

72526-2

72526-2

No. 72526-2-I

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

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BLAIR LA MOTHE,

Appellant

v.

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE HOLDERS OF  
THE THORNBURG MORTGAGE SECURITIES TRUST 2005-4  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-4 ITS  
SUCCESSORS IN INTEREST AND/OR ASSIGNS

Respondents

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Appeal from Superior Court for King County  
The Honorable Douglass A. North

2015 DEC 11 AM 11:59



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**APPELLANT'S REPLY BRIEF**

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Blair La Mothe  
8117 NE 110<sup>th</sup> Place  
Kirkland, WA 98034

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## I. Introduction

Appellant's appeal is with merit and should not be denied. Appellant did borrow \$1,500,000 from Liberty Financial Group, Inc. and did sign a promissory Note and DoT. However Respondent who was never a party to the original Note and DoT is claiming to be the current holder of the Liberty-La Mothe Note and DoT without ever proving how and when it allegedly obtained the Note and DoT. So we are here because Respondent never had to prove it held the Note at the time it filed this action on March 13, 2013 and Respondent never had to prove it held the original Note at the date of the summary judgment hearing was conducted on August 8, 2014.

Appellant disputes Respondent ever held the original note. Appellant's position is based on more than technical grounds and challenges due to various assignments of the loan. It has to do with Respondent's failure to show it possessed the original note on the date it filed its complaint and the DoT assignment timing and the unauthorized or non-existing parties executing and recording various DoT assignments.

## II. Standard for Review

The standard of review on summary judgment is de novo; the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). CR 56 (c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)). However, bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

When reviewing an order granting summary judgment, the Appeals Court engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate if the pleadings, depositions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See CR 56(c). "A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The Appeals Court considers the facts submitted and all

reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one conclusion. *Stenger v. State*, 104 Wn.App. 393, 398, 16 P.3d 655 (2001).

Here the trial court committed reversible error by not giving the Appellant the proper deference to the evidence he presented.

### **III. Respondent's lack of standing at time complaint filed**

Even if Appellant conceded that Respondent brought the original Note and DoT to the MSJ hearing, which Appellant does not, Respondent did not show it held the Note as of the day the complaint was filed.

The attachments to Respondent's August 13, 2013 complaint included copies of the alleged Note and DoT, recorded Assignments of the DoT and other documents.

The Judge raised the important standing issue question at the MSJ hearing, an issue which should be answered, did Respondent possess the original note and DoT on the date the complaint was filed? **“So, if the – if U.S. Bank is going to foreclose as a beneficiary, then it needs to be able to show as a – a beneficiary, presumably back when this lawsuit was filed in March of 2013 and up through today, in order to be able to – to so – so foreclose.** And I'm not quite clear on – on where we are on

that.” (**Emphasis added.**) See ROP 5:18-23. Although Respondent’s counsel danced around the issue, the answer to whether Respondent had standing on August 13, 2013 is important and the answer to whether Respondent had the right to file the original complaint back on August 13, 2013 was never revealed during the MSJ hearing nor in any of Respondent’s MSJ briefs.

If Respondent was not the legal owner of the Note as of the date the complaint was filed, it had no standing<sup>1</sup> to initiate any kind of foreclosure proceedings against Appellant.

To maintain a cause of action, a “real party in interest” must show “that he has some real interest in the cause of action. ‘His Interest must be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and he must show that he will be benefited by the relief granted.’” *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672 (1943).

Under the common law, a person entitled to enforce a mortgage must also be the holder of the secured promissory note. As explained in the Restatement (Third of Property (Mortgages) § 5.4:

§5.4 Transfer of Mortgages and Obligations Secured by Mortgages

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<sup>1</sup> Standing was one of Appellant’s affirmative defenses. See CP 72:9-11.

