the public interest, or intentionally inflicted emotional distress on her when she stopped paying the loan in November *2011*, and simply because NWTS followed the steps it was required to undertake pursuant to the DTA. Trujillo's flawed interpretation of RCW 61.24.030(7) does not substantiate her causes of action, and the trial court properly dismissed NWTS from this case.

IV. CONCLUSION

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

NWTS obtained a sworn statement from Wells Fargo entitled "Beneficiary Declaration (Note Holder)." CP 36. Because Trujillo did not allege that NWTS acted in bad faith apart from accepting this

Declaration itself, NWTS was entitled to rely on it and record the Notice of Trustee's Sale.

All of Trujillo's claims fail to establish a possible grant of relief under these circumstances, or alternatively, the claims do not give rise to a genuine issue of material fact supporting liability against NWTS. This Court should affirm the ruling below.

DATED this 25th day of October, 2013.

RCO LEGAL, P.S.

By: _____
Joshua S. Schaer, WSBA #31491

Of Attorneys for Appellee Northwest Trustee Services, Inc.