

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BANK OF NEW YORK MELLON,
fka Bank of New York as Trustee for the
Certificate Holders of CWALT, Inc.
Alternative Loan Trust 2007-3T1,
Mortgage Pass-Through Certificates 2007-3T1
and Recontrust Company, N. A.,
its successors in interest and or assigns,
Plaintiff-Respondent,

v.

Tammie M. DELANEY
and Michael E. Delaney,
as tenants by the entirety,
Defendants-Appellants,
and

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
a Delaware corporation, et al.,
Defendants.

Crook County Circuit Court
12CV0099; A163489

Gary Lee Williams, Judge.

Argued and submitted December 11, 2017.

W. J. Barnes, Florida, argued the cause for appellants.
Also on the briefs was Philip Anderson.

Erick J. Haynie argued the cause for respondent. On the
brief were Tony Kullen and RCO Legal, P.S.

Before Armstrong, Presiding Judge, and Tookey, Judge,
and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Defendants appeal a general judgment of judicial foreclosure of a residential deed of trust, arguing that the trial court erred in concluding that plaintiff was entitled to enforce the note. We conclude that defendants have not raised any issues on appeal that provide a basis on which we could conclude that plaintiff was not entitled to enforce the note. Accordingly, we affirm.

Judicial foreclosure is an equitable proceeding that we may exercise our discretion to review *de novo*. *Blunier v. Staggs*, 250 Or App 215, 217, 279 P3d 826 (2012); ORS 19.415(3). However, we decline to do that because neither party presents an argument in favor of our taking *de novo* review, and this is not an exceptional case justifying such review. ORAP 5.40(8)(c). Thus, we review the trial court's findings to determine whether there is any evidence in the record to support them, and its legal conclusions for legal error. *See, e.g., Frontgate Properties, LLC v. Bennett*, 261 Or App 810, 812, 324 P3d 483, *rev den*, 356 Or 400 (2014). In so doing, "we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome." *Dept. of Human Services v. N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013).

Defendants executed a promissory note dated January 16, 2007, payable to "America's Wholesale Lender," in the principal amount of \$577,054. The note identified America's Wholesale Lender as "lender" and provided that "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" The original note, which was admitted into evidence at trial, was indorsed in blank by "Countrywide Home Loans, Inc., a New York Corporation doing business as America's Wholesale Lender." Defendants also executed a deed of trust securing that note, which identified the "lender" as "America's Wholesale Lender" and as a corporation organized under the laws of New York.

In 2012, plaintiff brought this action for judicial foreclosure of the deed of trust as security for the note. Plaintiff moved for summary judgment. Defendants opposed that motion and also filed a cross-motion for summary judgment on their counterclaim for declaratory relief. Defendants sought a declaration that the note and deed of trust are invalid and void because America's Wholesale Lender was not incorporated and did not have a lender license in Oregon, plaintiff had not obtained a proper assignment of the deed of trust, and the indorsement of the note included with plaintiff's summary judgment motion was of "dubious authenticity." Plaintiff responded that, among other things, defendants could not seek a declaration that the note and deed of trust were void because they did not set out such a defense or claim in their pleadings.

The trial court granted plaintiff's motion in part and denied defendants' motion. On plaintiff's motion for summary judgment, the trial court concluded that it was undisputed that the deed of trust authorized judicial foreclosure, that defendants were in default under the terms of the note, and that, despite notice and an opportunity to cure the default, defendants had not done so. However, the trial court concluded that genuine issues of material fact existed as to whether plaintiff was entitled to enforce the note, and the trial court conducted a bench trial on that issue.

At trial, plaintiff presented testimony from Gerardo Trueba, the custodian of records for Bayview Loan Servicing, LLC, the servicer of the loan to defendants. Trueba testified that business records showed that the prior loan servicer, Bank of America, had received the indorsed note in 2007, and that Bayview became the servicer for the loan in October 2012, with plaintiff as the owner of the loan. Trueba also testified that Bank of America had acquired Countrywide Home Loans, Inc.

Defendants presented an expert witness, Richard Kahn. Kahn testified that a New York corporation called "America's Wholesale Lender" does not exist and that America's Wholesale Lender did not have an Oregon lending license. He did testify, however, that Countrywide Home

Loans, Inc. dba America's Wholesale Lender did have a license in Oregon and that the license was cancelled in 2001. Kahn also questioned the legitimacy of the indorsement on the note because it was not dated, it was in the name of Countrywide Home Loans, Inc. dba America's Wholesale Lender and not America's Wholesale Lender, Inc., and the signature in the stamp was small in height. Kahn further testified on cross-examination that "[i]t is commonly known that Countrywide Home Loans does have a DBA of America's Wholesale Lender."

