

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF SNOHOMISH

3
4 MICHAEL RAETHER AND SAVANNA)
 RAETHER,)

5 Petitioner,)

6 vs.)

Cause No. 16-2-03164-0

7))
8 DEUTSCHE BANK NATIONAL TRUST)
 COMPANY; SELECT PORTFOLIO)
9 SERVICING, INC.; UNKNOWN)
 INVESTORS IN HSI ASSET)
10 SECURITIZATION CORPORATION)
 TRUST 2007-HEI,)

11 Defendant.)

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13 REPORT OF PROCEEDINGS

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17 THE HONORABLE MILLIE M. JUDGE
 Snohomish County Courthouse
18 June 23, 2017

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22 SHERILYNN V. McKAY, RMR, CRR, CCP, RDR
23 Official Court Reporter, CCR No. 3236
 Snohomish County Superior Court
24 3000 Rockefeller Avenue
 Everett, Washington 98201-4046
25 (425) 388-3996

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A P P E A R A N C E S

For the SCOTT E. STAFNE, Esq.
Plaintiff: STAFNE LAW FIRM
(Appearing telephonically)
239 N. Olympic Avenue
Arlington, Washington 98223
Scott@stafnelawfirm.com

For the JOHN GLOWNEY, Esq.
Defendant: STOEL RIVES, LLP
600 University Street
Suite 3600
Seattle, Washington 98101
John.glowney@stoel.com

ALSO PRESENT: AVERY HUFFORD

- - -

1 THE COURT: Good morning.
2 Did you want to come forward?
3 MR. HUFFORD: I'm not an attorney.
4 THE COURT: Okay. And who are you?
5 MR. HUFFORD: I just work for Scott. He wanted 10:29
6 somebody in the office while he was out -- I'm sorry,
7 in the courtroom.
8 THE COURT: Thank you. All right.
9 Good morning, counsel.
10 MR. GLOWNEY: Good morning, Your Honor. John 10:29
11 Glowney on behalf of Deutsche Bank.
12 THE COURT: Mr. Stafne, you're on the phone?
13 MR. STAFNE: I am, Your Honor.
14 THE COURT: Okay. Thank you.
15 Mr. Glowney? 10:30
16 MR. GLOWNEY: Thank you, Your Honor.
17 You have cross-motions before you. Our motion is to
18 add an indispensable party. I originally noted this
19 motion on the commissioner's calendar, Mr. Stafne
20 objected, and in one of those rare moments I think 10:30
21 between he and I, I basically agreed with him. I
22 thought probably it wasn't, after listening to him, so
23 we noted it here on the judge's calendar. I think
24 beyond that, we probably won't agree on much.
25 THE COURT: Okay. 10:30

1 MR. GLOWNEY: So this is a motion to add Deutsche
2 Bank National Trust Company as trustee for this
3 mortgage trust as the proper defendant here. Here's
4 why: The Raethers made a claim of a statute of
5 limitations defense against a note and deed of trust. 10:30
6 That is a claim against the holder of that note and
7 deed of trust. The holder is this trust, which would
8 be this Deutsche Bank National Trust Company in its
9 capacity as trustee.

10 I know they're the holder, because it's a bearer 10:31
11 instrument. I know they have the original, because
12 they sent it to me through Select Portfolio, their
13 servicing agent, their loan servicer, and I've brought
14 it to court twice. I didn't bring it this time, I can
15 bring it again, but we've got the original. 10:31

16 So that means a claim -- the Statute of Limitations
17 is to bar the party who has the power to enforce it.
18 That's the party you're going to sue. So that's why
19 throughout this case we've said, well, this is the
20 trustee, is the correct party, and that's why we think 10:31
21 they should be added here, and possibly substituted.

22 So the case has been litigated, we have said
23 throughout our pleadings, this is who we are
24 representing. I'll address, you know, the misplaced
25 comma typographical error, but that's who we've been 10:31

1 representing throughout this case.

2 The response didn't get any objections. They
3 consented, stipulated to an amended answer, they
4 stipulated to us stopping our counter claim --

5 (Interruption in proceedings.)

6 MR. GLOWNEY: They stipulated to an amended answer,
7 they stipulated to us amending our answer further to
8 added a counterclaim for judicial foreclosure. And then
9 we finally argued I think a second summary judgment
10 before this Court where they sort of raised it. And
11 they raised in it the context of arguing that a Supreme
12 Court case from 2016, *Americold*, required a different
13 outcome, and, in fact, the individual investors in the
14 trust should be the defendants.