- (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

Generally, possession of an indorsed promissory note, in compliance with the requirements of RCW Chapter 62A is essential before an entity may conduct a foreclosure. However, there is no evidence in this record that Respondent was the holder of Appellant's note when it filed its complaint. The DoT assignments, which Respondent attached to its complaint are wholly insufficient to establish this elemental fact. As the Supreme Court of Vermont explained in *U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087 (Vt. 2011), to show standing, the foreclosing entity must show it is entitled to enforce the note and it must show it possessed the original note on the date the complaint was filed:

13. To foreclose a mortgage, a plaintiff must demonstrate that it has a right to enforce the note, and without such ownership, the plaintiff lacks standing. *Wells Fargo Bank, N.A. v. Ford*, 418 N.J.Super. 592, 15 A.3d 327, 329 (2011). While a plaintiff in a foreclosure should also have assignment of the mortgage, it is the note that is important because "[w]here a promissory note is secured by a mortgage, the mortgage is an incident to the note." *Huntington v. McCarty*, 174 Vt. 69, 70, 807 A.2d 950, 952 (2002). Because the note is a negotiable instrument, it is subject to the requirements of the UCC. Thus, U.S. Bank had the burden of demonstrating that it was a "[p]erson entitled to enforce" the note, by showing it was "(i) the holder of the instrument, (ii) a nonholder in

possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument." 9A V.S.A. § 3-301. On appeal, U.S. Bank asserts that it is entitled to enforce the note under the first category- as a holder of the instrument.

14. A person becomes the holder of an instrument when it is issued or later negotiated to that person. 9A V.S.A. § 3-201 (a). Negotiation always requires a transfer of possession of the instrument. *Id.* § 3-201 cmt. When the instrument is made payable to bearer, it can be negotiated by transfer alone. *Id.* §§ 3-201(b), 3-205(a). If it is payable to order-that is, to an identified person-then negotiation is completed by transfer and endorsement of the instrument. *Id.* § 3-201 (b). An instrument payable to order can become a bearer instrument if endorsed in blank. *Id.* § 3-205(b). **Therefore, in this case, because the note was not issued to U.S. Bank, to be a holder, U.S. Bank was required to show that at the time the complaint was filed it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank.** *See Bank of N.Y. v. Raflogianis*, 418 N.J.Super. 323, 13 A.3d 435, 439-40 (2010) (reciting requirements for bank to demonstrate that it was holder of note at time complaint was filed).

15. U.S. Bank lacked standing because it has failed to demonstrate either requirement. Initially, U.S. Bank's suit was based solely on an assignment of the mortgage by MERS.

**(Emphasis added.)** *Id.* at 1092.

Here, the Respondent has never shown it was the holder of the note on the date it filed its complaint against Appellant. Neither of Recksiek's two declarations (see CP 103-146, CP 1834-1837) nor his deposition testimony (see CP 411-456) show he ever saw the original Note and that he was relying upon information only depicted on a computer screen. See

CP 1655:9-15 and CP 1688, 11:4-112-24. Recksiek never physically saw the original Note. See CP 431, page 78.

Also significant is Recksiek claimed SPS had been in possession of the original Note before sending it to Respondent's counsel, yet SPS was not the Thornburg Trust's document custodian according to the Thornburg Trust's own documents; La Salle Bank was the Thornburg Trust's document custodian<sup>2</sup>. (See CP 1903-2518, Request for Judicial Notice, Ex. 2.1, the Pooling & Servicing Agreement, page 12/174.) It is clear that Recksiek did not know who SPS' alleged document custodian actually was (see his deposition testimony at CP 455, 177:9-22); so it follows he would not know from where the alleged Note was sent and nothing was provided from anyone else.

The Ninth Circuit Bankruptcy Appellate Panel in *In re Veal*, 450 B.R. 897 (9th Cir. B.A.P. 2011), also carefully analyzed the doctrine of standing in the context of an alleged mortgagee. *Veal*, similar to the present case, involved an alleged mortgage loan holder's claim against a bankruptcy debtor's real property. In that case, the Bankruptcy Appellate Panel concluded that the alleged mortgage loan holder failed to establish its authority to foreclose, because it provided no evidence that it possessed

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<sup>2</sup> Custodian: LaSalle Bank National Association acting in its capacity as custodian of the Mortgage Loans on behalf of the Trustee under the Custodial Agreement or any successor custodian appointed pursuant to a Custodial Agreement.

the promissory note, beyond a mere "assignment" of mortgage. The Court explained:

[U]nder the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. *Restatement (Third) of Property (Mortgages)* § 5.4 cmt. e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation"). As stated in a leading real property treatise:

...

