

NONJUDICIAL FORECLOSURE OF MERS TRUST DEEDS
AFTER *BRANDRUP* AND *NIDAY*

OREGON STATE BAR
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CASE SUMMARIES

Brandrup v. ReconTrust Company

__ Or. __, __ P.3d __ (2013), Opinion filed June 6, 2013 SC S060281

Facts: Plaintiff homeowners in four separate cases brought actions against MERS and other entities challenging nonjudicial foreclosures under the Oregon Trust Deed Act. ORS 86.705 – 86.795. In each case, plaintiffs had obtained loans, signed promissory notes and deeds of trust and later defaulted in repayment of the loans. In each case, the promissory notes had been transferred by the original lender, and MERS executed a formal written assignment of the trust deed to the last reputed successor in interest of the original lender. The assignments were recorded. Each assignee then appointed ReconTrust as successor trustee. ReconTrust commenced nonjudicial foreclosures.

Issues: In *Brandrup v. ReconTrust Company*, A, 311CV1390; *Powell v. ReconTrust Company*, NA, 311CV1399HZ; *Mayo v. ReconTrust Company*, NA, 311CVI533PK; and *Mirararbshahi v. ReconTrust Company*, NA, 312CVOOJOHA, the Oregon Supreme Court accepted questions certified by the United States District Court. The questions, two of which were reframed by the Oregon Supreme Court are:

1. May an entity such as MERS, that is neither a lender nor successor to a lender, be a "beneficiary" as that term is used in the Oregon Trust Deed Act?
2. May MERS be designated as beneficiary under the Oregon Trust Deed Act where the trust deed provides that MERS "holds only the legal title to the interests granted by Borrower in the Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests"?

Question 2 was reframed by the Oregon Supreme Court as follows:

- (2) Is MERS eligible to serve as beneficiary under the Oregon Trust Deed Act where the trust deed provides that MERS "holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests"?
3. Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under ORS 86.735(1)?

4. Does the Oregon Trust Deed Act allow MERS to retain and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series of successors?

Question 4 was reframed by the Oregon Supreme Court in two parts as follows:

(4)(a) Does the Oregon Trust Deed Act allow MERS to hold and transfer legal title to a trust deed as nominee for the lender after the note secured by the trust deed is transferred from the lender to a successor or series of successors?

(4)(b) Does MERS nevertheless have authority as an agent for the original lender and its successors in interest to act on their behalves with respect to the transfer of the beneficial interest in the trust deed or the nonjudicial foreclosure process?

Opinion:

Certified questions 1 and 2 were answered in the negative. After extensive analysis, the Court held that the “beneficiary,” as that term is used in the Oregon Trust Deed Act, is the person to whom the obligation that the trust deed secures is owed or that person’s successor in interest. In a typical trust deed, including the trust deeds at issue, the person identified as the lender or the lender’s successor in interest is the person to whom the obligation is owed and to whom the trust deed secures the right of repayment. The Court concluded that MERS is not the person to whom the obligation is owed, nor does MERS succeed to the right of repayment under the obligation.

In answering certified question 3, the Court reviewed long-standing statutes and case law applicable to mortgage assignments. By statute, mortgages may be assigned by an instrument in writing which may be recorded. ORS 86.060. By case law, mortgages also are transferred by operation of law under the principle that mortgages follow transfers of the promissory notes they secure. The Court characterized a trust deed as “a species of mortgage” subject to the same principles. In other words, a trust deed may be transferred by formal written recorded assignment or by operation of law upon transfer of the underlying note. The Court held that the requirement in ORS 86.735(1) that “any assignments” be recorded does not apply to assignments by operation of law. The Court held that the recording condition set forth in ORS 86.735(1) refers only to assignments which are “in writing, executed and acknowledged with the same formality as required in deeds and mortgages of real property” (quoting ORS 86.060).

After reframing the fourth certified question in two parts, the Court held that MERS cannot hold or transfer legal title to a trust deed. MERS is not a beneficiary under the Oregon Trust Deed Act. MERS does not own legal title to the lien of the trust deed (legal title is held by the trustee) nor does MERS own equitable title to the lien of the trust deed (equitable title is held by the lender or its successor). The Court then addressed the question whether MERS has authority to act as agent for the original

lender or its successor in interest. The Court held that MERS's authority, if any, to assign the trust deed or perform any act in the foreclosure process, must derive from the original beneficiary and its successors under traditional agency principles. Finding that the trust deed language alone was not adequate to create an agency between MERS and the lender or its successor, the Court concluded that the record in the case did not include evidence regarding the existence or scope of MERS's agency authority.