15 *Americold* is a Supreme Court case dealing with
16 diversity in the federal courts, and it was dealing
17 with what are called business trusts. So if you look
18 at the cases and sites, they talk about the business
19 trusts.

20 So he argues, well, the members here should be the
21 proper parties in our case. But I've submitted now to
22 the Court the PSA, the pooling and servicing agreement,
23 submitted the whole thing. It's pretty lengthy. I
24 also attached to the briefing sort of the highlighted
25 pieces. But what we've highlighted makes it clear that

1 this is an express trust. It's not a business trust.

2 The distinction, of course, is that the members,
3 they're just -- it's a legal relationship between the
4 trustee and the beneficiaries. In a business trust,
5 the members actually have a right to sue and be sued. 10:33
6 The case rose in a diversity case in federal
7 jurisdiction, so it doesn't have much applicability
8 here. But that case, *Americold*, recognizes the
9 traditional rule that we cite here: When you are suing
10 the trust, you sue the trustee. So *Americold* doesn't 10:33
11 work.

12 We cited two or three other cases that came to that
13 same conclusion with a couple dealing with PSAs --
14 pooling and servicing agreements -- very similar to the
15 one here. So if you look at all that, we should be the 10:33
16 proper party. We've tried to litigate it as the proper
17 party.

18 Civil Rule 21 says you could do it at any stage.
19 Maybe we should have done it sooner, but it didn't
20 really get raised as an issue in dispute. It is now. 10:33
21 But the Court clearly has jurisdiction to do it now.
22 You know, you can do it at any stage. Let's do it now,
23 so let's get this issue out of way. That's the point
24 on that.

25 Much of the defense here, and I think on the 10:34

1 cross-motion to prove the authority, turns on a typo.
2 There's a comma that got stuck in. The best I can
3 tell, the only place it appears is in Stoel Rives'
4 pleadings. It's our problem. But it's a typo. Typos
5 don't change substantive rights anywhere. It's a typo.
6 It shows up in the pleadings here, but no place else.
7 In fact, it didn't even seem to confuse the parties
8 here, because the original party they named doesn't
9 have the extra comma in there.

10:34

10 If you look at the PSA, it names Deutsche Bank
11 National Trust Company, without the comma, and the
12 limited power of attorney, which makes Select
13 Portfolio, the servicer who hired us, doesn't have the
14 comma. So the comma has no effect. It certainly
15 doesn't get into money laundering issues or suspicious
16 activities. It has no effect. And nobody treated it
17 as having any effect.

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10:35

18 So it doesn't make any substantive changes in
19 anybody, other than somehow it got into our template
20 and didn't get changed. But it has no substantive
21 effect. And they've identified no original document
22 anywhere outside the pleadings that's made that comma
23 mistake. But a typo is just a typo. It really is. It
24 doesn't make substantive changes.

10:35

25 They've made several arguments -- I'll come back to

10:35

1 *Americold* for just a second -- about indemnification
2 provisions or other provisions of the PSA. Those are
3 contractual relationships between the trust/trustee,
4 and the various servicers or master servicers. They
5 don't change the nature of the entity. The nature of
6 it being an express trust. They don't have any effect
7 on it one way or another. Moreover, this party, the
8 Raethers, have no standing to stick their nose in
9 there. So I don't know, that doesn't -- I just don't
10 think that gets you anywhere here.

10:35

10:36

11 The money laundering stuff -- which my eyes glazed
12 over -- okay, Deutsche Bank is apparently supposed to
13 do something about money laundering. This is a
14 mortgage foreclosure case. There's no connection. In
15 the classic sense of ER 401 and 400, relevance, all
16 that stuff doesn't make anything here true or less
17 true, because it's not relevant. This is a mortgage
18 foreclosure on a note that hasn't been paid for a
19 number of years, that's all that's relevant here, and
20 whether the Statute of Limitations has or has not run.

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21 So on those points, Judge, I don't have much to add.
22 If the Court has questions on that I can address
23 briefly the motion for authority, I think I should, and
24 then he -- make it simpler, if it that's okay with the
25 Court.

10:36

1 THE COURT: Yes.

2 MR. GLOWNEY: The motion for authority says, well,
3 prove that you have authority to represent the
4 individual investors and Deutsche Bank National Trust
5 Company. Well, we have not represented that we've had 10:37
6 that authority. We have represented Deutsche Bank
7 National Trust Company as trustee, for better or worse.
8 That's who we've said from the get-go, that's who we're
9 representing. So the motion is a little misplaced.