4 Richard R. Powell, *Powell on Real Property*, § 37.27[2] (2000). *Cf In re Foreclosure Cases*, 521 F.Supp.2d 650, 653 (S.D.Ohio 2007) (finding that one who did not acquire the note which the mortgage secured is not entitled to enforce the lien of the mortgage); *In re Mims*, 438 B.R. 52, 56 (Bankr.S.D.N.Y.2010) ("Under New York law 'foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.'") (quoting *Kluge v. Fugazy*, 145 A.D.2d 537, 536 N.Y.S.2d 92, 93 (N.Y.App.Div.1988)).

This rule appears to be the common law rule. See, e.g., *Restatement (Third) of Property (Mortgage)* § 5.4 (1997); *Carpenter v. Longan*, 83 U.S. 271, 274-75, 16 Wall. 271, 21 L.Ed. 313 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *Orman v. North Alabama Assets Co.*, 204 F. 289, 293 (N.D. Ala. 1913); *Rockford Trust Co. v. Purtell*, 183 Ark. 918, 39 S.W.2d 733 (1931). While we are aware that some states may have altered this rule by statute, that is not the case here.

As a result, to show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other "person entitled to enforce," or that it was someone who held some ownership or other interest in the Note. See *In re Hwang*, 438 B.R. 661, 665 (C.D.Cal.2010) (finding that

holder of note has real party in interest status). None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a "person entitled to enforce," or as an entity with any ownership or other interest in the Note.

Not surprisingly, Wells Fargo disagrees. It argues that it submitted documents in support of its relief from stay motion which established a "colorable claim" against property of the estate. In this regard, it cites *In re Robbins*, 310 B.R. 626,631 (9th Cir. BAP 2004) (which in turn cites *Grella*, 42 F.3d at 32). However, neither *Robbins* nor *Grella* dealt with a challenge to the movant's standing which, as we have said, is an independent threshold issue. Simply put, the colorable claim standard set forth in *Robbins* does not free Wells Fargo from the burden of establishing its status as a real party in interest allowing it to move for relief from stay, as this is the way in which Wells Fargo satisfies its prudential standing requirement.

In particular, because it did not show that it or its agent had actual possession of the Note, Wells Fargo could not establish that it was a holder of the Note, or a "person entitled to enforce" the Note. In addition, even if admissible, the final purported assignment of the Mortgage was insufficient under Article 9 to support a conclusion that Wells Fargo holds any interest, ownership or otherwise, in the Note. Put another way, without any evidence tending to show it was a "person entitled to enforce" the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.

Accordingly, the bankruptcy court erred when it granted Wells Fargo's motion for relief from stay, and we must reverse that ruling.

*Id.* at 915-18 (footnotes omitted). See also, *In re Weisband*, 427

RR. 13, \*18 (Bkrtcy. D. Ariz. 2010) ("If GMAC is the holder of the Note,

GMAC would be a party injured by the Debtor's failure to pay it, thereby satisfying the constitutional standing requirement. GMAC would also be the real party in interest under Fed.R.Civ.P. 17 because under Ariz.Rev.Stat. ("A.R.S.") § 47-3301, the holder of a note has the right to enforce it. However, as discussed below, GMAC did not prove it is the holder of the Note.").

Foreclosure standing was carefully analyzed by the Washington Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 110 (2012), wherein the Court held that Mortgage Electronic Registration System ("MERS") lacked the authority to foreclose under the Washington deeds of trust act, RCW 61.24 ("DTA") when it did not hold the underlying mortgage loan. Therein, the Court held MERS is an "ineligible beneficiary within the terms of the [DTA], if it never held the promissory note or other debt instrument secured by the deed of trust." (internal quotation marks omitted). The Court explained that "[a] plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* at 89 (emphasis added).

#### **IV. Appellant's use of PSA as evidence**

Does Appellant have standing to challenge the validity of the transactions by which Liberty Financial Group, Inc., the loan originator, purportedly assigned the DoT and corresponding promissory Note to TMST Home Loans, Inc. and the subsequent assignment from TMST Home Loans, Inc. to Respondent? Respondent urges that the law is well settled that a stranger to a contract lacks standing to challenge the contract and that numerous jurisdictions have recognized that Appellant lacks standing to challenge the assignment of security instruments in cases similar to the present. Appellant rejoins that Washington state and federal courts routinely allow a homeowner to challenge the chain of assignments by which a party claims a right to foreclose, dismissing the cases relied upon by Respondent as incorrectly decided.

