

1 (The proceedings began at 2:58 p.m.)

2 THE COURT: The question for the Court in this action,
3 which is an unlawful detainer action, is a right of
4 possession, and the right of possession asserted by Fannie
5 Mae necessarily stems from its claim that it is the rightful
6 owner of the property. That starts us off on a process of
7 inquiry as to how Fannie Mae came to be the owner of the
8 property. That all stems back to the foreclosure sale.

9 My sympathies are not necessarily with the banks or
10 lenders which control or direct foreclosure sales, but in
11 this case it's also not with a borrower who may be in
12 default on a purchase loan to the extent of some \$100,000.

13 The authority of the trustee in this case, Quality Loan
14 Services, comes from the beneficiary from the original Deed
15 of Trust, which was Homecomings, or a successor beneficiary
16 if Homecomings had assigned its rights to another entity.
17 Homecomings never did that except through the actions of
18 MERS and claiming that MERS is a nominee.

19 The Deed of Trust that's presented to the Court clearly
20 identifies MERS as the beneficiary under the Deed of Trust.
21 Yet there's no evidence that MERS ever held the note or was
22 the owner of the note, and under Bain, MERS could not be the
23 beneficiary despite recitations in the Deed of Trust. It is
24 through MERS' actions that the interest of Homecomings
25 appears to have passed on to Nationstar and through

1 Nationstar that Quality was appointed as the trustee.

2 From the perspective of the trustee, Quality, the facts
3 show that once it received a referral from a lender or
4 servicer, here Nationstar, it assumed that it had the
5 authority to begin the foreclosure process and set about
6 preparation of all of the necessary legal documents,
7 including the assignment form from MERS and the self-serving
8 declaration of the beneficiary upon which Quality then
9 claims it was entitled to rely.

10 When it became aware that the apparent interest of Wells
11 Fargo from MERS' earlier assignment had mucked up the
12 waters, Quality canceled the pending foreclosure sale, but
13 from the evidence apparently undertook no inquiry to find
14 out who the actual holder of the note may have been.
15 There's a declaration of the beneficiary, which Quality
16 acknowledges that it prepared for signature by Nationstar,
17 which says that Nationstar is the holder of the note, but
18 that's a declaration dated in October of 2011, which
19 predated the assignment conveying Wells Fargo's interest to
20 Nationstar. That appears to be a document which Quality
21 also prepared to assign Wells Fargo's interest to
22 Nationstar.

23 Here at trial, counsel for Fannie Mae says that the
24 assignment from MERS to Wells Fargo was meaningless. If
25 that was meaningless, then the assignment by MERS of the

1 beneficial interest under the Deed of Trust to Nationstar
2 was equally meaningless. They can't have it both ways.

3 And if MERS had no authority to convey or assign the
4 beneficial interest under the note because it wasn't a
5 beneficiary of the note, then the process was flawed from
6 the beginning, and that's the problem when the lender seeks
7 to shortcut the foreclosure process by using the Deed of
8 Trust Act provisions instead of a judicially supervised
9 foreclosure process. It's perfectly permissible to do so,
10 but the case law is clear that the Deed of Trust Act has to
11 be strictly complied with.

12 I believe the defendants here have met their burden to
13 show that the Deed of Trust Act was not materially complied
14 with by the trustee. It's significant, it seems to me, that
15 it is the trustee which also prepared and executed the
16 conveyance, the assignment of Deed of Trust from Nationstar
17 to Fannie Mae. It did so acting as the attorney in fact for
18 Nationstar. So we have the trustee, presumably an
19 independent fiduciary owing an equal obligation of fealty,
20 good faith and fair dealing to both the borrower and the
21 lender, who is preparing all of the documents, all of these
22 assignments, the declaration of beneficiary. It's not ever
23 asking to see where the note is or asking for production of
24 the note as important as the declaration of the beneficiary
25 is, it seems to me, to both the borrower and lender but

1 especially the borrower.

2 When that designation appears to change through the
3 assignment from Nationstar to Fannie Mae, there's no
4 subsequent notification to the borrower. So he remains in
5 the dark as to who the beneficiary may be as of about ten
6 days or two weeks or so after the notice of trustee sale.
7 Who is the beneficiary at that time? Who holds the note?
8 There's no subsequent declaration that Nationstar then held
9 the note. We have to go back and assume that the original
10 preparation of the declaration of beneficiary that predated
11 the assignment of Wells Fargo's interest to Nationstar was
12 still a valid designation of beneficiary.

13 I think the obligations under the Deed of Trust Act
14 require more on the part of the trustee. I'm not convinced
15 from the evidence that there was the independence required
16 of the trustee given its actions on behalf of Nationstar as
17 Nationstar's attorney in fact and acting as Nationstar and
18 assigning its interest to Fannie Mae in preparing and having
19 executed the assignments of Deed of Trust that purportedly
20 were issued by MERS as well as preparing the declaration of
21 the beneficiary upon which it relies.

22 I look back on the sequence, and if, in fact, MERS had
23 the authority to convey the interest of the Deed of Trust
24 through an assignment, then it did so when it assigned the
25 Deed of Trust to Wells Fargo in November of 2010. If so, it

1 had absolutely no authority to appoint Quality as a
2 successor trustee after the date of that assignment of the
3 Deed of Trust.