10 The real issue here is who should be the defendant. 10:37
11 And if we're correct on our law about trustees, then
12 those parties shouldn't be defendants here because
13 there's no legal theories that goes against them.

14 The Raethers have no contractual relationship with
15 those parties. They have no other legal relationship, 10:37
16 so they have no basis to sue them. But Stoel Rives has
17 been hired by Select Portfolio, who is the loan
18 servicer under limited power of attorney. They are
19 hired by the trustee to be the loan servicer -- there's
20 a master service who's also involved in this -- but 10:37
21 that's how it gets to Stoel Rives. But we represent
22 the trustee through that chain of events.

23 The last thing I'll say is they cited some older,
24 2010, letters from Deutsche Bank to their parties. I
25 don't know what was happening in 2010, I don't know the 10:38

1 context of those. I represented many trusts, Deutsche
2 Bank and others of these times, and other trustees.
3 Nobody said anything to me. Again, I don't think they
4 have any standing to get to that. I don't really know
5 the purport of those.

10:38

6 So I would ask the Court to grant the motion, make
7 us a defendant -- we're clearly indispensable. You
8 can't rule on a motion, on a Statute of Limitations,
9 without having the party who holds the note in the
10 case. I would ask the Court to substitute us for the
11 other parties, because they're not truly the correct
12 parties. I mean, one is just Deutsche Bank in its
13 individual capacity. So you've served somebody in
14 their individual capacity, and you should have sued
15 them in their representative capacity. I don't know
16 that the individual investors have ever been served.
17 Maybe they have. I didn't see any. But I don't think
18 they're proper parties here, because they have no
19 relationship to this, given that it's an express trust.
20 So I'd ask the Court to deny his motion and grant ours.

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10:38

21 THE COURT: Thank you.

22 Mr. Stafne, with regard to the motion to join and
23 substitute the trust, through the trustee, as an
24 indispensable party, what's your response to that?

25 MR. STAFNE: I'd ask you to take a look at the

10:39

1 motion. The motion is brought in the name of Deutsche
2 Bank National Trust, comma, Company, rather than in the
3 name of the actual trustee, which is Deutsche Bank
4 National Trust Company. What we now have is at the
5 last minute we have a reply that says it's a
6 typographical error made only in the pleadings. Of
7 course it's been made in each answer, and it was even
8 made in this motion to substitute.

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9 THE COURT: Counsel, do you have any evidence that
10 this is anything more than a typo? It certainly
11 appears to the Court that it's a typo.

10:40

12 MR. STAFNE: I couldn't hear you, Your Honor.

13 THE COURT: I said do you have any evidence to
14 support your allegation that this is more than a typo.
15 It certainly appears to the Court that it is.

10:40

16 MR. STAFNE: I do, I do, Your Honor. Mr. Avery
17 Hufford is before you, and I would ask him to bring up
18 to you certified copies of the corporate assignment of
19 the deed of trust and all the notices of trustee sale
20 which were also brought in the comma name. And he's
21 got a copy for Mr. Glowney as well.

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22 THE COURT: Okay. If you'd just give us a moment to
23 take a look at that.

24 MR. STAFNE: I'm happy to, Your Honor. It needs to
25 be looked at, because it clearly disputes what

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1 Mr. Glowney just said.
2 THE COURT: Your representative has handed each of
3 us a pleading entitled "Raethers' Evidence There Was No
4 Typographical Error When Stoel Rives Described Trustee
5 As 'Deutsche Bank National Trust, Company' in its reply
6 filed yesterday."

10:41

7 So give us a moment. We just were handed this.
8 So I've had a moment to take a look at this and see
9 where the comma appears throughout. What substantive
10 difference does that make? A comma is a comma is a
11 comma.

10:42

12 MR. STAFNE: So if I could continue, Mr. Glowney.

13 MR. GLOWNEY: Yes.

14 MR. STAFNE: So they are actually stating who is
15 foreclosing is a different entity than Deutsche Bank
16 National Trust Company. And this is not an isolated
17 event. In fact, it's going on -- I have been told, in
18 fact, just this morning -- that it's involved in a
19 number of cases, and so --

10:42

20 THE COURT: What's involved in a number of cases?
21 What's involved?

10:42

22 MR. STAFNE: Excuse me? The comma. The little
23 bitty change in the name, which makes it not actually
24 the name.

25 THE COURT: So how does it not actually make it the

10:42

1 name?