To be sure, Washington courts have held that a non-party to a contract cannot enforce the contract unless he is an intended third-party beneficiary, occasionally couching this principle in terms of “standing.” Here, however, the Appellant is not attempting to enforce the terms of the instruments of assignment; to the contrary, Appellant urges that the assignments are void ab initio. Though the law is settled in Washington that an obligor cannot defend against an assignee's efforts to enforce the obligation on a ground that merely renders the assignment voidable at the

election of the assignor, Washington courts follow the majority rule that the obligor may defend “on any ground which renders the assignment void.” A contrary rule would lead to the odd result that Respondent could foreclose on the Appellant’s property though it is not a valid party to the DoT or promissory note, which, by Respondent’s reasoning, should mean that it lacks “standing” to foreclose.

Although the courts invariably deny mortgagors third-party status to enforce Pooling & Service Agreements (“PSA”), Appellant is not seeking third-party status to enforce the PSA. Instead, Appellant points to defects in the Thornburg Trust securitization process as evidence that neither title nor possession of the note passed to the Respondent who sought to foreclose Appellant’s mortgage. Thus, the Appellant seeks only to use the breaches as evidence that the party seeking to foreclose is not the owner of his note.” *Ball v. Bank of N.Y.*, 2012 WL 6645695 at \*4 (W.D. Mo. Dec. 20, 2012) (permitting homeowners to challenge foreclosures based on violation of the PSA). It makes very little sense that Appellant has a right to challenge the assignments based on fraud but lack the right to challenge the assignments based on a violation of the PSA. Both bases for challenging the assignments are valid, and should be considered on the merits.

Further, Respondent provided no evidence that a transfer of possession of the subject Note from the original lender, Liberty Financial Group, Inc. to itself had ever occurred to entitle it to enforce the terms of the Note and DoT. The Note, which is a negotiable instrument governed under the Uniform Commercial Code, could not have been conveyed by any "assignment." Instead, said instrument had to have been negotiated in compliance with the requirements of RCW 62A.

Pursuant to RCW 62A.3-203 governing negotiable instruments:

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

**(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.**

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee. RCW 62A.3-203

**(Emphasis added.)**

In the instant case, the record fails to establish that the original Liberty-Lamothe Note was properly negotiated and transferred from Liberty Financial Group, Inc. to Thornburg Mortgage Home Loans, Inc. and then in turn to Structured Asset Management Investments, Inc. and then in turn to Respondent, sufficient to create a present interest and ownership of the subject note and DoT allegedly owned and held by Respondent. See e.g., *Davis v. Bartz*, 65 Wn. 395, 400 (1911) (“the only distinction between an owner and a mortgagee as a party to the lien foreclosure is that the owner is a necessary party to any valid foreclosure, while a mortgagee is a proper party. The only distinction, so far as here material, between a necessary party and a proper party is that a foreclosure of the lien without the one is absolutely void, while a foreclosure without the other is void only as to him”). Thus Respondent’s reliance upon the subject Assignments to create a chain of title between Liberty Financial Group, Inc./TMST Home Loans, Inc. and Respondent fails, and Respondent lacked standing in August 2013 to initiate a judicial foreclosure and sue herein. Without a complete chain of title supported by valid and enforceable transfers of the subject Note and DoT and contractual rights thereunder, Respondent lacked standing to sue and accordingly the superior court committed reversible error by finding in favor of Respondent at the MSJ hearing when this material issue exists.

**V. Respondent's lack of authority to initiate foreclosure.**

The record is unclear as to whether or not the subject Note was ever properly and timely negotiated and transferred to Respondent, and thus whether Respondent had standing to initiate a judicial foreclosure and sue herein. The cutoff date for the Thornburg Trust was December 1, 2005. See CP 1903-2518, Ex 2.1, PSA, page 12/174. The original Note and original DoT were required to be in the Thornburg Trust's custodian's possession by the cutoff date. See CP 1903-2518, Ex 2.1, PSA §2.01(b)(i) and (iii). This meant the Liberty-La Mothe DoT should have been assigned to the Thornburg Trust and in the Thornburg Trust's custodian's possession by December 1, 2005. However, there were never valid and timely DoT assignments being made from the original lender, Liberty Financial Group, Inc. to Thornburg Mortgage Home Loans, Inc. then to SAMI and then from SAMI to Respondent.