Plaintiff then presented rebuttal testimony from Matthew LaBrie, an employee of Bank of America, and the custodian of records for the loan. LaBrie testified that the bank records showed that the original note was received by Bank of America, as the custodian for plaintiff, on January 25, 2007, and that the note was indorsed when it was received.

In post-trial briefing, among other things, defendants argued that the loan was void from its origination because America's Wholesale Lender was not a valid corporation in New York and neither America's Wholesale Lender nor Countrywide Home Loans, Inc., held a valid lender license in Oregon at the time of the loan. In response, among other things, plaintiff again objected to defendants' argument about the loan being void because it was not a claim or defense included in defendants' pleadings.

In a letter opinion, the trial court found that plaintiff was the holder of the note and entitled to enforce it based on the testimony of LaBrie that "the Original Note was in Plaintiff's possession and endorsed in 2007, prior to the commencement of the foreclosure action." The trial court also found that "Countrywide Home Loan, Inc. was an owner of America's Wholesale Lender, and later merged with Bank of America in 2011." Also, because defendants were third parties to the transfer of the note and deed of trust to plaintiff, the court concluded that defendants had no standing to challenge the authenticity of the note indorsement or the assignment of the note and deed of trust. The trial court then entered a general judgment in favor of plaintiff foreclosing the deed of trust.

On appeal, defendants assign error to the trial court's conclusion that plaintiff was a holder of the note and entitled to enforce it. "In the context of judicial foreclosure on a negotiable instrument such as a promissory note secured by a trust deed or mortgage, the power to enforce the underlying note is established by ORS 73.0301 (UCC § 3-301)." *Deutsche Bank Trust Co. Americas v. Walmsley*, 277 Or App 690, 695-96, 374 P3d 937 (2016). That statute provides:

"'Person entitled to enforce' an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to ORS 73.0309 or 73.0418(4). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

As relevant here, a "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." ORS 71.2010(2)(u)(A). Under ORS 73.0205(2), "[i]f an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank endorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." Thus, we have held that "the fact that plaintiff is the current holder of a promissory note, indorsed in blank, gives plaintiff the right to enforce the note." *Nationstar Mortgage, LLC v. Peper*, 278 Or App 594, 596, 377 P3d 678 (2016); see also *Deutsche Bank Trust Co. Americas*, 277 Or App at 696 ("[T]o be entitled to enforce a negotiable instrument as a holder, a party must simply demonstrate that it is in possession of the instrument and that the instrument is payable either to the bearer or to the party itself."). Also, in Oregon, the deed of trust follows the assignment of the note. *Deutsche Bank Trust Co. Americas*, 277 Or App at 695.

Here, defendants do not challenge the principle of law that the holder of a note indorsed in blank has the right to enforce that note. Rather, defendants challenge plaintiff's ability to enforce the note based on their assertions that (1) America's Wholesale Lender, as its own corporation, did

not exist, (2) the indorsement of Countrywide Home Loans, Inc. dba America's Wholesale Lender was not valid because that was not the name of the "lender" on the note, (3) neither Countrywide Home Loans, Inc. or America's Wholesale Lender had a valid Oregon lending license at the time the loan was made, and (4) plaintiff failed to prove the authenticity of the indorsement, which defendants called into question through their expert. Because, defendants assert, the note was not validly indorsed and the underlying loan was illegal, plaintiff did not have authority to enforce the note. In their reply, defendants assert that their arguments are not premised on the underlying loan being subject to rescission or being "void" but, rather, on the lack of evidence that Countrywide Home Loans, Inc. could make the indorsement for America's Wholesale Lender, or that a lender without a license could indorse or transfer the note. Defendants also argue that plaintiff did not prove that it was in "possession" of the indorsed note when it filed the complaint because the indorsed note "only appeared after the complaint was filed."

We first reject defendants' argument challenging plaintiff's "possession" of the note. The trial court expressly found that plaintiff was the holder of the note, indorsed in blank, at the time that the complaint was filed. There is evidence in the record to support that finding, and, thus, we will not disturb it. *Troubled Asset Solutions*, 291 Or App at 525 ("[W]e review the trial court's findings to determine whether there is any evidence in the record to support them[.]").