2 MR. STAFNE: Well, if you look at the pooling and
3 servicing agreement, and if you look at the prospectus,
4 they indicate that the name of the trust is Deutsche
5 Bank National Trust Company. Okay. What you got
6 before you is that -- if you take a look at the
7 corporate assignment, SPS assigned the deed of trust
8 not to that trust but to a different entity, which
9 included a comma. Now, that is not the same name.

10 Now, even if you look at the latest reply, and you
11 look at all of the signatures Mr. Glowney and Stoel
12 Rives have provided, what they indicate is that the
13 attorneys for defendants, Select Portfolio Servicing,
14 Inc., and Deutsche Bank National Trust, comma, Company,
15 as trustee for the holders of HSI Assets Securitization
16 Corporation Trust 207-HE1 (sic) mortgage pass-through
17 certificates series 2007-HEI (sic).

18 So based on the representations that Mr. Glowney
19 made to you that this has occurred in no other
20 documents other than the pleadings, we certainly have a
21 question of fact. Mr. Glowney has just told you that
22 that is a mistaken name, so there would be no reason, I
23 would think, that you would, without some fact-finding,
24 determine whether this is purposeful, particularly in
25 light of the cease and desist order against Deutsche

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1 National Bank Trust Company in this case.

2 I mean, under the cease and desist order, they're
3 supposed to be stopping all of this type of thing, in
4 all of their areas where they are making money, and
5 they're supposed to take I think it's two months to
6 three months and kind of analyze what's going on. So I
7 think this is problematic.

8 I think it's problematic from your perspective for
9 two reasons: One, they're coming to you and they're
10 finally admitting, though we raised this issue in the
11 motion for summary judgment, the motion to reconsider,
12 we raised it in our response to their motion to
13 substitute, and it was only when we accused these
14 defendants and their attorneys of money laundering that
15 we get anything back that said that there was a problem
16 with it.

17 What we got back is a statement that it's merely a
18 typographical error that doesn't matter, by the person
19 who made the typographical error, and then typed the
20 pleading on behalf of the same comma company. Now, I
21 think this creates a question of fact, and from our
22 perspective, given what has just been told to the
23 Court, and what is in the pleadings, it may create a
24 fraud on the Court as I understand it.

25 Now I'd like to talk a little bit about the

1 certificate holders. If you look at the name they are
2 using, even if they were using the correct name for
3 Deutsche Bank National Trust Company as trustee,
4 they're bringing it on behalf of the holders of these
5 certificates. Now, that is problematic for them in
6 this case because in their most recent pleadings they
7 agreed with me that these certificate holders will in
8 no way benefit from the foreclosure. And so where is
9 that money going to go?

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10 THE COURT: So why would you have standing to raise
11 that claim? Why would you have standing to raise that
12 claim?

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13 MR. STAFNE: Because we are being sued now.

14 THE COURT: But let's say they're successful in
15 their suit. Who that money goes to is not a matter for
16 your client, is it?

10:48

17 MR. STAFNE: No. What is a matter to my client is
18 that he be sued by the proper party, because what
19 appears to have happened is this is all a part of a
20 money laundering scheme that violates the federal law.
21 And we have raised in our answer, we have raised the
22 fraud as an issue, and the Supreme Court has held, and
23 if you want to check those citations you can see that
24 they're old, but they never been reversed, and the
25 Shepard's indicates that they are still in force.

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10:49

1 What they basically hold is that when you have an
2 issue of fraud such as this, that has been raised in
3 the pleadings, you cannot have an officer of the bank
4 who is biased come and testify as a witness and just
5 have it go through. You have to go to a jury.

10:50

6 THE COURT: Counsel, I don't know how that has
7 anything to do with the issue before us as to who the
8 proper party is and whether or not you'd even have
9 standing to bring those claims. We're getting way far
10 afield here.

10:50

11 MR. STAFNE: Okay. So let's make sure we got for
12 the record exactly what you're saying. You're saying
13 that it does not matter whether or not this action is
14 being brought on behalf of an entity which is not the
15 trust?

10:51

16 THE COURT: That's not what I'm saying at all. What
17 I'm saying to you is what standing do you have to bring
18 claims as to whether or not Deutsche Bank, dot, dot,
19 dot, dot, the long name, the trustee on behalf of the
20 trust -- I'm trying understand your argument as to who
21 the proper party should be in this case, and if they're
22 not bringing themselves forward as the proper parties
23 representing the trust, what standing you would have to
24 attack that relationship as the plaintiff in this case.