Respondent, who is otherwise a complete stranger to the original Note and DoT, without presenting any evidence thereof, argued that the subject DoT was properly conveyed to it. Respondent's only recorded links to the original lender – Liberty Financial Group, Inc. – are the copies of the following recorded documents: the September 18, 2008 Modification of Deed of Trust (see CP 54-57), the December 31, 2009 Assignment of DoT (see CP 59-60) purportedly transferring the interests

of the subject DoT from the no longer existing Liberty Financial Group, Inc.<sup>3</sup> to TMST Home Loans, Inc., and, the recorded January 29, 2013 Assignment of DoT (see CP 61) purportedly transferring the interests of the subject DoT from TMST Home Loans, Inc.<sup>4</sup> to Respondent. Respondent's reliance upon the DoT assignments, however, is insufficient to establish standing, as no interest in the debt is assigned without proper negotiation and transfer of the note. This is because a mortgage is but an incident to the debt which it is intended to secure and cannot exist independently. The trial court committed reversible error by finding in favor of Respondent on this issue at the MSJ hearing when facts and evidence exist in the record to support finding in favor of the non-moving party.

## **VI. RCW 62A.3-308 Requirements**

Respondent claims the Note and DoT are self-authenticating documents pursuant to RCW 62A.3-308, which states:

Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is

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<sup>3</sup> The entity, Liberty Financial Group, Inc., was acquired by Guild Mortgage in May 2009, See CP 356 and CP 370.

<sup>4</sup> Select Portfolio Servicing, Inc. signed the Assignment of DoT as the attorney in fact for TMST home Loans, Inc. yet no copy of the attorney in fact documentation was attached to the complaint nor was it provided in either of David Recksiek's two declarations.

presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature....

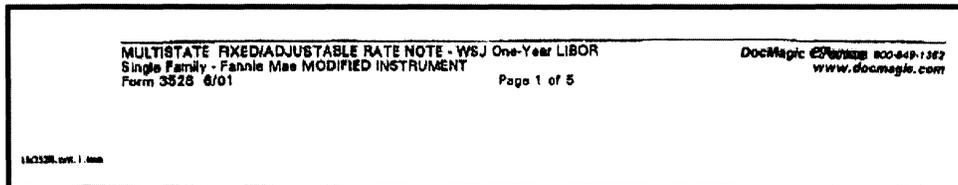
Basically, Respondent argues that before Respondent was required to prove the Note its counsel brought to the summary judgment hearing was an original and not a forgery, Appellant should have specifically denied the genuineness of his signature in his answer to Respondent's complaint and then once such a denial had been made, he should have then proven the signature on the Note was a forgery.

During the MSJ process, Appellant brought certified copies of several documents, which had been judicially noticed. One of those documents was a Deed of Partial Reconveyance, which proved the Thornburg Trust did not have possession of the Liberty-La Mothe Note and DoT in 2008 (see ROP 22:5-23:22). Other documents brought to the court proved the Liberty-La Mothe Note and DoT were not in the Thornburg Trust as late as January 2013. Such documents made clear that David Recksiek did not know what he was talking about when claiming the Thornburg Trust had been in possession of the original Note and DoT since December 2005. Respondent never did have the original Note and DoT.

Additionally, the copies of the documents attached to Respondent's complaint showed the Note was not original. The



complaint note document. That original document was not brought to the court as promised and therefore SJ was erroneous. Instead, Respondent's counsel, Stoel Rives LLP, brought into the summary judgment hearing courtroom was a Note, with a bottom page looking like the below:



In the instant matter, when the alleged original was presented by Respondent's counsel in court, the discrepancy between that document and the barcoded complaint note was pointed out immediately but the Judge apparently did not understand what Appellant's counsel was trying to communicate. See ROP 19:7-19.