Niday v. GMAC Mortgage, LLC

___ Or. ___, ___ P.3d ___ (2013), Opinion filed June 6, 2013 SC S060655

Facts: Plaintiff obtained a loan from Greenpoint Mortgage to finance her purchase of a house, and signed a promissory note and deed of trust. The trust deed identified MERS as the beneficiary solely as nominee for the lender Greenpoint Mortgage. Subsequently, plaintiff received notice that the loan servicing had been transferred to GMAC Mortgage and she made her payments to GMAC for a period of time until she allegedly defaulted on her payment obligation. MERS executed the recorded document that appointed LSI Title as successor trustee under the trust deed. Plaintiff received a trustee's notice of sale from Executive Trustee Services acting as agent for the trustee LSI Title. The notice stated that the beneficiary and the trustee had elected to sell the property under the Oregon Trust Deed Act. No assignment of the trust deed was recorded. Plaintiff brought an action for injunctive and declaratory relief, arguing that MERS was not the beneficiary within the meaning of the Oregon Trust Deed Act. Plaintiff also argued that the condition in ORS 86.735(1) requiring recordation of any assignments by beneficiary and trustee had not been satisfied.

The trial court granted defendants' motion for summary judgment, concluding that MERS was the beneficiary under the trust deed and that the condition in ORS 86.735(1) requiring the recording of any assignments had not failed because there was no evidence of any assignment of the trust deed by MERS or the trustee. The Court of Appeals reversed. The Court of Appeals concluded that, regardless of the trust deed's designation of MERS as the beneficiary, only the lender Greenpoint or its successor was the beneficiary under the Oregon Trust Deed Act. The Court of Appeals pointed out that the record included evidence of Greenpoint's transfer of the note, and rejected defendants' argument that the statutory term "assignments" in ORS 86.735(1) refers only to formal, written assignments that are capable of recordation. The Court of Appeals held that evidence of Greenpoint's transfer of the note created a genuine issue of material fact as to whether ORS 86.735(1) had been satisfied.



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Issues: Did original lender Greenpoint's transfer of the promissory note without recording an assignment of the trust deed create a genuine issue of material fact as to whether the recording requirement under ORS 86.735(1) was satisfied? Was MERS authorized to execute the appointment of successor trustee and initiate or direct the nonjudicial foreclosure of the trust deed?

Opinion: The Supreme Court affirmed the Court of Appeals decision, finding that a genuine issue of material fact remains regarding the validity of the MERS-executed recorded appointment of successor trustee. The Court applied its reasoning in *Brandrup* and held that MERS is not the beneficiary under the trust deed as that term is used in the Oregon Trust Deed Act. The Court noted that only a beneficiary may appoint a successor trustee and that there was no evidence in the record establishing that MERS had authority to act as agent for the lender or its successors in its execution of the appointment document. The Court also noted that, although there was evidence in the record that Greenpoint had transferred the promissory note--and therefore the trust deed was transferred by operation of law--there was no evidence in the record establishing the identity(ies) of the lender's successors in interest nor was there evidence of any formal written recordable assignments of the trust deed as the term assignment is intended under ORS 86.735(1).

DISCUSSION QUESTIONS

-How will the documents recorded in connection with a nonjudicial foreclosure establish that all formal written recordable assignments were recorded, or that none such assignments existed and all transfers of the trust deed followed the promissory note by operation of law?

-If the party signing the appointment of successor trustee or otherwise initiating the foreclosure is not the original lender, how will the recorded foreclosure documents establish that the party initiating the foreclosure is the owner of the promissory note?

-Can the foregoing issues be addressed in a recorded certification? Who will execute the certification? Who has a right to rely on the certification?

-If MERS or a servicer under ORS Chapter 86A executed the appointment of successor trustee leading to the commencement of the nonjudicial foreclosure, how will the recorded documents establish agency authority from the then owner of the promissory note to MERS as agent or to the servicer?