4 If MERS lacked the authority to assign the beneficial
5 interest of the Deed of Trust to Wells Fargo, then it
6 obviously lacked the same capacity to assign the Deed of
7 Trust subsequently to Nationstar. And that seems to be the
8 inherent logical flaw of plaintiff's argument in trying to
9 have it both ways: That the assignment to Wells Fargo is
10 somehow a nullity and meaningless, because Wells Fargo
11 apparently never had an interest or never held the note, but
12 yet the same document executed on behalf of Nationstar
13 through Quality's preparation of the documents is somehow a
14 document on which it can rely after the conveyance from
15 Wells Fargo to Nationstar to uphold the earlier declaration
16 of beneficiary, saying, oh, yeah, Nationstar holds the note.

17 This process is a cluster...of problems; and the
18 responsibility for that lies with Quality more than anyone
19 else. Homecomings was the original beneficiary under the
20 Deed of Trust. All of this could have been backed up to get
21 back to the original parties, if necessary , to find out who
22 holds the note and begin anew. And the time to have done
23 that, I think, in applying strictly the Deed of Trust Act
24 is, if not sooner, at least no later than when Quality
25 became aware that MERS had earlier transferred the interest

1 under the Deed of Trust to Wells Fargo. That was the time
2 to back up and start this whole process anew and not rely on
3 an earlier and, in my opinion, invalid designation of
4 Quality as a trustee for purposes of foreclosure. It could
5 have been done, but I think the trustee chose not to do it
6 in following whatever advice may have been issued internally
7 to try to salvage a flawed foreclosure process at that time.

8 I am unconcerned if my decision is making new law or
9 creating headaches for the lending industry. I think it is
10 consistent with the case law that repeatedly says the Deed
11 of Trust Act is to be strictly construed.

12 And probably the one area where the courts have also been
13 consistent is with respect to the fiduciary obligations of
14 the trustee in acting independently to protect the interests
15 of both the borrower and the lender, which Quality failed to
16 do in this case. It paid short shrift to the concerns that
17 were obvious from the records in this case.

18 The Schroeder case, I think, stands as a signal case that
19 even when the parties agree to circumvent the strict
20 requirements of the Deed of Trust Act, the courts still have
21 responsibility to enforce the act strictly even when there's
22 nobody apparently at that time complaining. I recognize in
23 Schroeder there was an effort to restrain the sale, but it
24 was a failed effort because there was no preliminary
25 injunction issued to stop the foreclosure sale. The sale

1 went through just as it did here. There was a sale that was
2 recorded and the court still said but the act was not
3 followed strictly. It has to be set aside. It's not just a
4 matter of monetary damages to be resolved.

5 And that, I think, begs the issue. If there is a
6 departure that is material from the requirements of the Deed
7 of Trust Act, do we ever get to a waiver that would limit
8 Mr. Brevick to monetary damages in a subsequent lawsuit? I
9 don't think those circumstances are present here given the
10 history of this foreclosure process by Quality as well as
11 the lack of authority demonstrated here that MERS had the
12 authority to act as it did, which started this process
13 rolling.

14 So for those reasons, the request for the writ of
15 restitution is denied. I'll ask Mr. Long to prepare
16 findings and conclusions consistent with my ruling.

17 I probably have not touched on all of the issues, but I
18 think your pleadings amplify some of the problems of this
19 sale. I think it's probably best to set this for a date for
20 presentation. If you can agree on the language of the
21 findings and conclusions and both sign off, they can be
22 presented ex parte and save the need for further court
23 hearing. But if not, then we'll go forward with that.

24 So let me ask Mr. Long how much time you feel you may
25 need to prepare those findings.

1 MR. LONG: Can we get two weeks, Your Honor?

2 THE COURT: I was going to give you a day and a half.

3 MR. LONG: Okay.

4 THE COURT: Two weeks will be fine. Let me look at my
5 calendar.

6 MR. LONG: I'll try to get it done right away, because
7 it's freshest today, but this week is shot, and I haven't --

8 THE COURT: Right.

9 (Pause.)

10 THE COURT: How about if we set this for 9:00 on Friday,
11 June 13? Would that work for both counsel?

12 MR. LONG: Let me take a quick look here. I believe it
13 will.

14 (Pause.)

15 MR. McDONALD: I can make myself available, yes, Your
16 Honor --

17 MR. LONG: I'm almost there.

18 MR. McDONALD: -- in the event that we're not able to
19 agree and submit it ex parte.

20 THE COURT: One other question.

21 (The Court conferred with the court
22 reporter.)

23 (Pause.)

24 THE COURT: All right. We'll set this for presentation,
25 then, for 9:00 Friday, June 13.

1 If either party would like a transcript of my ruling from
2 the court reporter, she indicates she can make those
3 arrangements with you and have that to you sometime next
4 week. So you could make those arrangements, if you wish.

5 MR. McDONALD: Thank you, Your Honor.

6 MR. LONG: Thank you, Your Honor.

7 MR. MASCH: Thank you, Your Honor.

8 (The Court recessed at 3:14 p.m.)

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