10:51

25 MR. STAFNE: Okay. Your Honor, we would have

10:51

1 standing because we are being sued -- now, granted,
2 this motion doesn't necessarily deal with it, but we
3 are being sued -- we have standing to raise any issue
4 where the result would be that the assignment is void.
5 I cited to you the *Culhane* case, in which
6 Justice Souter was one of the First Circuit's
7 three-judge panel. I cited you the *Dernier* case, which
8 is from Vermont. And I've cited you the *Ynanova* case
9 out of California. In the majority ruling is that if
10 it would make it void, then you have standing to raise
11 it.

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10:52

12 THE COURT: But the claim here is that the person
13 holding the note has the authority to move forward on
14 that note, which is Mr. Glowney's client. They've
15 brought it to court and shown it to me.

10:53

16 MR. STAFNE: Yes. The question is if that note is
17 being used as part of a money laundering scheme, and if
18 there is evidence that it is, and if it is what you're
19 doing is substituting them as a party pursuant to a --
20 when they're not -- its attorneys, whether you have the
21 ability to do that. And I would go back and we'll get
22 into this argument in just a second, but if they're not
23 the parties for Deutsche Bank trust, either with the
24 comma or without, then this case is a nullity.

10:53

10:54

1 THE COURT: Mr. Stafne, I'm going to stop you there.

2 I've heard enough. I've read all of the materials.

3 The Court finds that you do not have standing to

4 challenge the transfer of the note. The Court finds

5 that Deutsche Bank National Trust Company Trust

10:54

6 Company, as trustee for the holders of the HSI Asset

7 Securitization Corporation Trust 2007-HE1, Mortgage

8 Pass-Through Certificates Series, 2007-HE1, the trust,

9 is an indispensable and proper party in this action,

10 and I'm going to grant the motion. I'm going to deny

10:54

11 the cross-motion to prove authority.

12 MR. STAFNE: I haven't even been able to argue that,

13 Your Honor.

14 THE COURT: No. Counsel, I've heard enough.

15 At this point, I'm finding that Mr. Glowney, as a

10:54

16 representative of Stoel Rives, has made an adequate

17 showing to the Court that they are the proper attorney

18 present before me, and that the Court has discretion as

19 to whether or not it needs it to prove its authority to

20 represent the client here, and find that they've done

10:55

21 so. So for those reasons, I'm granting the motion.

22 Do you have an order?

23 MR. GLOWNEY: Your Honor, I have a form order

24 substituting. I don't have one denying their motion,

25 but I do have one substituting, which I can hand up.

10:55

1 THE COURT: The Court will just enter a minute entry
2 that the cross-motion for authority is denied.

3 MR. STAFNE: Your Honor, and then I will, after I
4 look at the order, determine whether I agree to its
5 form --

10:55

6 THE COURT: That's fine. I've signed the order.

7 MR. STAFNE: -- and ask you that you consider a
8 54(b) certification of this issue. Have you considered
9 that? Does it make any sense for me to make a motion?

10 THE COURT: You can make whatever motions you want.
11 I can't give legal advice, counsel.

10:56

12 MR. STAFNE: Okay. And that you considered and
13 decided you don't want to include that in any order?

14 THE COURT: I'm not including that today, no.
15 The Court will be in recess. Thank you.

10:56

16 MR. GLOWNEY: Thank you, Your Honor.

17 (Proceedings concluded at 10:56 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF WASHINGTON)
COUNTY OF SNOHOMISH)

I, SHERILYNN V. McKAY, Certified Court Reporter,
Washington CCR 3236, hereby certify that the following
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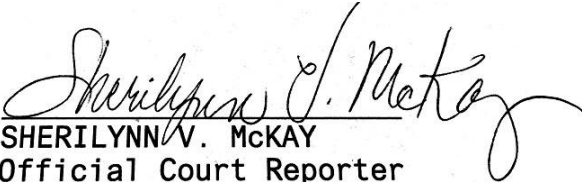
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The foregoing pages constitute a full, true and
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I am in no way related to or employed by any party
or counsel in this matter;

I have no financial interest in the litigation.

So certified in Everett, Washington on July 3, 2017.


SHERILYNN V. McKAY
Official Court Reporter