Thus, Respondent's reliance upon the Assignment of Mortgage to create a chain of title in the instant case fails. Without a complete chain of title supported by valid and enforceable transfers of the subject Note and contractual rights thereunder, Respondent neither demonstrated its standing to sue, nor its entitlement to initiate a judicial foreclosure. Appellant raised the issue about the authenticity of the alleged original Note during the hearing and provided valid evidence to the court. The court committed reversible error by finding in favor of Respondent at the MSJ hearing when valid evidence exists, and valid argument was made,

that the purported original Note was not in fact the original. The court should have allowed the case to proceed to trial so that the truth could be flushed out but instead chose to award in favor of the moving party.

## **VII. Respondent's fraud upon the Court**

The reason Appellant has gone into such detail regarding what should have happened if the Liberty-La Mothe Note had gone through the Thornburg Mortgage Securities Trust 2005-4 securitization process is not to assert a bunch of technical arguments; the primary reason is to show Respondent has committed fraud along the path to summary judgment.

There are several undisputed facts on the record that demonstrate Respondent's fraudulent representations to the Court. First, there was a complete failure to show a proper chain of assignments and transfers for the DoT and for the Note. The facts regarding the actual assignments of the DoT with Respondent's statements as to when it allegedly possessed the Note do not add up. DoT assignments and recordings were being done with entities not statutorily authorized, entities not in existence at the time or bankrupt entities at the time such as MERS<sup>5</sup>, Liberty Financial Group,

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<sup>5</sup> MERS execution of the Assignment of the DoT to TMST Home Loans, Inc. is false and deceptive. The Washington Supreme Court has held that — characterizing MERS as the beneficiary has the capacity to deceive, and such a characterization presumptively satisfies the unfair act or practice element of a CPA claim. *Bain*, 285 P.3d at 51. Here, the Assignment of DoT, characterizes MERS as the beneficiary of the Deed of Trust. (See CP 59-60.) Thus, the act of recording that document presumptively satisfies a Consumer Protection Act element. Although Appellant has not made any claims under the

Inc. and TMST Home Loans, Inc.<sup>6</sup> How can MERS assign a DOT when it is not a beneficiary, and if it is acting as an nominee or agent for Liberty Financial Group, Inc. how can it execute a DoT assignment in December 2009 (see CP 59-60) when Liberty Financial Group, Inc. had been purchased by Guild Mortgage in May 2008 (see CP 356:2-6 and 370)? How can TMST Home Loans, Inc.'s alleged attorney in fact (see CP 61), SPS, assign a DoT when there is no attorney in fact authorization attached to the complaint or in the record and TMST Home Loans, Inc. is in bankruptcy as of January 2013 (see CP 356:19-25 and 372)? How can the Note and DoT have been in the custody of the Thornburg Trust from late 2005 if other alleged beneficiary entities are assigning the DoT several years (2012 and 2013) after December 2005?

There is no evidence in the record indicating: how Respondent obtained, if they ever did obtain, the Note, in order to be able to foreclose; how Respondent's attorneys obtained the Note; that David Recksieck ever even saw the original note and DoT (and if he did not see it how could he tell the copies were exact representations of the originals); and proving

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Consumer Protection act, he claims that because MERS executed the Assignment of DoT, the assignment is void as MERS was not the beneficiary.

<sup>6</sup> How can TMST Home Loans, Inc. be assigning a DoT in January 2013 when it went bankrupt in 2009? For that matter, how can SPS sign on behalf of TMST Home Loans, Inc. as the attorney in fact without providing a document showing SPS was authorized to be the attorney in fact for TMST Home Loans, Inc.?

Recksiek did not even know where the original Note and DoT were located.

David Recksiek, during his deposition said that the original Note and DoT had been sent to Respondent's counsel. See CP 455. Yet Mr. Recksiek did not know the name of the document custodian in possession of the alleged original note. See CP 455, pg 177:9-178:14.

Mr. Recksiek never saw the original Note and DoT. See his deposition testimony, CP 430 & 431, dep page 77:25-78:3. His declaration said the originals were in Respondent's counsel's possession without identifying when they were sent, by whom, or even how they were sent. How could he know with certainty that the originals had been sent to Respondent's counsel? What did he rely on? His declarations never identified who sent the originals or to whom the originals were sent.