We next reject all of defendants' arguments that are based on the premise that the underlying loan was illegal, either because America's Wholesale Lender did not "exist" or that it or Countrywide Home Loans, Inc. did not have a valid lender license in Oregon. As stated above, "the fact that plaintiff is the current holder of a promissory note, indorsed in blank, gives plaintiff the right to enforce the note." *Nationstar Mortgage, LLC*, 278 Or App at 596. None of defendants' arguments attacking the legality of the underlying loan defeats that basic principle. Even if defendants are correct that the loan between them and America's Wholesale Lender was defective based on the lender's status, defendants

do not explain, nor do we perceive, how that would provide a basis on which we could conclude as a matter of law that the note was not indorsed or that plaintiff is not the holder of the note indorsed in blank.¹ Thus, to the extent that defendants' arguments rest upon the premise that the underlying loan was illegal, we reject those arguments.

We next reject all of defendants' arguments that are premised on the "lender" in the note being identified as a New York corporation named America's Wholesale Lender. As an initial matter, the note does not in fact identify America's Wholesale Lender as a New York corporation. The *note*, as opposed to the deed of trust, only identifies "America's Wholesale Lender" as the lender to whom the note is payable without any reference to what type of entity that named lender is. Thus, defendants' arguments do not have a factual foundation in the record. Moreover, there is evidence in the record to support the trial court's finding that America's Wholesale Lender, as the lender in the note, was owned by Countrywide Home Loans, Inc.

Finally, we reject all of defendants' remaining arguments that are directed at attacking the authenticity of the indorsement in blank on the note, or the intent of the signer of the indorsement. With regard to intent, under ORS 73.0204(1), "[r]egardless of the intent of the signer, a signature and its accompanying words is an indorsement unless

¹ We also reject any argument by defendants that is based upon the underlying loan being void or illegal and, thus, making the note unenforceable. In reply and at oral argument, defendants pointed out that, under ORS 73.0305(1)(a), the right to enforce a note is subject to a "defense of the obligor based on *** lack of legal capacity or illegality of the transaction which, under other law, nullifies the obligation of the obligor." Setting aside for the moment the continually shifting argument being made by defendants, including their representation in their reply brief that their arguments on appeal were not premised on the loan being void, we reject that argument because defendants did not raise the issue as an affirmative defense or as part of their declaratory relief counterclaim. Because the issue was not pleaded or otherwise tried by consent, defendants are not entitled to relief based on it. *See* ORCP 19 B (illegality and "any other matter constituting an avoidance or affirmative defense" must be set forth affirmatively in the pleading); *Pacificorp v. Union Pacific Railroad*, 118 Or App 712, 717, 848 P2d 1249 (1993) ("[A]n avoidance asserts non-liability on bases outside the plaintiff's pleadings."). *Cf.* ORCP 23 B ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). In addition, defendants have not identified the "other law" that would nullify their obligation under the note based on their arguments.

the accompanying words, terms of the instrument, place of the signature or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement.” Defendants have not raised any factual or legal issue that puts the indorsement in question under the terms of ORS 73.0204.

With respect to the authenticity of the indorsement, under ORS 73.0308, a signature on an instrument “is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer.” ORS 73.0308(1). Here, the liability of Countrywide Home Loans, Inc. dba America’s Wholesale Lender or its signatory is not at issue, and, thus, the indorsement is presumed to be authentic and authorized. Defendants have not raised a factual or legal argument that overcomes that presumption. Countrywide Home Loans, Inc. dba America’s Wholesale Lender was permitted to sign the indorsement “[m]anually or by means of a devise or machine” and “[b]y the use of any name, including a trade or assumed name.” ORS 73.0401(2). In addition, Countrywide Home Loans, Inc. as the holder of the note could indorse the note in its name, in America’s Wholesale Lender’s name, or both. ORS 73.0204(4).² And, once a note is indorsed in blank, “it may be negotiated by transfer of possession alone.” ORS 73.0201(2). That negotiation “is effective even if obtained *** [f]rom *** a corporation exceeding its powers or a person without capacity *** or *** [i]n breach of duty or as a part of an illegal transaction.” ORS 73.0202 (1)(a), (c); *see also* ORS 73.0301 (“A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”). None of the arguments raised by defendants that question the authenticity of the indorsement provide a basis on which we could conclude that plaintiff is not entitled to enforce the note as the holder of the note indorsed in blank.

² ORS 73.0204(4) provides:

“If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder’s name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.”

Accordingly, we affirm the judgment.

Affirmed.