David Recksiek claimed Respondent had been in possession of the original Note since December 2005 (see CP 454, 172:1-3). That claim was incorrect. A notarized and acknowledged document recorded in the King County Auditor's office on September 19, 2008 identified MERS/Liberty Financial Group, Inc. as "the legal owner and holder of the promissory note" as of April 28, 2008. MERS/Liberty Financial Group, Inc. was the beneficiary in 2008, not the Thornburg Trust. See CPs 402 and 403. If it is true that the DoT follows the Note at the time of any

transfer of the Note, then the DoT followed the Note when it was transferred from Liberty Financial Group, Inc.<sup>7</sup> to Thornburg in December 2012 (see CP 1822). Then from Thornburg to the Trust in January 2013 (see CP 61). Respondent has relied upon questionable evidence that the Note was transferred to it even though acknowledged documents recorded with the King County Auditor's office clearly say otherwise.

In its MSJ briefing and at the MSJ hearing, Respondent failed to prove it had custody of the original Note when it filed this action in August 2013 and therefore the material issue of standing to file exists and should be resolved at trial.

### **VIII. Evidence Rule 902**

During the summary judgment hearing, Respondent's counsel brought the alleged original Note and DoT into court and claimed ER 902 applied for the Note and DoT. (See CP 35:15-21.) According to Respondent, such documents are self-authenticating. ER 902(i) is quoted as follows:

#### **Self-Authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

...

(i) Commercial Paper Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

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<sup>7</sup> Is Appellant the only one suspicious of a Note transfer taking place from Liberty, which was no longer in business at the time of the DoT assignment?

Appellant also brought evidentiary documents into the courtroom, which had been previously judicially noticed. See CP 399:3-11. Also, see ROP 21:23-23:22. Those documents were certified copies of acknowledged and recorded King County Auditor's records. Yet the Court failed to give proper deference to Appellant's evidence despite that evidence being brought to the Court's attention under different parts of the same evidence rule: ER 902(d) and ER 902(h).

**IX. Waiver of payment issue**

Respondent says Appellant needed to assert the affirmative defense of waiver of payment. Appellant was never provided notice that someone other than Thornburg Mortgage Home Loans, Inc. was entitled to payment and after Thornburg Mortgage Home Loans, Inc. went bankrupt, Appellant did not know who to pay.

**X. Failure to notify change in servicer**

Appellant was never provided notice that the servicing of his loan was transferred to another entity. After Appellant signed the Liberty-LaMothe Note, he made payments to Thornburg Mortgage Home Loans, Inc. No one provided Appellant notice he was to pay someone else.

**XI. Conclusion**

The trial court committed reversible errors. Facts, evidence and law exist in the record to support Appellant's defense against the

foreclosure actions of Respondent. The trial court was obligated to construe the facts and evidence as true in Appellant's favor during the Summary Judgment hearing and should have found in favor of the non-moving party on unresolved issues material to the outcome of the suit.

Material questions exist regarding the authenticity of the Note presented to the court, the standing of Respondent to file suit, the chain of title and the validity of the testimony of Respondent's sole witness. The trial judge admitted that he had not reviewed all the documents in the case. Appellant maintains that the trial court, on numerous issues, did not provide the deference due to a non-moving party in a Summary Judgment hearing and requests that this matter be remanded back to the trial court for a reversal of the summary judgment order and requests direction to the trial court to allow the parties to proceed to trial.

DATED this \_\_\_\_ day of December, 2015

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I hand delivered a true and accurate copy of the Appellant's Reply Brief in Court of Appeals Cause No. 72526-2-I to the following party:

John Glowney  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: December \_\_\_\_, 2015 at \_\_\_\_\_, Washington.

\_\_\_\_\_  
\_\_\_\_\_  
(printed name)

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Material questions exist regarding the authenticity of the Note presented to the court, the standing of Respondent to file suit, the chain of title and the validity of the testimony of Respondent's sole witness. The trial judge admitted that he had not reviewed all the documents in the case. Appellant maintains that the trial court, on numerous issues, did not provide the deference due to a non-moving party in a Summary Judgment hearing and requests that this matter be remanded back to the trial court for a reversal of the summary judgment order and requests direction to the trial court to allow the parties to proceed to trial.

DATED this 11 day of December, 2015

Respectfully submitted,



---

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

Dated: December 11, 2015 at Seattle, Washington.

  
\_\_\_\_\_  
Larry C. Nelson (printed name)

2015 DEC 11 AM 11:59  
STOEL RIVES LLP